OFFICIAL REPORT
AITHISG OIFIGEIL

Constitution, Europe, External Affairs and Culture Committee

Thursday 27 October 2022

Session 6

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CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE
23rd Meeting 2022, Session 6

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Donald Cameron (Highlands and Islands) (Con)

COMMITTEE MEMBERS

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Catherine Barnard (UK in a Changing Europe)
Dr Ruth Fox (Hansard Society)
Dr Oliver Garner (Bingham Centre for the Rule of Law)
Professor Katy Hayward (Adviser)
Sir Jonathan Jones KC (Linklaters LLP)
Angus Robertson (Cabinet Secretary for the Constitution, External Affairs and Culture)
Frank Strang (Scottish Government)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Constitution, Europe, External Affairs and Culture Committee

Thursday 27 October 2022

[The Convener opened the meeting at 08:45]

Decision on Taking Business in Private

The Convener (Clare Adamson): Good morning. I give a warm welcome to the 23rd meeting in 2022 of the Constitution, Europe, External Affairs and Culture Committee.

Our first agenda item is to decide whether to take agenda item 3 in private. Are members content to do so?

Members *indicated agreement.*

Northern Ireland Protocol Bill

08:45

The Convener: Our second item is to take evidence on the legislative consent memorandum for the Northern Ireland Protocol Bill. We have two evidence sessions on the LCM this morning. I welcome to the committee Dr Ruth Fox, director, Hansard Society; Sir Jonathan Jones KC, senior consultant, Linklaters LLP; and Dr Oliver Garner, research fellow, Bingham Centre for the Rule of Law. I hope that we will be joined online by Professor Catherine Barnard, deputy director, UK in a Changing Europe. We might also be joined by our committee's advisor Professor Katy Hayward for a short time.

I will ask the opening question. In our recent report, "The Impact of Brexit on Devolution", the committee shared its view that

"the extent of UK Ministers' new delegated powers in devolved areas amounts to a significant constitutional change."

Given that the Northern Ireland Protocol Bill does not confer any powers directly on Scottish ministers and that there would be no requirement to obtain consent from the Scottish Parliament or Scottish Government before the delegated powers proposed in the bill are exercised by United Kingdom ministers, what are your views on the impact that that could have on the way in which devolution operates and on the Scottish Parliament's scrutiny roles in particular?

Dr Ruth Fox (Hansard Society): Morning. I broadly agree that the bill presents a significant constitutional problem. The nature of the bill and the powers that are in it are so broad that the bill grants considerable powers to UK ministers across a broad range of areas. In addition to the question of ministers being able to legislate in areas of devolved competence, the bill also undermines the role of Parliament. That is because the provisions for the scrutiny of the exercise of powers that you would normally see contained in bills are not contained in this bill.

Sir Jonathan Jones KC (Linklaters LLP): I agree with Dr Fox's critique. The bill is a very bad piece of legislation for two fundamental reasons. First—I realise that this is not necessarily your focus at the moment, but it is worth reflecting on—is the widely held view, including by me, that the bill is a clear breach of the UK's international law obligations under the withdrawal agreement and the Protocol on Ireland/Northern Ireland. I and others are on record as saying that we find completely unpersuasive the UK Government's explanation that the bill is justified by reasons of necessity and of a grave and imminent threat to

the UK's essential interests. The bill's incompatibility with international law is a serious problem.

The second fundamental problem is the one that you have touched on, convener, and Dr Fox has mentioned, which is the extremely wide nature of the powers that the bill confers on UK ministers. The UK Government's tendency to introduce legislation that confers very wide powers on ministers with limited opportunity even for the UK Parliament to scrutinise their exercise is a serious problem that is not only confined to this bill. The Hansard Society, among others, is very much on the case in that regard. The bill is a very strong example of that tendency. The powers would allow action to be taken that is contrary to the protocol.

If I link my two points, the bill empowers ministers to do things that are incompatible with the UK's international law obligations, which is extraordinary. In that respect, the nature of the power is very strange and I would say objectionable.

As I think that you well recognise, the bill correctly confers no powers on any of the devolved Administrations. It empowers UK ministers to act. We have a very strong layer of delegation or sub-delegation in which UK ministers can decide, at their discretion, that some aspects of the powers are sub-delegated to, say, Scottish ministers, but we have no way of knowing whether that will happen. There is no opportunity—there is certainly no legal opportunity—for the Scottish Government or the Scottish Parliament to influence that decision; there is no obligation under the bill to consult. It follows that, as you said, there is little scope for scrutiny of the exercise of those powers, including of a decision on whether to delegate them.

Dr Oliver Garner (Bingham Centre for the Rule of Law): I agree with my fellow witnesses on the point that the scope of the powers in the bill is extremely wide and also about the issues of compliance with international law. That is part of the Bingham Centre for the Rule of Law's main engagement on the bill.

I will make a number of points about the impact and effect on the devolution settlement. It is worth pointing out that, as is outlined in paragraphs 41 and 42 of the legislative consent memorandum, the Northern Ireland protocol affects Scotland's interests. That leads to questions in relation to the democratic principle—that is, those whose interests are affected should be involved in decision making.

Yes, the powers are broad in terms of allowing UK Government ministers to define what could be "excluded provision" and therefore what the UK would no longer implement from the Northern Ireland protocol. However, in terms of the wider devolution settlement in relation to Scotland and the UK, that is a rather narrow context; it relates to the Northern Ireland protocol, which is about regulating matters on the island of Ireland. The important point temporally is that the UK is claiming that this is an emergency situation.

Although I would say that the UK Government's approach is symptomatic of a wider trend to create extended delegated powers, in this case, I do not believe that the powers in the bill would affect the devolution settlement because they are limited to a claimed situation of emergency.

The Convener: I believe that Professor Barnard is with us now. I am not sure whether she heard my opening question. Do you want to make comment at this point? I do not think that the connection is good enough. Perhaps we can look into that.

I open up the questions to members. I invite Mr Cameron to come in.

Donald Cameron (Highlands and Islands) (Con): I refer to my entry in the register of members' interests as a member of the Faculty of Advocates.

It is important to note that the politics in Northern Ireland and in the UK are moving very quickly. We know that negotiations between the UK Government and the European Union have been renewed. I think that the new Prime Minister has said that he prefers a negotiated solution to the dispute over the protocol. There is a general feeling that a pragmatic approach might render this legislation redundant.

That said, I will focus on the areas in the bill that suggest pragmatic solutions to the various issues, including the red and green lane issues, the dual regulatory regime and the governance arrangements. If we set aside the concerns, important as they are, about the legalities and issues of delegated powers, do the witnesses feel that there are areas of pragmatic compromise in the bill that are useful?

Sir Jonathan Jones: I am a lawyer, not a politician, although I have followed the politics of the issue reasonably closely, as you can imagine.

I will start with a basic point. I know that you are trying to step aside from the legality question, but negotiation is preferred as an approach because that is how you amend international treaties. If you sign up to a binding international treaty, which is what Northern Ireland protocol is, and you discover that, in some way, it is not working as you had expected it to, the thing to do is to try to negotiate changes, rather than unilaterally legislate to override it or walk away from it.

That might be an uncomfortable truth, but that is the nature of treaties, particularly one that the UK entered into as recently as this. To legislate in the way that the UK Government is proposing is inevitably being seen as a hostile act by the other party to the agreement, the EU.

I repeat that I am not a politician, but my assessment is that proceeding in that way will not solve the problem, to the extent that there is problem. If we accept for the moment that there is a problem in the way that the protocol is operating, legislating in that unilateral way is not the way to settle or solve the problem. On the contrary, that will be seen as a hostile act by the EU and it will inevitably damage relations with the EU. It is liable to provoke retaliatory action and, at worst, provoke a trade war and so on.

For reasons of principle and practicality, I hope that the UK Government's new leadership will take a different approach. So far, as far as I can see, that has not included any commitment to withdrawing the bill. We will have to see whether the bill is withdrawn or it is at least paused.

I hope that it is. It is quite difficult to see how the UK Government can say on the one hand that it wants a negotiated settlement and that it wants to talk, which I think is the right thing to do in principle and in practice, but on the other hand it is actively pursuing a bill that, as I keep saying, overrides the UK's international obligations and will be very damaging to its international relationships.

I do not claim to be expert in what the specific areas of negotiation are likely to be or to know which ones are likely to be successful. The bill is quite opaque as to what options the Government wants to pursue. That, again, is part of the problem with a bill that confers very wide powers. There is no certainty as to exactly what the UK Government will want to do with them.

If the real issue is around freedom of trade and the level of checks at the border and so on, that is what should be pursued, not questions of governance, for example. I regard questions of governance as red herrings. There might well be politicians who dislike the fact that, for example, the European Court Justice has been given a supervisory role over aspects of the protocol, but that was the deal that was struck.

The idea that that is now a serious impediment to trade, a serious cause of disruption to the Northern Ireland economy or, still less, a cause of societal disruption, is completely implausible. I would not be pursuing those aspects at all, because I do not think they are the source of the problem. Essentially, the issues are the nature of trade, the flowing of trade and the level of checks between Great Britain and Northern Ireland. I suggest that those are the areas on which negotiations should focus.

09:00

Dr Fox: I cannot comment on the technicalities of the protocol and the issues around what the Government wants to achieve, or thinks it wants to achieve, in terms of changing aspects of that. However, the fundamental problem is that legislation is preceding the formulation of policy; in the normal course of events, it would be the other way around. The Government is doing so on the basis of claiming, on the grounds of speed and flexibility and the need to act quickly, that it needs the breadth of these powers, but it is not acting quickly, as we have seen. The bill has now been around for several months and the Government has acted far more quickly with regard to other legislation. The Energy Prices Act 2022, for example, went through all its stages in the House of Commons in one day, so if the Government needed to act quickly once policy was formulated, it could do so.

As Sir Jonathan said, the problem is that the nature and breadth of the powers and the lack of detail mean that you can read the entirety of the bill and have absolutely no real idea of what it is that the Government intends to do and how it will use the powers. They are simply framework powers that will confer on ministers extraordinary discretion to essentially rip up aspects of the protocol as they wish, with little oversight by the UK Parliament.

Dr Garner: I echo what Sir Jonathan said in response to the question about compromise. Any solutions that are proposed could hypothetically be perfect solutions to this problem that has vexed the EU and the UK ever since negotiations started. However, so long as the promulgation of these new proposals does not comply with the rules of the game that the UK and the EU agreed to, the policies simply do not pass the entry requirement for them to be regarded as sufficiently pragmatic compromises by the EU.

A lot is said about the EU being a community of law founded on legal process but what is crucial here is that there is a broader rule of law point about complying with the rules of the game that one has not only agreed to but created. That is the case with the Northern Ireland protocol and particularly with mechanisms such as article 16 of the protocol—a mechanism for appropriate safeguard measures which the UK Government has not decided to trigger at this point.

On that point, I would argue that this is why the Bingham Centre for the Rule of Law, in its July report on the committee stage of the bill, supported amendments that would create what we

call an international treaty compliance trigger. That would establish a prior condition whereby the clauses in the bill that create powers to extend excluded provision could only come into force either if they were implementing a future agreement between the EU and the UK on the protocol or if they were implementing article 16 measures—appropriate safeguard measures.

To go back to the original question, it is a political question and an economic question about whether the proposed solutions are good compromises. The legal question—the key legal point—is that the means by which they are delivered must comply with the rules of the game. Until we are at the point where the proposed solutions comply with the rules of the game, we cannot even go on to consider whether they are appropriate solutions and the EU, I believe, will simply not engage.

Donald Cameron: I hear that and, as a lawyer and a politician, I acknowledge those points, but, for instance, Stuart Anderson of the Northern Ireland Chamber of Commerce and Industry, which represents Northern Ireland businesses, has said that some of the practical proposals in the bill will help consumer-facing businesses. Ultimately, this is a practical political problem that needs to be solved. Do you have any comments on those practical proposals as potential areas of compromise that could help to solve this problem?

Dr Garner: In my professional capacity, I cannot comment on the proposals themselves. What I can say is that article 16 provides means by which the EU and the UK could discuss these proposals within the auspices of safeguard mechanisms. Annex 7 outlines that if article 16 is triggered, that starts discussions in the joint committee with a view to finding a commonly acceptable solution.

I know that it is not exactly an answer to the question that you are asking but there are platforms within the protocol that would allow the UK to make its case in the joint committee rather than it being done in this very antagonistic way.

Donald Cameron: Can I turn to Professor Barnard, who I think is joining us by audio link?

The Convener: Professor Barnard—are you there? We are not hearing you at the moment.

Professor Catherine Barnard (UK in a Changing Europe): Can you hear me now?

The Convener: We can hear you now, yes.

Professor Barnard: I would like to make three points. First, it is unlikely that the Government will pull the bill, not least because [*Inaudible*.] clause 19 of the bill enables the Government to implement any new agreement with the EU via a statutory instrument and not by an Act of Parliament, so the Government wants to hang on to clause 19.

To the specific question about what could be done to make this work better, the reality is that what could be done to make it work better is for the UK to sign up to a veterinary agreement with the EU and, even better, to a sanitary and phytosanitary agreement. That looks unlikely at the moment, so we fall back on the red and green lanes. The EU is exploring that proposal. [*Inaudible*.] The problem with the red and green lanes is that the big supermarkets will benefit from the green lane but [*Inaudible*.] smaller businesses will have to go through the red lane, so that does not help that much with the consumer-facing [*Inaudible*.] and finally, in respect of [*Inaudible*.]—

The Convener: I am sorry, Professor Barnard, but your sound is breaking up at this end and we are not able to pick up enough of your contribution. I am very sorry but we are going to have to move on to a supplementary question from Alasdair Allan.

Alasdair Allan (Na h-Eileanan an Iar) (SNP): I think that we may still be on the third point there, but I am not sure.

I noticed, Sir Jonathan, that you referred to—I was going to say “the excuse” but let me put it more neutrally—the reason that the UK Government has given for proposing to breach international law. I do not want to put words into your mouth but I think that you said the Government cited the grave threat or the emergency situation, or something like that. As much as public life in the UK at the moment does feel like an on-going emergency, I wonder what the threshold is in terms of precedent, if any, for such an extraordinary act as to propose to legislate to breach international law and whether you find the reasons offered to be convincing.

Sir Jonathan Jones: I think that it is fairly obvious that I do not find the reasons offered to be convincing and I think that I am in good company in taking that view.

Like many others, I find the assertion that there is a situation of necessity that amounts to grave and imminent peril to the UK’s essential interests, is hopeless, frankly, as I have described it elsewhere. There are some precedents but what can be deduced from the precedents is that this a very high hurdle. The idea that a party to an international agreement can depart from the agreement just because it has changed its mind or because the agreement is causing some inconvenience is not enough. There has to be a very high level of disruption or peril to the national interest.

The Government’s arguments were [*Inaudible*.] completely unpersuasive when they were

advanced in June and since then, as we heard, this bill has been sitting around. We have had the leadership contests and a summer adjournment and so on, and nothing has been done to pursue those options. You would have thought, as Dr Fox said, that if the situation really were as urgent as the test of necessity implies, this legislation would have been rammed through and the Government would have been taking truly urgent action to tackle the emergency that it says exists, but it has not done that.

It may be that some adverse effects are flowing from the protocol but they have continued to flow since June and the idea that this is a situation of necessity—a situation of grave and imminent peril—is even less plausible now than it was when the Government first advanced that argument.

The Convener: I will bring in Professor Hayward now, who is our adviser—I did not realise that she was still with us, so my apologies to the deputy convener, as I said that she had left.

Professor Katy Hayward (Adviser): Yes, apologies—I am just going to leave my students waiting.

To answer the deputy convener's question about the practicalities, very succinctly, the green/red channel proposal in the bill is a statement of ambition at the moment. The details of how it would operate would need to be put into force through secondary legislation.

The green/red channel idea is being discussed with the EU because it is very similar to an EU proposal that was made earlier this year with respect to express lanes. The difficulties are, as you would expect, in the detail—for example, as Professor Barnard mentioned, who would be eligible for the green lane—and a fundamental issue is that businesses wanting to have the option of trading not just into Northern Ireland but into the single market would tend to prefer to use the red lane. That is because they would want to maintain that sense of integrity, to ensure that there would be no doubt that what they were bringing in could go south. It becomes very complicated very quickly. Also, you would need to have risk-based and intelligence-based checks even on some goods coming through the green lane and the UK officials dealing with this recognise that as well.

If a dual regulatory regime were to operate in Northern Ireland, the fundamental benefits of that regime would be for GB businesses rather than NI businesses. It would essentially mean that GB businesses would not have to meet EU standards coming into Northern Ireland because, of course, NI businesses already benefit from free access to the single market and to the UK internal market.

A consequence of the dual regulatory regime is that anything then circulating in Northern Ireland could be of GB standard or EU standard. That makes it very complicated to verify that your goods meet EU standards crossing the Irish border, so you are right back to the question of whether you need checks and controls on the Irish border, given that non-EU standard goods would be in free circulation in Northern Ireland.

Another point which is often missed is that if the dual regulatory regime were operating in Northern Ireland, Northern Ireland would still need to align to EU rules. That challenge of alignment, which we know is very acute, would still remain if, for the most part, NI businesses and others choose to align to EU standards, so that dynamic alignment challenge remains.

On the governance question, that is not really a practical question. The jurisdiction of the European Court of Justice would immediately be gone as a consequence of this bill and that is very much a matter of principle for the EU. Other witnesses will be much more expert than I am in that area but the EU has been absolutely clear that, without the jurisdiction of the Court of Justice, Northern Ireland would lose access to the single market. Also, something that is not often recognised is that such things as the operation of the single electricity market also depend on the jurisdiction of the European Court of Justice, so there would be consequences. That point is not really a practical one, but the other issues are extremely complicated, as you would expect. There is a lot that is not clear from this bill because so much of it would come through secondary legislation.

09:15

Dr Garner: I would like to respond to Alasdair Allan's question about the Government's attempt to rely on the doctrine of necessity. That is found in article 25 of the "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries". In the Bingham Centre for the Rule of Law's first report on the bill in June, we outlined the legal argument for why we believe that the conditions found in article 25 for a grave and imminent threat are not fulfilled.

The important point that I want to make about the strategy is that there is, in a sense, an irony. I have mentioned article 16 of the Northern Ireland protocol, which is about appropriate safeguard measures. I would argue that the conditions for the adoption of measures under article 16 could be regarded as a lower threshold than article 25, because there is basically the creation of a permission to adopt the measures in the event of conditions being fulfilled that lead to

> "serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade".

Precedents were mentioned. Of course this is unprecedented. There was a partial attempt to trigger article 16 around the time of the coronavirus pandemic by the European Commission, but that was reversed. However, those conditions are far more appropriate to the situation that the UK claims, in terms of emergency and difficulties. That is a tailored condition within the lex specialis of article 16. Legally, I would argue that it would be more appropriate to try to rely on article 16. Even in terms of political or negotiating strategy, I think that it would be easier for the UK Government to make the case that those article 16 conditions are fulfilled rather than the very strict, high threshold conditions on necessity in article 25 of the "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries".

Sarah Boyack (Lothian) (Lab): As a result of having read the paperwork in advance of the meeting and listening to the questions and answers, my question has changed slightly. It is partly triggered by the deputy convener talking about the need for pragmatism. My concern is about accountability through the legislation in respect of knowing what we are voting for, given the huge powers that it will give to Government at both the UK and Scottish levels, and the difficulty for us in working out what they might be and testing that. My initial question was going to be about the uncertainty and the damage to relations with the EU. However, the fact that things have changed since the bill was introduced makes things even harder, because the uncertainty is greater. It seems to me that we do not know what we are voting for.

In respect of parliamentary precedent, given the huge scope of the bill, should we as parliamentarians support it? We are being asked to vote for something before we know about the negotiations. We do not know the context of what will be in the negotiations, and we are, in effect, being asked to support a bill that could be anything without being able to scrutinise it. I would be interested in feedback from the panel on the precedent for that at the UK and Scottish levels. Would Jonathan Jones like to come in on that precedent and uncertainty issue? Is the bill bad in terms of accountability?

Sir Jonathan Jones: I think that it is. You have summarised the matter very well.

We have already touched on the uncertainty. The scope of the powers is so wide that one could have no certainty about how, whether or when they will be exercised and therefore what the legal effect will be at the end of the process. As we have said, we know that the intention is to do things that override or contradict the protocol—that is a problem in itself—but we do not know which things. That is a problem for scrutiny. Parliamentarians are not being given an opportunity to properly scrutinise the policy and the decisions that have been made. As I have said, that is true for the Westminster Parliament and even more so for the devolved Parliaments. How can parliamentarians be accountable for decisions and actions on which they have had no opportunity at all to comment in any meaningful way?

Does that set a precedent? Unfortunately, there are already other precedents. Obviously, there are plenty of examples of Governments taking powers in legislation to make secondary legislation. Sometimes those powers are very wide, and sometimes they are criticised. Sometimes they include powers to amend primary legislation—the so-called Henry VIII powers. There has been plenty of comment about that over the years.

I think that the problem has got worse in recent years, partly because of Covid. We may not want to go down that alley but, for all sorts of reasons—some of which are good and some of which are not so good—the Government took and exercised very wide powers with very little scrutiny during the Covid pandemic.

Another current example, which I know that Dr Fox, among others, is very focused on, is the so-called Brexit freedoms bill—the Retained EU Law (Revocation and Reform) Bill—which is currently before the Westminster Parliament. Again, there are all sorts of objections to that bill. One objection is the fact that it will confer very wide powers on ministers—in that case, potentially both UK and devolved Administration ministers—to make decisions about which aspects of former EU law are retained, binned or changed across the whole policy area covered by EU law during the period of our membership, which is, of course, very wide. Those powers are also very wide, and they are being hotly debated in Parliament.

There are other precedents, but this is a particularly bad one. Basically, I agree with your critique.

Sarah Boyack: I will ask Dr Fox the same question. Should we have concerns about certainty and the lack of accountability?

Dr Fox: Absolutely. I think that the bill, as framed, undermines the principles of parliamentary democracy, because you are being asked to confer powers on ministers without having any detail about how they will propose to use them. I say again that the Government could, if it wished—it seems to me that this is a decision that it could choose to make, but it has chosen not to—choose, having reached a negotiated agreement, to legislate quickly to achieve the objectives that it requires in respect of any

agreement outcome. However, it has chosen not to do that. It has chosen to claim some of the broadest powers that we have seen. The House of Lords Delegated Powers and Regulatory Reform Committee, which is an influential committee that looks at bills that come before it in each parliamentary session, has said:

> "The Bill represents as stark a transfer of power from Parliament to the Executive as we have seen throughout the Brexit process."

We have described the powers as having incredible breadth because, essentially, discretion is conferred on ministers in 10 out of 26 clauses to make provisions that they deem appropriate in connection with whatever it is that they wish to do with the particular clauses, whether that is to do with the movement of goods or the regulation of goods and customs, for example. The problem is that there is quite a low and subjective threshold—a threshold of being appropriate rather than necessary, for example. What do "appropriate" and "in connection with" mean? To put it baldly, how connected does connected need to be in order to fall within the purview of the powers? There could be a fairly tenuous connection, because the drafting would permit a fairly tenuous connection.

The third element is that the scrutiny procedure—the process that the Government proposes to be adopted in relation to the powers—is what it calls, rather oddly, a dual procedure. In effect, it is talking about the application of the negative and affirmative procedures to all the powers. It proposes that all the powers should be subject to the negative procedure so that active parliamentary approval is not required. A member of Parliament at Westminster would be required to object to the statutory instrument and to win a vote to prevent it from continuing in law unless the power amends an act of Parliament or makes retrospective provision. That is quite a narrow interpretation of what active parliamentary approval should cover.

The affirmative procedure should certainly cover those areas, but it would normally cover a much broader area of what the Government is trying to do with its regulations. Therefore, the approach does not include any of the kinds of constraints that we saw in the Brexit bills to constrain those kinds of broad powers, such as a sifting process in which, if the Government wants to bring forward an instrument under the negative procedure, committees in both houses at Westminster can look at that instrument and decide whether the procedure should be upgraded to the affirmative scrutiny procedure, so that at least people have the protection of knowing that, if the Government is doing something more substantive that warrants parliamentary debate, that can be done.

There is no pre-laying consultation, and there are no requirements for reporting. There is just a blanket negative procedure unless the regulation falls under one of the two conditions that I have outlined.

Clause 22 in effect could potentially turn all the regulation-making powers in the bill to Henry VIII provisions. That is pretty extraordinary. That would, in effect, function in such a way that the powers would enable ministers to amend, repeal or otherwise alter the effects of acts of Parliament by regulations, including the bill once it has achieved royal assent. There is a pretty extraordinary combination of powers and procedure.

Sarah Boyack: Thank you for that. Professor Barnard, do you have similar concerns about transparency and accountability in the legislation?

The Convener: Professor Barnard has had to leave, because of connection issues.

Sarah Boyack: In that case, I will ask Dr Garner exactly the same question. You have said that you do not see this as being unprecedented in terms of the devolved settlement, but the evidence that we have received and our Delegated Powers and Law Reform Committee have raised concerns about people knowing what they are voting for and the lack of scrutiny both at UK and Scottish Parliament levels. Is that something that we should explore and be concerned about?

Dr Garner: I should perhaps clarify that, in my answer to the first question, I was pointing out that I do not see how the powers in this bill pose a threat to the devolved settlement. Of course, in so far as Scottish interests are being affected, that is a very specific problem, but I just wanted to make that clarification with regard to the settlement itself.

I echo what has been said by the other witnesses and think that it might be useful to provide the committee with two more examples. Dr Fox highlighted the example of clause 22, which is the Henry VIII conversion power, but it might be useful for committee members to be aware of clauses 18 and 20, too. With regard to clause 18, it might be worth reading out verbatim what is in the legislation. It states:

> "A Minister of the Crown may engage in conduct in relation to any matter dealt with in the Northern Ireland Protocol (where that conduct is not otherwise authorised by this Act) if the Minister of the Crown considers it appropriate to do so in connection with one or more of the purposes of this Act."

I simply highlight that as an illustration of Dr Fox's comment about subjective thresholds, because that clause is incredibly subjective, given that the only condition for engagement is the minister's consideration of its being "appropriate".

What really struck me was how broad the actions that can be authorised are. Indeed, the use of the term "conduct" in the phrase

"conduct in relation to any matter dealt with in the Northern Ireland Protocol",

is very broad, and the term "any matter" is necessarily broad, too. If the power is authorised, what would a minister be allowed to do with regard to conducting relations with the EU?

09:30

The second power that I want to highlight—and this is in response to your question about certainty—is that in clause 20, which relates to the role of the European Court of Justice in court and tribunal proceedings. For me, this is an issue of legal certainty. Clause 20(2) outlines that a UK court or tribunal

"is not bound by any principles laid down, or any decisions made, on or after the day on which this section comes into force by the European Court".

Crucially, it also states that domestic courts

"cannot refer any matter to the European Courts".

It has been a matter of discussion that these clauses, if they come into force, breach article 12 of the Northern Ireland protocol, which outlines the jurisdiction of the European Court of Justice.

As for your specific point about powers, clause 20(3) states that:

"A Minister of the Crown may, by regulations, make any provision which the Minister considers appropriate in connection with subsection (2)."

This represents a real problem for the rule of law principle of legal certainty, because this is fundamentally about courts knowing what law they have to apply and what powers they have to determine legal questions. If a minister has the potential to "make any provision" on such matters, it will lead to real problems for stability in the legal system and simply knowing that things will not change from one day to the next, simply with the publication of a regulation.

It comes back to your point about the importance of accountability and parliamentary scrutiny of these powers. I hope that it has been useful to outline just two of the many powers that Dr Fox has mentioned to see how extensive the legislation could be.

Sarah Boyack: That was helpful. The concern about what "conduct" and the making of "any provision" might mean and our capacity to interrogate that has come across very clearly, and I thank the witnesses for their answers to my questions.

The Convener: I call Mark Ruskell, who joins us online.

Mark Ruskell (Mid Scotland and Fife) (Green): I want to ask about the implications of breaching international law. Worsening relations with the EU and potentially a trade war have already been mentioned, but what other implications could there be? Perhaps I could ask Sir Jonathan Jones to respond first of all.

Sir Jonathan Jones: The main legal risks are, first of all, proceedings by the EU under the withdrawal agreement; indeed, such proceedings have been commenced before. It remains to be seen whether, if relations have broken down as badly as that, the UK would even seriously engage in such proceedings. If the UK seeks unilaterally to alter the governance arrangements, including the dissolution of the role of the European Court of Justice, we will be in an Alice-in-Wonderland world where the UK is saying, "We're deciding what the rules of the game are, what the remedies are and what the procedure is when the rules are broken." I am quite convinced the EU will not be having any of that. The risk, therefore, is that it would bring proceedings—and goodness knows what would happen then. Would the UK engage with the EU, or would it simply say, "No, we've changed the rules and we don't recognise the legitimacy of the procedure"? At that point, you are in a legal mess.

The other channel that the EU might very well pursue is that of retaliatory action up to and including a trade war. Such action might take all sorts of forms. It would have to be proportionate, but again, given that we do not know what action the UK Government might take under the bill, we cannot be clear what the level of retaliation might be. That would be the other practical action that the EU might legitimately take in response to what it would see undoubtedly as a breach by the UK.

Those are the legal routes. Of course, it all adds up in practice to a massive worsening of relations, including trading relations, between the UK and the EU. As I said earlier, no matter how neat a solution the UK Government might come up with to satisfy the different interests and constituencies not just in Northern Ireland—as difficult as that would be, and it would be hard enough—but in the rest of the UK, if it does not comply with the agreement, and it triggers the kind of reaction by the EU that we are discussing, it is not a solution. It is not an end state; it does not settle anything. All it does is provoke a legal and trade war, a stand-off or worsening relations. You have that combination of legal, diplomatic and trading consequences, and I cannot see how any of it ends well.

Dr Garner: EU lawyers and UK constitutional lawyers are really aware of the potential, as Sir Jonathan Jones has made clear, for this to become legally messy. That is precisely because the bill seeks to exclude the jurisdiction of the

European Court of Justice; that is a special jurisdiction under article 12 of the Northern Ireland protocol and relates to the fact that the protocol itself creates a very special regime for Northern Ireland. This is about maintaining Northern Ireland's de facto place within the EU internal market; if EU law is in force, you need the means to enforce it, and that, I think, is the reason for giving ECJ jurisdiction. If domestic legislation seeks to exclude that jurisdiction, we end up in a very difficult situation.

Sir Jonathan Jones has alluded to the fact that the bill could trigger the withdrawal agreement's general dispute resolution procedure, which, in case members are interested, comes under articles 167 to 181. As Sir Jonathan has suggested, the real question mark over this—and it is a major issue for the rule of law—is whether the UK Government would engage in good faith if the European Union were to bring these dispute resolution procedures. I have to be careful—we are in the realms of speculation or, at least, looking a long way down the road—but I could imagine one potential outcome in which the EU sought to bring proceedings against the UK in international tribunals on compliance with international treaty law. That would be unprecedented; indeed, one could even argue that it would challenge the perception of the EU's legal order as autonomous.

At the risk of being slightly theoretical, I will make one final point. "The Concept of Law" by HLA Hart, who was at the University of Oxford, is a very influential book on the theory of law and how, in his opinion, legal systems operate. He said that one of the key secondary set of rules that allow a legal system to operate is the rules of adjudication, which ensure that individuals know which body has the authority to resolve any disputes over the rules that might arise. We have that sort of thing throughout society; indeed, we have referees in football matches. The rule of law problem that arises here is that the way in which the UK Government is seeking to exclude jurisdiction is creating uncertainty over who has the authority to resolve disputes. That is a real problem for legal stability and certainty.

Dr Fox: From a parliamentary angle, the long-standing convention has been that, if a Government wants to make an international agreement that changes UK law, it is done by statute through an act of Parliament. This bill is a vehicle for getting there by enabling ministers to do it by regulations and it seems to me that, if ministers can take that approach, it will undermine our understanding of ourselves as a parliamentary democracy. These kinds of contentious policy issues, given all the implications for our international reputation and the diplomatic, political and economic aspects that the other two panellists have spoken about, should be put to Parliament in primary legislation to be debated and assented to or not.

Mark Ruskell: I see that Jonathan Jones wants to come in, but I have another question, which is about international precedent. It feels as if we are in quite a unique situation, but in recent years have any other Administrations in other parts of the world sought a similar level of executive power over their Parliaments? I will bring Jonathan Jones back in at this point.

Sir Jonathan Jones: I will let others talk about such precedents, because I am not aware of any. I am certainly not aware of any precedent in the UK for this combination of what I would say is a flagrant breach of international law and very wide powers being given to ministers to decide what they want to do about it.

The other point that I wanted to make, and which might be a bit obvious, is that the UK signed up to this deal. It did so not very long ago, and the deal included, for example, the adjudication provisions that we have been talking about, including the role of the European Court of Justice. I agree that it is obvious why the EU would insist that the court have a role in the interests of its own legal order, given that various EU rules are being applied to aspects of the withdrawal agreement, but the fact is that the UK agreed to that.

Secondly, all of this was embodied in an act of the UK Parliament: the European Union (Withdrawal Agreement) Act 2020. In truth, there was limited time for scrutiny at that point; nevertheless, the Parliament was given the opportunity to look at the deal. It did so, and it said that it was to have effect in UK law. To that extent, Parliament has already had a go at looking at the agreement and has accepted that it should be ratified and given effect to in domestic law.

That is what this bill is operating on; it is operating on a settled international law agreement that Parliament has endorsed and which at the time—which was not so very long ago—was said to be a great deal. I think that it would be pretty difficult to point to a precedent quite as flagrant as this one.

Dr Garner: I think that it is very important to advise caution when talking about international precedents. Every legal and constitutional system is quite unique in itself, and it is important to be aware of the context on the ground.

I should disclose that I am also a research fellow at the Central European University Democracy Institute, which is still based in Budapest in Hungary even though the university itself moved to Vienna, because of conflict with the Government. I point out that in Hungary itself—and this is true of other member states, too—

constitutional states of emergency have been declared in relation to recent crises. According to a report in July 2022, the Hungarian Government declared a state of emergency over the energy crisis, which was, of course, to do with the geopolitical situation.

I just wanted to mention that, because your question was about the dominance of the executive over the Parliament. The crucial point that I want to make is that you will have systems in which a state of emergency is written into the constitution, and it might give the Government limited powers to take action without involving the legislature or the Parliament as it would in normal situations. Of course, because it is written into the constitution, one can check whether the state of emergency being claimed by a Government indeed fulfils those conditions.

In the UK, however, we do not have a written constitution or provision for a state of emergency. Instead, I would say that we almost have something that, during the passage of the United Kingdom Internal Market Bill in 2020, I described as the creation of an almost de facto state of emergency in quite a piecemeal way through all the different skeleton bills. I do not know if that is helpful in answering your question, but I think it is something that is—[*Inaudible*.]—perspective of the UK.

Mark Ruskell: Dr Fox, do you have any final comments before I hand back to the convener?

Dr Fox: No, I do not have anything to add to what the others have said.

Mark Ruskell: Thank you very much.

09:45

Jenni Minto (Argyll and Bute) (SNP): I return to the question with which the convener started the discussion, which is the impact on the Scottish Parliament and its ability to scrutinise the legislation. Dr Garner, I hope that I am not misquoting you, but you said that the bill

“does not comply with the rules of the game”

between the UK and the EU. I am interested in your thoughts on how the bill perhaps impacts on the rules of the game between the UK Parliament and the devolved Governments across these islands.

Dr Garner: I should clarify that my claim—that the bill does not comply with the rules of the game that the UK not only agreed to with the EU but helped to create—is a very narrowly defined claim in relation to emergency situations under the Northern Ireland protocol. Actually, there are two points to be made. The first is that, if one agrees to something in an international agreement and then decides, “Actually, we don’t think we should be doing this. We want to create domestic law so that we no longer implement these obligations,” that is, in a sense, not playing by the rules of the game and one needs justification for why one is doing that.

That brings in the secondary point of not playing by the rules of the situation for dealing with problems within the game, which is found in article 16 of the Northern Ireland protocol. Again, the UK Government decided not to engage on that. That was my claim about playing by the rules of the game.

When it comes to the rules of the game that have been established in devolution legislation, I should clarify that I am not an expert in that matter. My expertise is in European Union law and UK public law in so far as it relates to European Union law. However, from what I have seen in other scholars’ writing, and although there is an important difference between rules and conventions, there definitely seems to be a movement away from the conventions that have arisen and are enshrined in legislation, as we saw discussed in the first Miller case. That will have an impact for those who are affected, as you are, as members of the Scottish Parliament.

Jenni Minto: We have had long debates over the meaning of conventions in this committee.

I was also struck by Dr Fox’s comments about parliamentary scrutiny. I appreciate that you look at it from a Westminster perspective, Dr Fox, but I would be interested in any comments that you have on how members of the Scottish Parliament will have an opportunity to scrutinise, given the timings and the different procedures in the Parliaments. As my colleague Sarah Boyack did, I highlight the letter from our Delegated Powers and Law Reform Committee that specifically questioned the UK Government about that matter.

Dr Fox: As Jonathan Jones referred to earlier, what we are seeing in this bill is also coming through in other bills. I was talking about this a few days ago in the context of the Retained EU Law (Revocation and Reform) Bill. The problem is that the legislation at Westminster that is coming from the Government is silent about what should happen when UK ministers intend to legislate by statutory instrument in areas of devolved competence. There is a lack of clarity about not just consent but even the lower threshold of consultation. Arguably, the bill that we are considering goes slightly further, because in effect what is proposed is legislative sub-delegation. It is granting power to be exercised by the devolved Government via a sub-delegated power to, in effect, make tertiary legislation.

At Westminster, the House of Lords Delegated Powers and Regulatory Reform Committee has argued particularly strongly about that. It refers to the disguised nature of some of the legislation. It has legal force, but it is extremely difficult to scrutinise it. Fundamentally, it breaks the important link between those who are empowered to make the law and the accountability to Parliament, whether at Westminster or in Scotland.

As I referred to earlier, the problem with the bill is that it does not, as would normally be the case, set out what the scrutiny procedures would be in respect of the Scottish Parliament, even where it is the Scottish ministers that make the statutory instruments. If there is an agreement, there is a question about how quickly the instruments that are required will then be brought forward and how they will be scrutinised. On the basis that they will, by and large, be subject to the negative scrutiny procedure, you will have the ability only to object to it and try to secure a debate. The bill does not require active parliamentary approval, except in the two cases that I referred to earlier: unless it amends an act of Parliament or makes a retrospective provision.

Overall, the provision is utterly inadequate. Even if it had the higher levels of scrutiny procedures at Westminster and, I think, in Edinburgh, those are not as good as they could and should be to ensure that you can do the oversight that you need to do for your constituents.

Jenni Minto: Sir Jonathan Jones, do you have any comments to make?

Sir Jonathan Jones: I have very little to add. Just to draw on Dr Garner's comment about the distinction between rules and conventions, that gets you only so far. Given that, ultimately, the Westminster Parliament is sovereign, if it wants to enact this kind of bill, in the end, it can do so and the courts will do their best to give effect to it and there you are—the rules, if they were rules, will have been changed.

In substance, I think the bill transgresses, in all the ways that we have talked about. I started by saying that it transgresses international law. I think that it also transgresses what we would normally regard as acceptable levels of scrutiny, legal certainty and accountability. Whether or not you regard that as breaking the rules, it is definitely a problem.

The Convener: I will bring in Dr Allan. I am conscious of time, so if we can try to keep things short for the remainder of the session, that will be helpful.

Alasdair Allan: I will keep it to a couple of brief questions in that case.

I know that this is returning to a theme, but I want to ask about the relation between UK ministers and the Scottish Parliament that could or will emerge from the bill. We have talked a bit about Henry VIII powers and the implications for this Parliament. Thankfully, Henry VIII never had the opportunity to legislate in Scotland. Nonetheless, there is the combination of the Henry VIII powers and other provisions in the bill, together with the decline of the Sewel convention, which has been alluded to. What is the effect of that combination of things? I know that Sir Jonathan Jones mentioned a range of unfortunate precedents, or words to that effect. How does the bill combine with the fact that, arguably at least, there is a decline in the Scottish Parliament's ability to rely on the Sewel convention?

Sir Jonathan Jones: Again, I agree with the analysis, and it is difficult to add much more to it. There is a problem in both of those respects. It is for you in the Scottish Parliament to decide what you think about that, how big a problem it is and what can be done politically to change it. Dr Fox and I, and others, have had many long conversations about the systemic trend that we are seeing of the Government taking ever wider powers with ever less parliamentary scrutiny. That is partly a cultural issue—it is the way in which the Government approaches governance. It is partly about the role of individual parliamentarians and how they see their role and how, if at all, they assert themselves, for example, through select committees.

I agree with the analysis that there is a problem of scrutiny that extends to the Westminster Parliament and, I would say, to the devolved Parliaments. How do you solve that against the background of a sovereign Westminster Parliament that has its own view—let us put it no higher than that—of the various conventions and modes of governance that might have applied in the past? At the moment, at any rate, it is a Government with a strong majority that we assume will be able to get such legislation through, although we will see what happens. The Retained EU Law (Revocation and Reform) Bill has had a bit of a battering, but you have to assume that it will get through the House of Commons in Westminster. Finding a solution to any of that, other than talking about it, is much more difficult.

Alasdair Allan: I put the same question to Dr Fox. What is the cumulative impact of the bill when it is taken together with other developments such as the changes to our understanding of the Sewel convention?

Dr Fox: It is extremely worrying. We cannot exclude the possibility that we will end up at a point of constitutional crisis, if not on this bill, on

some other bill. As Sir Jonathan Jones has said, emerging out of Whitehall we have a series of bills that are pulling on the question of who is and who should be making the law in areas of devolved competence. That will not change, unless the Government in London has a change of heart and takes a different attitudinal and cultural approach. In that context, it is difficult to see, at least for the foreseeable future, how that will be resolved or alleviated.

I cannot offer any short-term prospects for a solution, but one thing that we have been looking at is that, particularly at Westminster, there is a lack of understanding among many MPs of the devolved settlement and the respective roles of the devolved institutions vis-à-vis Whitehall and Westminster. There have been some helpful initial interparliamentary discussions. I have been a member of a group formed through the Study of Parliament Group, which is a group of academics and clerks and so on that looks at procedural issues. One thing that we are looking at is whether it would be possible to propose an interparliamentary model that could help to improve relationships, consultation and contacts.

I do not profess that that would resolve the very serious issues in respect of the legislative problems, but it might help to address some of the ingrained lack of knowledge, and the cultural and attitudinal problems that we see at Westminster, which are quite difficult from my perspective.

The Convener: I am conscious of time, but I will finish with a question that is really for the wider public's understanding. We have heard quite concerning things. In your last contribution, Dr Fox, you said that the situation is "extremely worrying". I think that Sir Jonathan Jones said earlier that potentially it will not end well. We already know that the measures are stifling certain areas of the trade and co-operation agreement, such as access to horizon funding and justice co-operation, and that there is an impact on Scottish areas, in agrifoods and exports. The emergency in my mind and that of many of my colleagues is the cost of living crisis. However, just how serious would it be for the reputation and the economy of the UK if the situation escalates into a further area of contention or indeed a trade war with the EU? Your answer could be succinct, and I realise that you may not want to answer the question.

Dr Garner: I will try to be as succinct as possible. The risk, especially from the legal perspective—of course, law regulates society, the economy and so on—is that, if things escalate between the EU and the UK, parts of the trade and co-operation agreement may well be suspended. There is provision for that. That could be serious, because we would be in a de facto state of emergency, as I said. It would create a similar state to the one that we found ourselves in around the time when the TCA was being concluded. Both parties should look to avoid that as far as possible, because of the effects that it would have in terms of certainty and regulation, and the societal and economic issues that you mentioned.

Dr Fox: Given my role, I cannot really comment but, as a citizen, I do not think that a trade war and undermining of our international reputation are particularly helpful. I would have thought that the Government had more than enough problems on its plate and does not need to add to them with that or indeed a broader constitutional crisis.

Sir Jonathan Jones: I am not an economist but, from the point of view of a lawyer and, as Dr Fox said, a citizen, this can only be damaging to the UK's relationship with the EU and to our international reputation as a rule of law nation. If there is retaliation and a trade war, the practical consequences can only be bad. I am not in a position to comment on how bad they would be, because we do not know what shape that would take. We now have a substantially new Government in Westminster. I hope that some of the more positive conciliatory signs turn out to be true and that we get more into negotiation than the confrontation that the bill represents.

The Convener: Thank you all for your contributions. We are again sorry that Professor Barnard had to leave, but she has indicated that she will write in with any comments on the questions if she wishes to add to her submission to the committee.

I will suspend the meeting briefly to allow the next witnesses to come on board.

10:01

Meeting suspended.

10:04

On resuming—

The Convener: For our second panel this morning, as part of our consideration for the legislative consent memorandum on the Northern Ireland Protocol Bill, I welcome Angus Robertson MSP, Cabinet Secretary for the Constitution, External Affairs and Culture, who is joined by Frank Strang, deputy director of EU relations at the Scottish Government, and Chris Nicholson, solicitor, Scottish Government legal directorate. A warm welcome to you. Cabinet secretary, I invite you to make an opening statement.

The Cabinet Secretary for the Constitution, External Affairs and Culture (Angus Robertson): Thank you very much, convener, and a very good morning to colleagues on the

committee. We are here today to discuss the Scottish Government's legislative consent memorandum on the UK Government's Northern Ireland Protocol Bill. The committee is very well aware of all the reasons why colleagues and I have serious misgivings about the bill, but let me begin by acknowledging that talks between the UK and the EU on the protocol have resumed in recent weeks—they are the first substantive structured talks since the early part of 2022—and that there appears to be a shift in tone.

It was certainly striking to hear the Northern Ireland minister and former European research group chair, Steve Baker MP, publicly apologise to Ireland and the EU for behaviour during Brexit negotiations that had not inspired trust. It is my sincere hope that the UK Government will seize this moment to re-engage in good faith with our European partners, build more positive momentum and seek sustainable shared solutions, but two important things must happen to make that possible. First, the chaos engulfing Westminster needs to be brought to an end. Secondly, the UK Government must end its irresponsible threats to override the protocol unilaterally and withdraw the bill without delay.

As the committee will be aware, shortly after the bill's introduction in June, the Scottish Parliament held a debate and passed a motion condemning the bill as "fundamentally unacceptable". Not a single member of the Scottish Parliament voted against that. Since then, the legislation has passed through the House of Commons unamended and is now progressing through the House of Lords. The bill has been met with deep concern by legal experts and our allies around the world, yet not a single Conservative member of Parliament voted against it. The UK Government has acknowledged that the bill engages the legislative consent process and has sought the consent of the Scottish Parliament. As the memorandum sets out, the Scottish Government does not recommend consent for the bill, for reasons of its potential illegality and its impact on Scottish interests.

On the question of legality, the bill will make UK domestic law incompatible with the UK's international obligations under the protocol. To do so may put the UK in breach of international law. Although that is a question ultimately for the courts, domestic or international, many prominent legal commentators—you have heard from some this morning—and European leaders have already robustly challenged the UK Government's legal position. The bill also threatens profound consequences for Scotland. It has heightened tensions in a dispute that has already badly damaged UK-EU relations and stalled all progress on the TCA, with direct implications for Scottish priorities, including horizon Europe association, energy trading and re-establishing market access for key exports.

As the memorandum sets out, if the bill becomes law, the consequences of the escalation could be economically disastrous for people in Scotland. It could lead to tariffs being imposed and even to the trade and co-operation agreement being suspended. That the UK Government is willing to risk a trade war in the middle of a cost of living crisis, after all the ideologically driven economic chaos that it has already inflicted on us all, is unconscionable. For those reasons, the Scottish Government cannot recommend consent for the bill.

On my last trip to Brussels, I met the UK ambassador to the EU and European partners and emphasised that a negotiated solution is in everybody's interests. It is important to maintain constructive relations, and that is what the Scottish Government will continue to seek to do. Indeed, that is why I wrote to the Foreign Secretary, James Cleverly, on 30 September requesting urgent bilateral and four-nations meetings on UK-EU relations. Mr Cleverly responded this week, committing to a four-nations meeting before the TCA partnership council next meets. However, no date has been fixed and in general there has been a frustrating lack of ministerial-level engagement in this space.

I hope that this introduction has been helpful and I welcome any questions, convener.

The Convener: Thank you very much, cabinet secretary. I will open on those points about four-nations co-operation. We have heard today that there may well be some progress in Northern Ireland and we wait to see what happens there, but what discussions have you had with your Welsh counterparts about this? Are they on the same page as the Scottish Government in their opinion of the bill and its potential impact on devolved settlements in both areas?

Angus Robertson: When I have discussed this issue with colleagues in Wales, it has been one of the areas of great concern that we share because of the direct implications of what is happening as a result of the very confrontational course that the UK Government is taking. It is no way to run international relations; it is no way to deal with an important trading partner in Ireland and the wider EU in general. What is happening in relation specifically to Henry VIII powers—the ability of the UK Government to pass legislation that allows it to make subsequent legislative changes that are not subject to parliamentary scrutiny and oversight at Westminster, let alone here in the Scottish Parliament, and potentially in devolved areas—should concern us all.

The last part—and this is a concern in Wales, as it is in Scotland—is that when we, as Parliaments and Governments, say that we have a profound problem with a piece of legislation and we use the mechanisms that are in place to underline that, up until now and repeatedly we have seen the UK Government override it. Yes, the concerns are shared. I would hope that there is understanding across the committee, given that no MSP objected to the concerns that were expressed in the motion that the Scottish Parliament passed, and that we are of one mind, both as a Parliament and as a Government, in saying to the UK Government that it really needs to think again about this. Not only is it of profound importance to Northern Ireland, it matters to devolution and intergovernmental relations in the UK, and of course it matters that we do not escalate things with the EU such that we face a potential trade war. It is in nobody's interest.

Donald Cameron: I was very glad to hear at the outset of your comments that you acknowledge the change of tone, because I think that that is true. I think that there is a change of tone and that the new Prime Minister will adopt a more pragmatic approach. I am going to ask the same question of you that I asked the panel earlier, which is that the Northern Ireland Protocol Bill—and we debated this in June—contains various pragmatic proposals, such as the red/green lane and the dual regulatory regime. From the Scottish Government's perspective, do you see any mileage in those as being viable solutions to the very knotty problems that exist?

Angus Robertson: There is the direct question, but there is also the implied suggestion that there should, with a change of tone, perhaps also be a change of approach more generally that might be able to secure an agreed solution between the UK and the EU. If that is the thinking in Downing Street, I would very much welcome it, but I think that Donald Cameron would agree with me that we need more than a change in tone. These are very technical questions, but just to underline his point, which I agree with, I note that in the conversations that I had with UK and European partners, which I alluded to in my opening statement, there was a clear acknowledgement that there is a potential for what is described in the jargon as a landing zone for an agreement. All of that underlines the point to me that, if that is the preferred trajectory, that is indeed where we should be looking, rather than passing legislation, which as we know is deeply troubling for a number of reasons, especially given where things are in Northern Ireland and the sensitivities around that.

I think that everybody understands that no Executive has been formed in Northern Ireland and that, unless there is progress this week, that there will be elections again in Northern Ireland. It is worth putting on record if it has not been put on record thus far today, that in the last Northern Irish elections, a majority of members were elected in support of the arrangements, and it seems to me that what we need now is more than just a change in tone. We need a change in substance. We need to break the logjam in all of this, which is why I think that the UK Government should not proceed with the confrontational course of action that it is proposing to take with this legislation but should do what the Scottish Parliament voted for—or certainly did not vote against—and withdraw the bill and make progress on a diplomatic and technical level to reach a solution that I would hope is to everybody's benefit. A change of tone, yes, but let us see a change in substance too.

Donald Cameron asked whether there were areas where one could see room for technical solutions. The answer is yes, and that has been signalled by Commissioner Šefčovič and proposals have been made by the EU side. It would be good to see those from the UK side, but it certainly will not be helped by legislation that legal observers with much greater legal training than I have—I am sure that Donald Cameron, as an advocate, knows many of them—believe is in breach of international law. That is very serious, if that is the case, and is yet another reason why the UK Government should not be proceeding with the legislation.

10:15

Sarah Boyack: We have had some very concerning evidence from witnesses this morning about the way in which the bill undermines parliamentary accountability, leading to the instability and uncertainty that you referred to in your opening comments. Can you say a bit more about the discussions that you have had with other devolved nations about pushing back on this legislation? You have highlighted the challenge in Northern Ireland, but what about the Welsh Government? Can you say a bit in principle about the use of secondary legislation rather than primary legislation, using the Henry VIII powers, which makes it impossible for us to conduct scrutiny on what you may be doing as a Government, given the concerns that our own devolved regulatory committee highlighted, as we have seen at the UK level, both in the House of Commons and the House of Lords.

Angus Robertson: Indeed. What is happening with these so-called Henry VIII powers has been described by the Hansard Society as "breathtaking" in scope. For those who are unaware of what Henry VIII powers are, it is very important that we do not hide behind terminology that sounds fluffy and historic and archaic. What does it mean? It is exactly as Sarah Boyack

suggests. It is in effect taking away the power of Parliament to have oversight and scrutiny, but at the same time it drives a coach and horses through the devolution settlement because it confers on the UK Government powers to legislate in any areas that it so chooses and is the end of us as parliamentarians, elected in this Parliament to hold the Scottish Government to account and me as a minister of the Scottish Government to be answerable to you as a committee and Parliament more generally. I would be saying to you that in future evidence sessions you really need to speak to UK Government ministers who are legislating in this area.

Work has been done in the House of Lords. I am a critic generally of the House of Lords as an unelected institution but, obviously, a great many members of the House of Lords have great minds and legal experience, and its European committees in particular have an incredibly high standing. I know that as somebody who sat on the European Scrutiny Committee of the House of Commons for a decade. What has been said by the House of Lords committees on the point that Sarah Boyack raises should make alarm bells ring everywhere. I do not know whether this is on the record, convener, but it is worth making sure that it is—the chair of the House of Commons Justice Committee, Sir Robert Neill, observed, somewhat colourfully:

"There are Henry VIII powers and Henry VIII powers; and this is Henry VIII, the six wives, Cardinal Wolsey and Thomas Cromwell all thrown in together."

That is amusing in making the point that we are talking about something that is very significant, but let us understand what the significance of it is. Again to pray in aid the House of Lords, I note that its Delegated Powers and Regulatory Reform Committee made the following assessment in June and I quote from it:

"The Northern Ireland Protocol Bill is a skeleton bill that confers on Ministers a licence to legislate in the widest possible terms. The Bill represents as stark a transfer of power from Parliament to the Executive"—

and we are talking about the UK Parliament and the UK Executive—

"as we have seen throughout the Brexit process. The Bill is unprecedented in its cavalier treatment of Parliament, the EU and the Government's international obligations."

One could add that the result of using this power is that it totally undermines and subverts the devolution settlement, so we should be very concerned about all of this, which is another reason why we should not be giving it legislative consent to proceed.

Frank Strang (Scottish Government): May I mention Wales?

Angus Robertson: Indeed.

Frank Strang: I want to mention Welsh and Northern Ireland colleagues and say how closely we are working at official level. I feel for our Northern Ireland colleagues—without the Executive for a ministerial steer, it is harder for them—but we are working very closely with the Welsh and note the impact on the Assemblies in general. You do not need to have a view about the ultimate destination of the Assemblies, but you can have a view about the impact on the current Assemblies as they are. The cumulative effect of this, plus the retained EU law, plus the United Kingdom Internal Market Act, one after the other, has us very concerned at an official level. We are engaging very closely with the Welsh.

The Convener: I will be attending and taking part in the interparliamentary forum that will be meeting on Friday, which has also raised concerns about these issues.

Sarah Boyack: I thank both of you for giving us those comments. I think that there has been a huge level of objection. My colleague David Lammy said that the bill gifts ministers unaccountable powers, so I think that the points made by the cabinet secretary are important for all of us to reflect on. I am guessing that the challenge will be how the Scottish Government responds in terms of our parliamentary accountability, given that at this stage you do not know what it is you would be expected to bring forward and what the timescales are. Having this exchange today is very helpful.

Jenni Minto: As an aside to the comment about Henry VIII, I think that we have to make sure that we are Catherine Parr, who survived him.

I was coming to work today thinking about the whole issue of the tone and the substance, which you referenced earlier. I was interested to read a quote from the Secretary of State for Northern Ireland, Chris Heaton-Harris, who said:

"People in Northern Ireland deserve locally-elected decision-makers and an Executive who can respond to issues facing people, families and communities across Northern Ireland at this challenging time. We are clear that people deserve an accountable devolved Government."

I was thinking that that is a good change in tone. The Scottish Government has highlighted the breadth of powers that the bill confers on the UK Government, including devolved areas, so I am interested in delving a bit more into your comments about tone and substance, cabinet secretary.

Angus Robertson: Notwithstanding political differences, there is a new Prime Minister and there is a new Cabinet, or a new old Cabinet. We have seen U-turns on major economic policy, thank goodness, from the short-lived Truss premiership and we have seen U-turns on fracking

in England. Who knows—maybe we might see the opportunity for some rethinking about Northern Ireland.

I have known Chris Heaton-Harris for a long time from when he was in the European Parliament and at Westminster when I was there. I very much hope that he will take the opportunity to try to find ways to get beyond the impasse. I acknowledge that it is not simple for a Government that has frankly dug itself into a hole because of the internal contradictions of its position. We all remember the former Prime Minister, Boris Johnson, saying one thing to business in Northern Ireland, telling everybody that the Brexit arrangements were fully baked or whatever it was—"half-baked" is probably more apposite—but one thing was being said to one key interest group at the same time as something else was being said to others, and those positions cannot be reconciled. There is an inherent internal contradiction in the UK Government's position, but it should not be in anybody's interests that any Government, whether at a devolved level or a UK level, is prepared to breach international law in clear sight, and that is what we are hearing from legal experts would be the case.

I think that it was Brandon Lewis, as Northern Ireland secretary, who seemed to suggest from the despatch box that breaking international law in a "limited way"—in his words—was somehow okay. It is not okay. I know that we are talking about areas that impact devolved decision-making powers in Scotland and areas of devolved policy. It will impact Scotland, not least because it is we who will be having to build border infrastructure in Scotland as a result of all this. We have little clarity yet about to the full scope of all this. We have a big direct interest in this in Scotland, but we have a wider interest, too. Northern Ireland is one of our closest neighbours. We are literally kith and kin. For all those people of all political traditions who worked so hard to find the hard-won solution to end the troubles in Northern Ireland to see it endangered is something that should concern us all. Having said that, but also reflecting on our collective position as a Parliament, I note that we have debated this and taken a view. Not a single MSP and no member of the committee has objected to that position or disagreed with a motion that described it as being

"fundamentally unacceptable for the UK Government to unilaterally disapply key parts of the EU-UK Withdrawal Agreement".

I could go on, but we are agreed. There is no disagreement. We believe this to be fundamentally unacceptable, and what is within our power is that we do not give the legislation legislative consent. I very much welcome Sarah Boyack's reference to David Lammy but also her underscoring of how important this is. It behoves all of us in all of our parties to have a united front on this and to speak with one loud and clear voice. There are a lot of issues at stake here, all of which matter, some of them more directly to us but also in general terms to us as supporters, as we all are, of peace and reconciliation in Northern Ireland. We cannot allow this to head in the direction of worsening relations between the UK and the European Union and the potential for a trade conflict. Also there is the running roughshod over the democratically elected majority view of parliamentarians in Northern Ireland, who want this arrangement to carry on and are not in favour of the UK Government's approach.

Mark Ruskell: Cabinet secretary, you mentioned in your opening comments some of the implications of the current impasse, particularly for horizon Europe and energy trading. Could you expand on those two issues? What are the current implications for Scotland?

Angus Robertson: In general terms—my colleagues at official level might have some more specific reflections to make—the UK Government's confrontational approach has undermined relations between the UK and the European Union to the point that there is not, broadly speaking, a fully constructive working relationship between the UK and the EU.

One of the damaging consequences of that course of action, which we must help the UK Government to understand, is that a series of other things are not proceeding under normalised or improved relations in a post-Brexit environment. There is a chilling effect on European institutions, and that is not a good thing. There is neither the bandwidth nor the willingness to have a fully mutually respectful relationship when the EU looks at the UK and observes that it is a partner that agrees something one year and then walks away from it the next year or the year after. Why would the EU seek other forms of agreement when it does not even know whether the UK will stick with the existing agreement? It is profoundly problematic. It is not a position that any rational, sensible actor wants to be in.

In the short period of opportunity that exists, I encourage the UK Government to think about pressing reset buttons. In particular, I encourage it to press a reset button on the Northern Ireland protocol, because it is in everybody's interests that we support peace and reconciliation in Northern Ireland, that we support the solution that has been found that, in effect, allows Northern Ireland to remain within the European single market, and that manageable and proportionate border arrangements can be found for Northern Ireland and Great Britain.

10:30

Frank Strang: When it comes to the specifics, there is a big long list. The point here is the overriding, overarching chilling effect. It surprises us every now and again when we want to engage with European partners on lots of things and they say, "I haven't seen it written down, but we are not supposed to be engaging with you because of the Northern Ireland protocol." As you can imagine, that affects lots of our activity because we are part of the UK and that is what the arrangement is, so we could make a long list.

The issues of horizon Europe and energy trading are mentioned because they are important to us. They are also urgent, which is important. When we were confronted with Brexit, we thought, "Actually, at least there are some things that we can pull out of the fire." One was horizon Europe. We thought that that was obviously in both our interests and that no one would stand in the way of something that is about university collaboration, given how important our universities are to European collaboration. We thought that people would come knocking at the door and that the process would be easy. The issue is urgent, because when collaboration is lost, it is lost. It is really hard to rebuild it.

On energy trading, we are at a critical moment. We want to be in at the time. We sometimes forget the chilling effect of the Northern Ireland protocol on everything else in our relationships with Europe.

Mark Ruskell: If there is a longer list, it would be good to see it.

Alasdair Allan: Thank you for being here again, cabinet secretary. As I am sure that you will have heard if you were listening in, we have heard a lot this morning about the issues that such matters give rise to about the rule of law. Experts have told us their view on that from a legal point of view, but from the point of view of other European countries where the rule of law and constitutions and so forth are taken seriously, what does the current situation do for the UK's reputation among them?

Angus Robertson: I think that the reputational damage is profound. One of the common narratives that one hears when one hears people internationally talk about the UK is about the mother of Parliaments, the rule of law and so on, and how all those things are positive attributes of the UK. That is being called into question, and not just—I say "just"—by our colleagues across the EU. That is also the position of the United States of America, which is one of our most important trading partners. We have not gone into this yet, but the idea that there will be a trade agreement between the UK and the United States in the present context is unimaginable. It will simply not happen and the US has said so in terms. You are absolutely right—the issue is a very broadly damaging one from the point of view of reputation.

There is another aspect to this that may develop in time. I reflect on the fact that there was an election in Northern Ireland at which people voted for something to happen, just as people voted in last year's Scottish Parliament election for something to happen. There will potentially be another election in Northern Ireland. Were it to be the case that, yet again, a majority of parliamentarians in Northern Ireland were to be elected with the view that they were in favour of the protocol arrangements and were not in favour of the UK Government's approach, and for that to be disregarded again, how much more would it take for that to be noticed internationally?

I do not think that it would take a lot more, because what we are seeing is a UK Government that is disregarding election results in Northern Ireland and in Scotland, and which is potentially about to do so again in Northern Ireland. Therefore, the UK Government has a reputational problem as regards its being prepared to "disapply" the protocol, which is the way that the UK Government likes to put it. Imagine having that as your defence in a court of law: "I have decided to unilaterally disapply the law as it affects me. Please rule in my favour." It is ludicrous. It is a unilateral breaking of international undertakings when there are other routes to remedy.

There are ways in which the UK Government could act in line with its international agreements in an effort to solve the problems that it believes to be in need of resolution. I agree that there is a reputational issue when it comes to international law, but I think that there is also a parallel issue in relation to the UK Government disregarding democracy, which I think will undermine us reputationally in the months to come.

Alasdair Allan: As I mentioned, we have heard from a number of experts. Sir Jonathan Jones KC, the Bingham Centre for the Rule of Law and the Hansard Society all expressed concern about UK ministers being allowed, through the proposed legislation, to step firmly into devolved areas and to radically change the relationship with the Scottish Parliament. I think that the Hansard Society described that as a constitutional crisis. Is it?

Angus Robertson: Yes, it is. As parliamentarians here, we should all be concerned about that. What are we talking about here? We are talking about a Government elsewhere, with a majority elected elsewhere, disregarding a devolved settlement that was agreed by people here, with a Parliament that was elected here and a Government that is responsible to parliamentarians here. How much more

problematic does it need to be for those who do not see it as such to set their alarm bells ringing? It is a profoundly challenging situation.

As has been pointed out, the Northern Ireland Protocol Bill is not the only legislative measure that we as parliamentarians have been confronted with in recent times. From the single market act to the recent attempts to deal with EU legislation, those are all profoundly problematic from a democratic and a legitimacy point of view, and that has the potential to hollow out our democratic system of government.

Surely no democrat can be happy with that situation. I call on all MSPs of all parties to follow the logic of their position, to not oppose a clearly stated motion of this Parliament that describes the UK Government's approach as fundamentally unacceptable and to use all avenues to get the UK Government to reconsider its position.

Jenni Minto: As part of the evidence that we have just heard, there was an implication that there is perhaps a lack of understanding at Westminster of devolved powers and how our Parliaments work, which perhaps even shows a cultural and attitudinal problem at Westminster. Given that you have sat in both Parliaments, cabinet secretary, do you have any thoughts on that?

I would also like to move on to the reasons that the Scottish Government laid out for its concerns about the future impact on Scottish interests in the event of further escalation of the possible dispute between the UK Government and the EU that the bill has provoked. You have talked a bit about trade measures, but the Scottish Government has also mentioned EU withdrawal of data protection adequacy and financial services equivalence, which could have major impacts on the Scottish economy. I would like to hear your thoughts on that as well.

Angus Robertson: There are two parts to the question. The attitudinal problem was confirmed to me when I gave evidence to a UK parliamentary committee that was taking evidence here in the Scottish Parliament. I spoke with UK MP colleagues, some of whom had held ministerial office, and they were absolutely up front about the fact that, at the time, they had little to no interest in taking on board needs, interests, concerns and expectations from devolved Governments or Parliaments elsewhere in the UK. That is an attitudinal problem.

As I have said to the committee previously, I can give evidence to the contrary. I have given the example before of the excellent working relationship that I had with Chloe Smith when she was at the Cabinet Office in relation to the framework arrangements around devolution. If UK Government colleagues wish to be constructive, it is perfectly possible that they can be. Up until now, however, my experience as a minister has involved my not meeting ministerial opposite numbers, requests not being answered and requests being answered but being turned down the whole time. Maybe we should publish at some point a master list of all of that so that one can see the full context.

Occasionally, I hear in the chamber that there is an argument of equivalence in the difficulties of intergovernmental relations on these islands. I can assure Ms Minto and the committee that that is absolutely not the case. I do not think that I have ever turned down a meeting with a UK Government opposite number, but I can point to opposite numbers that I have never even had a phone call from while we were in office, let alone met. There is a massive attitudinal problem. The difficulty is a case of "out of sight and out of mind", but that does not mean that it is without consequence. That is where we are.

On the particular concerns that were raised about trade measures, data protection and financial equivalence, we are meeting in Edinburgh, which is the heart of the Scottish financial services industry, so we are not talking about an esoteric subject here. We are talking about a course of action by the UK Government that is deleterious to significant parts of the Scottish economy. That is another reason why, if alarm bells are not ringing yet for some colleagues, they really must be, because it is not in our interests to see these important areas endangered.

Right at the start, Donald Cameron asked whether there has been a change of tone. There has been, but is there a change in substance? Not yet. Let us take the opportunity to say, "Can we please see that?" That would be a good thing. Who knows? That might lead to a resetting in this challenging area.

The Convener: I have a couple of final questions, cabinet secretary. A lot of our evidence has focused on the Sewel convention and how it has operated. The Hansard Society raised some concerns about that today. At a time when almost everything is changing, if we are dependent on the traditional conventions that we have, how do we move forward and ensure that what happens is not just about who is in place and the willingness of the Prime Minister and the Government? Is there something that we can do to improve the constitutional arrangements? From the evidence that we have seen, the Sewel convention appears to be, to put it politely, under strain.

Angus Robertson: That is very polite. The best way to deal with constitutional certainty or uncertainty around things like that is to actually

have a constitution. That would be a good start. That is what most normal countries do, and I would be in favour of Scotland having a written constitution so that we are not dependent on conventions.

The Sewel convention is very much observed in the breach, and increasingly so. We are supposed to have an agreement with the UK Government on what happens if the Scottish Parliament takes a view that the UK Government should not legislate in areas of devolved responsibility. That is what the Sewel convention is. However, it is increasingly being interpreted in a different way by the UK Government to simply say that, as long as one has consulted on consent, that satisfies the convention. That is weaselly, to be frank, and it is a breach of the way in which devolution has operated.

Maybe I should have brought with me a graph to illustrate the number of times that the Sewel convention is being breached. Again, that is a sign that intergovernmental relations are not working as they should. If the UK Government took relations with Scotland, Wales and Northern Ireland as seriously as it should, it would not be doing that.

I return to Donald Cameron's invitation to welcome a change in tone. I think that it is a good thing that the new Prime Minister rang the First Ministers of Scotland and Wales, which is something that his short-lived predecessor was unwilling to do. Just think about that for a second. The Prime Minister of the United Kingdom did not think it worthy to call the heads of Government in Scotland and Wales. That is unbelievable.

10:45

At least there is now a Prime Minister who realises that that is not a sustainable position. However, one has to move beyond tone and sending signals. One has to deal with things in practical terms and, in this case, in legal terms, because we are dealing with something that is going through the British Parliament—something that I think I am right in saying all Conservative members of Parliament voted in favour of. That is not what happened here, so different things are happening in different Parliaments.

The motion was agreed to by members across the Parliament. It was not objected to by any MSP or any party, and the overwhelming majority of Scottish members of Parliament at Westminster voted against the legislation proceeding.

This is not an esoteric point. It is extremely important not just for Northern Ireland, but for Scotland, for our devolved settlement and for our form of democracy and government full stop. Do we believe that it should be for our Parliament to pass laws and hold our Government to account or are we happy to see those powers being taken away from this place and exercised in another—that is, by the UK Government—in a form that makes it unanswerable even to the UK Parliament?

The Convener: The inaugural meeting of the Parliamentary Partnership Assembly was held on the morning on which the UK Government announced the bill, which did not set that partnership off on the best of terms, to say the least. We will meet again in the next couple of weeks. At that inaugural meeting, it was absolutely the view of Commissioner Šefčovič and the European contributors that the TCA was working and that that had been demonstrated by the negotiations on medicines.

Do you share that opinion? Do you think that the bill can be withdrawn and that we can move forward to negotiate on the areas, as highlighted by Mr Cameron, where there is a will?

Angus Robertson: The objective evidence about the workings of the TCA is there for anybody to see in what is happening with the Northern Irish economy when viewed against the other nations and regions of the UK. On a practical level, it is working—absolutely. Are there ways in which it can be amended by agreement? Both sides have suggested that that is indeed the case. That is the way in which the challenge should be approached, but the big picture is that the TCA is actually working.

It is because of a vocal minority that the UK Government is pursuing a confrontational course of action in relation to the Northern Ireland protocol. I appeal, even at this late stage, for the UK Government to press the pause button, to reset and to improve relations with our European partners. We do not need a trade war in the middle of a cost of living crisis and we certainly do not need anything that imperils peace in Northern Ireland.

Lastly, and as importantly, we do not need or want to see our democratic institutions being hollowed out so that UK Government ministers can govern by fiat. That is not governance as I understand it, and I hope that no member of the Scottish Parliament would understand it in that way.

The Convener: That exhausts the committee's questions this morning. I thank the cabinet secretary and his officials for their attendance. We will now move into private session.

10:48

Meeting continued in private until 11:10.

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