



OFFICIAL REPORT
AITHISG OIFIGEIL

Culture, Tourism, Europe and External Relations Committee

Thursday 8 March 2018

Session 5



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CULTURE, TOURISM, EUROPE AND EXTERNAL RELATIONS COMMITTEE
6th Meeting 2018, Session 5

CONVENER

*Joan McAlpine (South Scotland) (SNP)

COMMITTEE MEMBERS

*Claire Baker (Mid Scotland and Fife) (Lab)
Jackson Carlaw (Eastwood) (Con)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Ross Greer (West Scotland) (Green)
Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con)
Richard Lochhead (Moray) (SNP)
*Stuart McMillan (Greenock and Inverclyde) (SNP)
*Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Michael Cross (Scottish Further and Higher Education Funding Council)
Dr Tobias Lock (University of Edinburgh)
Dean Lockhart (Mid Scotland and Fife) (Con) (Committee Substitute)
David Martin (Skills Development Scotland)
Professor McEwen
Iain Munro (Creative Scotland)
David Oxley (Highlands and Islands Enterprise)
David Smith (Scottish Enterprise)

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Culture, Tourism, Europe and External Relations Committee

Thursday 8 March 2018

[The Convener opened the meeting at 09:08]

Decision on Taking Business in Private

The Convener (Joan McAlpine): Good morning. Welcome to the ninth meeting in 2018 of the Culture, Tourism, Europe and External Affairs Committee. I remind members and the public to turn off their mobile phones. Any members who are using electronic devices to access committee papers should ensure that they are turned to silent.

We have received apologies from Richard Lochhead, Jackson Carlaw and Rachael Hamilton, and I welcome Dean Lockhart to the committee as a substitute for Rachael Hamilton.

Item 1 is a decision on taking item 4 in private. Do members agree to do so?

Members *indicated agreement.*

Screen Sector

09:08

The Convener: Item 2 is the second evidence session of our inquiry into Scotland's screen sector. It will focus on the role of partner agencies in the delivery of the screen unit.

Before we move to questions, I would like to make those in the industry and others aware that, although last week's evidence session on finance, investment and support had to be cancelled because of the adverse weather conditions, we have rescheduled that session for 19 April. We appreciate that that is not ideal as we had hoped to use that evidence to inform today's session, but, unfortunately, we do not have any control over snow. However, please be assured that any issues that are raised in future evidence sessions will be used to inform the committee's report, and we intend to hear from Creative Scotland again on 31 May.

We hoped to have Janet Archer, the chief executive of Creative Scotland, with us today but she has been taken ill. Arrangements were made for Iain Munro, the deputy chief executive of Creative Scotland, to attend in her place, but I understand that he has been held up in traffic. He will arrive later in the meeting.

I welcome David Smith, sector director, digital technology and sector delivery at Scottish Enterprise; David Martin, sector manager, creative industries at Skills Development Scotland; David Oxley, director of business and sector development at Highlands and Islands Enterprise; and Michael Cross, interim director, access, skills and outcome agreements, at the Scottish Further and Higher Education Funding Council.

I remind members and witnesses that time is short and we have a lot of ground to cover. Therefore, I would be grateful if you could keep questions and answers as succinct as possible.

I would like to open by addressing the initial questions to David Smith, as Scottish Enterprise is the lead partner along with Creative Scotland. The screen unit proposal states that partners have agreed the right leadership role and remit for success. Can you explain how you came to that decision? I would also like you to address the recommendation in the report of the screen sector leadership group that a close working partnership agreement should be established between the public bodies. Can you provide more information about the partnership agreements? Are they in place yet, and can you share them with the committee?

David Smith (Scottish Enterprise): Thank you for the opportunity to be here this morning. I will try to answer your initial question as succinctly as possible.

The partners have undertaken a great deal of work, first of all to formulate the proposals for the new screen unit, and then to put together the implementation plans for it. In particular, as I am sure you will appreciate, we carefully considered the evidence around the sector. Scottish Enterprise led a work stream that resulted in a report from the Olsberg SPI consultancy, which considered the major opportunities for the sector as well as the barriers and challenges. The report highlighted strong opportunities with regard to the attraction of high-end television and mobile film productions and the opportunity to use the increased public sector broadcaster spend to stimulate further growth opportunities for companies in the sector. As a result of that, we discussed what needed to happen to develop the business support landscape in order to help the screen companies in Scotland to take advantage of and capitalise on those market opportunities.

One of the key things that we have worked towards is the reaching of an agreement, which was covered in the proposal, to have the screen unit lead on a one-door approach to joined-up business development support for the screen sector. That recognises that, as we have been going through a process of learning and continuous improvement, a number of agencies have been involved in the provision of support, particularly to earlier-stage companies in the screen sector, including business gateway; Creative Scotland, through its slate-funding programmes and so on; and Scottish Enterprise and Highlands and Islands Enterprise, through some of the products and services that we provide and are delivered through our business gateway partners.

Recognising the needs of the screen companies, particularly the ones that are at an earlier stage, we felt strongly that it is important to move towards more of a one-door approach, and that the screen unit should take responsibility for the delivery of that approach. That will make it easier for companies to access the support that is on offer. Further, through the provision of some of the extra funding and additional support services that we have been working on, there will now be an opportunity for those companies to benefit from a broader range of services.

The Convener: The sector has asked for the one-door approach. Can you tell me the timeframe for that? Will it be up and running at the same time as the screen unit? Can you also say when the online single portal will be available? That was

promised some time ago and has not yet been delivered.

09:15

David Smith: The timings will be a question for Iain Munro when he arrives, because Creative Scotland is leading on the precise nature of the landscape. However, we anticipate that it will be some time in the first quarter of the operation of the new screen unit.

We led on the first stage of the work on the portal, which was to amass and map all the different support services that are on offer from different agencies. The enterprise agencies and Creative Scotland assembled that information and mapping. Creative Scotland is leading on the development and launch of the portal, so Iain Munro will be able to confirm precisely when it is due to launch. Again, I anticipate that it will be some time early in the first quarter of operations.

The Convener: We have taken written and oral evidence from the industry. It highlighted leadership and the need for autonomy in the unit. One particular concern was the level of seniority of the people from each agency who are on the screen committee. What is the level of seniority of the people on the screen committee likely to be?

David Smith: I assume that you are referring to the overall senior governance committee.

The Convener: Yes.

David Smith: The representative from Scottish Enterprise has been, and will continue to be, Linda Hanna, who is our managing director for strategy and sectors. The other agencies are represented by people at a similar senior-executive level.

Claire Baker (Mid Scotland and Fife) (Lab): The screen unit is a partnership organisation and the level of collaboration is welcome, but that has led to some questions around decision making that follow on from the convener's question. In his evidence to the committee a few weeks ago, John McCormick said:

"We need to make it clear in the governance set-up—it is not clear from the paper—where decisions will be taken and what level of discretion the screen unit's leadership team will have to take decisions, make deals and get things moving in the industry."—[*Official Report, Culture, Tourism, Europe and External Relations Committee*, 8 February 2018; c 2.]

The committee is concerned that it is not clear where the decision making will lie. We recognise that it is important for the screen unit to be able to make decisions on appropriate timescales that suit the needs of the industry. Can you provide some assurances around those concerns?

David Smith: Let me address the point first, then others on the panel might wish to come in.

The majority of the decisions will rest with the executive leaders of the screen unit within Creative Scotland—that is the short response to your question.

Having said that, we will each have particular roles to play as we contribute to the support that is on offer to screen businesses. For example, Scottish Enterprise and HIE will continue to lead on decisions about utilising our account-management services and on the nature and type of the support that scaling businesses in the screen sector receive from other services. However, in all other respects relating to business support, the primary lead for decisions will largely rest with the screen unit in Creative Scotland. That is appropriate for the scale and nature of the challenges that businesses will face during their growth journey.

Claire Baker: It is difficult because no one from Creative Scotland is here. However, the screen unit sits within Creative Scotland, so there are some questions to be answered around whether decision making rests with the screen unit or, ultimately, with Creative Scotland.

David Smith: I see. You will appreciate that that is a question for Creative Scotland.

Claire Baker: I appreciate that it is not a question for you, but I am interested in your understanding of the autonomy of the screen unit.

David Smith: My understanding is that most of the decisions—I cannot say precisely how many—will rest with the executive in the screen unit. Iain Munro will be able to clarify that point.

David Oxley (Highlands and Islands Enterprise): That is also my understanding. The role of the screen committee is to act as a scrutiny board to ensure that partnership working is working well and that all agencies are contributing in the right roles. That is why HIE has senior representation—Charlotte Wright, our chief executive, is on the screen committee.

Michael Cross (Scottish Further and Higher Education Funding Council): That is my understanding. Our role as partner agencies is to offer the scrutiny that David Oxley describes.

I am currently an interim director at the Scottish funding council, so I report directly to the chief executive. Whoever takes my post in future will attend the group and have a similar level of authority.

David Martin (Skills Development Scotland): Skills Development Scotland is represented by Gordon McGuinness, who is director of industries and enterprise networks and who reports to the chief executive, Damien Yeates. The agencies are represented at a high level in the screen committee.

Claire Baker: The screen unit proposal includes 12 action plans that cover a range of things, including the need for a studio. Concerns have been expressed that the 12 action plans are not focused enough and that what we are setting out to achieve might not be clear enough because the proposals are too broad and there are too many aims. Are the partner agencies clear on what the strategic priorities of the screen unit will be and what roles you have to play in it?

David Smith: We are certainly clear on the overall priorities. We all share and support the vision, the objectives and the stretching targets that have been set to achieve a 100 per cent increase in production spend and to increase the number of scale companies—companies that generate more than £10 million of turnover—from two to six by 2023. That is the overall ambition and those are the objectives that have been set. Obviously, there are caveats relating to the fact that we need some key things to fall into place to enable those outcomes and objectives to be achieved.

In relation to the 12 actions, I am certainly clear on the contribution that we are being asked to make and will make to those actions.

David Oxley: We are starting to develop an action plan for each of the 12 actions. We are setting timescales for various things, so that we know how to monitor and judge our performance against that. Clearly, some of those things will not happen overnight, but the process is being followed.

Mairi Gougeon (Angus North and Mearns) (SNP): My question follows on from Claire Baker's question. We have heard suggestions that the screen unit should be a stand-alone unit rather than part of Creative Scotland. What are your thoughts on that? What would be the most beneficial model?

David Oxley: Screen is just one part of the creative industries landscape. For the Highlands and Islands, we have found that, although getting businesses to work collaboratively within a network for screen, music or whatever is useful, collaboration across those areas is becoming increasingly important. For example, a musician might work with a film producer. It is the networking that is really important. Therefore, it seems right for the unit to be part of Creative Scotland, because it is easy to make those connections when everything is part of one agency.

David Martin: It is fair to emphasise that the screen sector is relatively small. The Olsberg SPI report shows that there are just under 500 businesses. The interrelationships and the shared collaborative approach that the screen unit will

provide to those businesses will, I believe, lead to greater clarity and greater joint endeavour across the four growth opportunities. The purpose and function of the screen unit are much more significant than where it sits. I certainly have not had compelling evidence about the idea of it being outwith Creative Scotland.

Mairi Gougeon: Would the partnerships and networking opportunities that you talk about not be possible with a stand-alone agency?

David Martin: Scottish Screen was a stand-alone agency, and it worked to an extent. However, things have moved on since the emergence of Creative Scotland and that compound coverage in terms of development activity for the creative industries, the performing arts and screen. We are looking at a different beast. The request to examine the establishment of a unit involved considering that within Creative Scotland. That is very clear in the joint statement that is plainly laid out in the collaborative proposal.

Mairi Gougeon: I want to put to all of you a question about knowledge and expertise. How will you ensure that the screen unit has the right kind of knowledge and expertise to properly support the sector? In written evidence that we have received, some organisations have been concerned that such expertise might not necessarily be there. How will you ensure that that knowledge and expertise keeps pace as the unit progresses?

David Martin: Maybe I can initiate the conversation about that.

I have been looking at actions A5 to A7 in the collaborative proposal, which are primarily to do with the organisation's talent and skills development functions. The clear consensus across the industry on the approach and processes behind them has been significant. Intermediaries such as the Association of Film and Television Practitioners Scotland, the Broadcasting, Entertainment, Cinematograph and Theatre Union, the TV working group and the Producers Alliance for Cinema and Television in Scotland are all key agencies and structures for the sector, and they are working together with me and my colleague at Creative Scotland to action out the detail behind those specific actions.

A very close partnership is emerging involving the industry agencies and organisations, businesses and broadcasters on those actions one by one. Access to intelligence and expertise is built into the entire process and it will continue to be honed as the staffing plan is detailed and begins to be completed.

David Smith: It is clear that we all bring to the new screen unit expertise in and knowledge of different aspects of economic development and understanding of the cultural and social benefits

and aspects of the screen sector. I think we would all agree that the critical mass of that knowledge and expertise has rested and will continue to rest within Creative Scotland and the screen unit. It is clear that there are plans as part of the implementation of the proposals to add to that and increase the number of people, the knowledge, the resources and the expertise in the screen unit.

As I said, we all bring knowledge and expertise from our different organisations. In our case, that relates to economic development and how to support the scaling of businesses. The interaction with the industry helps us to really understand the challenges, opportunities and needs and to stay current. That is a critical point for all of us, and particularly for the screen unit. Going forward with the screen unit, it will be really important to maintain that, and to grow and develop the interaction with the industry.

Mairi Gougeon: I have some questions for Scottish Enterprise in particular. At the start of the meeting, the convener mentioned that, unfortunately, we had to cancel an evidence session that we were due to have. We have received written evidence from Caledonia TV and others that was critical of Scottish Enterprise because it was thought that there was a general lack of understanding of the industry in it.

On general support, Caledonia TV said that Scottish Enterprise had a couple of successful funding programmes that were discontinued. There is also a focus on high-growth companies. Caledonia TV said:

"The SSLG called for 'increased and appropriate business development support for screen businesses'. SE is failing to provide this. Our company has now been told by SE that we cannot even be account managed by them unless our turnover is £4 million upwards."

I think that only a couple of companies can achieve that. How would you address those criticisms, which have been made by others who have provided evidence?

David Smith: I am happy to respond to that question. We worked directly with Caledonia TV a number of years ago, but it has been a client of business gateway Glasgow for the past few years. Since Caledonia TV gave evidence, I have been in touch with the business gateway Glasgow team and asked it to reach out again to the company. It has done as I asked and is waiting to hear back from Caledonia TV about its plans and aspirations. Once we have feedback from business gateway Glasgow about those discussions, we will be happy to look at the position with the company and what more we can offer or provide, alongside business gateway, to support it.

09:30

On your broader question about what support we offer to the screen sector, we account manage 15 companies, support 21 companies that are being supported through different business gateways around the country, and provide a wider service of support to about 70 companies. You pointed to the role that we are being asked to take on, which is the one that the screen sector leadership group endorsed and said we should take on, and it is targeted at supporting the scaling of companies and businesses in the screen sector.

I note that Blazing Griffin was due to attend last Thursday's committee meeting, which had to be cancelled due to the adverse weather. Its post-production studios and operations are terrific and they compare very favourably with anything that is on offer in London and the US. We have been working closely with the company for a couple of years. We provided it with a regional selective assistance award of about £200,000, which will help it to put in place and support 15 new jobs. The company's post-production facilities and studios work on a number of leading productions with which I am sure you are familiar, including "Outlander" and "Shetland".

We are helping such companies to scale up. Another good example is Axis Animation, which Richard Scott leads. It is based at Skypark in Glasgow. Last year, it took over a whole new floor of one of the buildings at Skypark to develop and expand its operations, and we provided the company with a £250,000 RSA grant to support the creation of 20 new jobs. The company has terrific animation capabilities and facilities. It supports programmes such as "Doctor Who", "Call the Midwife" and "Shetland", and it is moving into the development of full-length animated feature films.

We are doing a lot more to try to provide a wider range of support through the programmes that we majority fund with TRC Media to help the development of business and leadership skills across a much wider range of companies in the screen sector. That is all done with a view to increasing the amount of capacity and capability in companies to help them to scale up.

Mairi Gougeon: Do the companies that you are working with meet the high-growth criteria? The screen sector leadership group raised concerns about the support that is provided to companies that do not meet those criteria. It said:

"uptake of this support is low and there is a perception from the sector that, as well as being difficult to understand what is available, many of the products are not specific enough to businesses in the screen sector to be useful."

How do you respond to that?

David Smith: I will make a couple of brief points. I mentioned that we account manage 15 companies, and I talked about a couple of them. They are the companies that most appropriately meet the criteria in that regard. However, a further 21 companies that are clients of business gateway benefit from a wider range of services that business gateway offers. They also get some of the grants and products that are delivered through business gateway but provided by us.

On the issue of wider support, we support a broader range of companies through our funding programmes, which include our focused programme and the TRC Media digital economy expansion programme. We offer such support to help them to grow the business development skills and capabilities that will, over time, help them to go through the growth journey and, we hope in a relatively short time, get to the point where account management support is the most appropriate intervention for them.

The Convener: I welcome Iain Munro to the meeting—I am glad that he has been able to make it. So far, the discussion has been focused on how the screen unit will work—including governance, leadership and delivery issues—and how it will tackle the systemic problems that have been identified by the screen sector leadership group in particular.

Tavish Scott has some questions about governance. Rather than repeat my questions on that topic, I will hand over to him.

Tavish Scott (Shetland Islands) (LD): Thank you, convener. I apologise for being late this morning. If I ask about an issue that has already been dealt with, at least Iain Munro will not know that that is the case.

The report on which we are basing today's analysis makes recommendations on partnership working and what change should happen. How senior will the people in the unit from the different organisations be?

David Smith: We have covered that question, but Iain Munro might want to respond.

Iain Munro (Creative Scotland): There are different component parts to the governance arrangements behind the unit to make sure that the partnership works effectively. The starting point, which we should not forget to recognise, is that the unit will be built on the firm foundations of a screen team in Creative Scotland and the partnership that you see before you today.

Arrangements are being put in place to make sure that there is not only senior representation from across the partnership, but industry representation feeding directly into the unit. We

recognise the sector's important point about the industry's role in ensuring the success of the unit.

The unit will be a combination of partnership structures with industry representation and the skills and expertise of the staff that we currently have. We will scale up the recruitment of new and additional staff to ensure that we deliver the step change, particularly in relation to the funding expectations that are right at the heart of much of the interest that exists.

Tavish Scott: There will be a unit with staff and a board that provides an overview. Is that correct?

Iain Munro: Yes.

Tavish Scott: How big will the board be?

Iain Munro: The screen committee, which is a combination of Creative Scotland and the partners with industry representatives, is being built at the moment. The foundation for that is a combination of the partners, plus three representatives from the Creative Scotland board—

Tavish Scott: How big will that make it?

Iain Munro: It will have between eight and 10 members.

Tavish Scott: Will all the agencies that are represented here be on it?

Iain Munro: On the screen committee?

Tavish Scott: On the committee.

Iain Munro: Yes. The screen committee has accountability to the Creative Scotland board, and the partners on it are accountable to their individual organisations.

Tavish Scott: How senior will the people be from Scottish Enterprise, Skills Development Scotland and so on? Are we talking about the chief execs?

David Smith: In Scottish Enterprise's case, it will be Linda Hanna, our managing director for strategy and sectors, who reports directly to our interim chief executive, Paul Lewis.

David Oxley: For HIE, it will be Charlotte Wright, the chief executive.

Tavish Scott: Charlotte will be on it?

David Oxley: Yes.

Michael Cross: For the SFC, it will be me. I am the director of access, skills and outcome agreements, and I report to John Kemp, the chief executive.

David Martin: For the SDS, it will be Gordon McGuinness, who is the director of industry and enterprise networks. He reports to the chief executive, Damien Yeates.

Tavish Scott: All the people who have been mentioned, and Michael Cross, have many different jobs to do. How important will the committee job be among everything else that they do?

Michael Cross: I anchor my reply in the strategic guidance that we get from Scottish ministers, because the minister has made plain to the SFC her expectation in supporting the establishment of the screen unit, and we will work to that end. We have other important elements to our jobs, but the committee is important.

Tavish Scott: How will we judge it? What will happen if you are all back here in a year's time, having sat on the committee? You all sit on numerous other committees. How can we be assured that the screen committee will matter and that you will bring a lot of focus to it?

David Smith: First, we have all bought into and signed off on the ambition and the stretch targets that have been set for the screen unit proposal, including the targets to achieve by 2023 a 100 per cent increase in production spend and to grow a number of businesses in Scotland that turn over more than £10 million a year in screen production. Ultimately, we will be judged on those targets, but you will also judge us on the progress towards them and on the implementation of the plan.

Tavish Scott: That is very true. Mr Munro, do you have confidence that that structure will work?

Iain Munro: Yes. We should recognise that it is a relatively new and innovative model, so it will be carefully monitored and kept under review. In relation to what David Smith has just said, it is ultimately about ensuring the delivery of the plan's objectives and the targets and having governance structures around this to make it work in the best way that we can. If that requires adjustment along the way, we will understand and recognise that, and we will communicate it and move on it as and when necessary.

Tavish Scott: Thank you. Clare Kerr made, in previous evidence, a very thoughtful suggestion regarding Denmark's approach, which is to have a revolving-door recruitment policy for the board. I presume that that is about industry people, rather than representatives of the quangos. The policy in Denmark is that people should be in its screen unit only for three years, then go back to the industry. The argument for that sounds pretty compelling. Have you given that some thought?

Iain Munro: Yes—it is part of our considerations. We are considering having industry representation directly in the screen unit governance structure. Of course, that will be down to the availability of individuals. Representation would be on an annual basis. We seek to understand future needs, and if industry

representation needs to change or adapt, that is what will happen.

Tavish Scott: Okay. Finally, has it been decided who will chair the committee?

Iain Munro: The committee will be chaired by a member of the Creative Scotland board.

Tavish Scott: It will be someone who, by definition, has an arts background.

Iain Munro: That will not necessarily be the case. We appointed Creative Scotland's new chairman just a few weeks ago, and we are about to move on to recruitment of board members. One of the identified specialist needs and requirements for the board is industry expertise from the screen industry.

Tavish Scott: Who will decide who will chair the committee that will be in charge of the screen unit?

Iain Munro: That is a decision for the Creative Scotland board, but in discussion with partners. The current chair is Barclay Price, who will stand down in June, at the end of his board term. His is one of the places that will be available in the recruitment process that we are about to get under way.

Ultimately, we recognise that there has to be confidence in the screen industry—not just in governance arrangements but in the people who take part. Of course, the aim and ambition is to recruit somebody who has the skills and expertise to chair that committee.

Tavish Scott: Will the route of accountability for the screen unit committee be the Creative Scotland board?

Iain Munro: Yes. Ultimately, accountability will be to the board and the two relevant ministers.

The Convener: I want clarification. Does the Creative Scotland board not currently have anyone with screen sector experience on it?

Iain Munro: There is not someone with experience that is as evident as we think is required.

The Convener: The Association of Film and Television Practitioners Scotland has made a late submission to us that is based on its recent meeting with the cabinet secretary. It says:

"We understand from Fiona Hyslop's office that recruitment for the Screen Unit team has begun. As the senior management of CS and current board have no screen industry experience, who is guiding the process to appoint staff of this calibre?"

If you do not have expertise in the industry—if you do not know the industry—how can you appoint staff of the right calibre?

Iain Munro: There are two points to make on that. The first is about governance at board level. Those appointments are, of course, made by the Scottish Government. The distinct need for screen expertise on the Creative Scotland board has been identified, so the recruitment process will address that.

On recruitment, I go back to my earlier point, which was that we should not forget that we have a screen team of excellent people who are respected, knowledgeable and have great expertise. They will inform the next steps and will help to deliver them.

The Convener: The people will be recruiting their own boss, in that case.

Iain Munro: No—they will have an interest in ensuring that the future senior incumbents work for them, too.

09:45

The Convener: We have been told privately that the recruitment process has started for the leader of the unit. Fiona Hyslop's office appears to have been told that, too.

Iain Munro: Yes. We have been working behind the scenes. I presume that you are referring to the most senior role.

The Convener: Yes.

Iain Munro: An external expert recruitment consultant has been commissioned to work with us on a global search, because that is a position that will attract global interest. Preparations for the role are under way, based on a job description that has been under discussion. Part of the process has been to test the job description with external industry representatives and not just within the Creative Scotland staff team, board and partners. We are ensuring that we have industry oversight of the job description before we go live with it.

The Convener: The unit is supposed to be up and running on 1 April. Clearly the leadership of the unit, at any level, will not be in place by then.

Iain Munro: The most senior post will not have been filled by then, but, given that it was decided to green light the unit only at the end of last year, we have all been very realistic about wanting to get it right. That takes time, and it was never going to be possible for the unit to be 100 per cent in place and operational from 1 April.

At the moment, we are focused on four things to ensure that an evident step change is beginning to happen. The first is funding. As I have said before, funding is central to many people in the industry. The second relates to the resourcing point that the convener made, and the move on recruitment to increase capacity. The third is the identity, brand

and portal for the screen unit: it is a partnership project, so people will have a single entry point and be able to see and understand what the unit is offering. The fourth is what goes on behind the scenes—which Tavish Scott asked about—in terms of governance and ensuring that the mechanisms and arrangements are in place to make certain that the partnership works to best effect.

The Convener: When will that single front door be in place?

Iain Munro: It will be in place as soon as possible. We have yet to nail down an exact date, but it will be in the first quarter of next year. As I said, we aim to get this absolutely right, but the partnership has not agreed an exact date.

The Convener: So, does that mean that the screen committee will be in place by the end of April?

Iain Munro: Potentially, it means that, but we are not able to confirm it.

Ross Greer (West Scotland) (Green): The evidence so far has been useful for getting more clarity on the governance arrangements, but I think that we need to drill down further. I still have questions about the relationship between the screen committee and the Creative Scotland board.

This goes back to a question that Mairi Gougeon asked before Iain Munro arrived, about concern in the sector about why the unit has been set up within Creative Scotland rather than as an independent body. A lot of that concern relates to the fact that the screen committee will be accountable ultimately to the Creative Scotland board which, as has been mentioned, does not have a majority with screen sector experience.

Will you outline more clearly the executive ability of the screen committee and where it would need to go for sign-off from Creative Scotland? Will it be a relationship in which the committee simply reports after the fact on its actions? The concern in the sector is that, on the most significant decisions, the screen committee will ultimately have to defer to a board that does not have the relevant industry experience, which the screen committee will have.

Iain Munro: The final details of that—not just the simple terms of reference but the financial parameters of decision making and issues of policy and so on—are being worked through at the moment in order to ensure that arrangements can be put in place as soon as possible. There are ongoing discussions this month with the operational project board, the screen committee and the Creative Scotland board. We should not forget that

understanding the arrangements also involves the Scottish Government.

Ross Greer: Do you acknowledge the concerns in the industry that, on the most significant decisions, the screen committee will potentially have to defer to a board that is not of the industry?

Iain Munro: When it comes to how our organisation works, custom and practice is that there are levels of delegation. What the delegation to the screen committee and the screen team will look like in practical terms is being worked out at the moment. I do not anticipate that anything other than the very highest level of policy or financial decision making will rest with the Creative Scotland board; the rest will be delegated to the screen committee and the screen team.

Ross Greer: Ultimately, who will sign off on the terms of reference once a draft has been agreed? Is that for the Creative Scotland board to do?

Iain Munro: Technically, yes it is, but that will not be done unless there is agreement across the partnership.

Ross Greer: Thank you.

Stuart McMillan (Greenock and Inverclyde) (SNP): Good morning, everyone. The committee has heard from previous witnesses on the leadership, the autonomy and the agility of the new unit, which have been touched on this morning. Each of the bodies that will be involved in the new unit has its own funding schemes. How much flexibility will there be with regard to how the money is used? If a proposal is made and Creative Scotland does not have enough resource, could it request that the shortfall be made up by other partners in order to ensure that a project can be delivered?

Iain Munro: I will start off, but others might want to contribute.

The starting point is the distinct set of funds that is on offer from Creative Scotland, which will be enhanced through provision by the Scottish Government of an additional £10 million annually. The detail of that is being worked through. Many of the funds are already in place and the resources that are available will be scaled up, although the content fund is new.

With all the funds—particularly the content fund—we will want to make sure that we have discussion not just across the partnership but with the industry, about the terms of funding, the form of the process and the criteria. The partnership will discuss the levels of resourcing that are currently available through the funds so that we have a solid foundation to offer to people who wish to pursue opportunities.

The intention is that when ideas and approaches are put forward, we will be fleet of foot in understanding the request, as the committee has said we will need to be. If a request does not fit what is on offer, we will need to find out what might be possible—it will not always be possible to respond to everything. Through the partnership, we will endeavour to ensure that we have a solid offer in the first place that will catch most proposals, and that we can have open conversations about what might be possible if a proposal goes beyond that.

Stuart McMillan: Let us say that another organisation wanted to set up a new studio somewhere in Scotland, but there was not enough funding available through the screen unit to get the project over the line. If Scottish Enterprise and Highlands and Islands Enterprise had additional resources available, would the new unit be able to call on those resources in order to deliver the project?

Iain Munro: In principle, the screen unit would be able to do that. We are always open to compelling business ideas in any form; Stuart McMillan gave the example of a new studio. We will look at such proposals with interest and we will explore them seriously. If we were to receive a sufficiently compelling proposition, we would take it to the partnership to establish what the response would be, how possible it might be to support the proposal and what form that support might take.

David Smith: I agree. I add that, if a substantial proposal was made and, between us, we felt that it was an exciting opportunity that we wanted to support, but we were unable to marshal all the necessary funding, we would, of course, seek dialogue with the Scottish Government about that.

David Oxley: That is already happening in small cases in which HIE and Creative Scotland have worked together on a project within stated limits. If a fantastic project comes forward, of course we will consider it.

Stuart McMillan: My next question is for Scottish Enterprise. Earlier, Mairi Gougeon quoted from the evidence, which suggests that

“Work currently being undertaken to develop an online portal mapping the support available and the provision of specific business support through the proposed Shared Resource Facility may address some of these concerns”

regarding the portal. Surely, it should say that it “will” address such concerns instead of leaving a question mark that it “may” do so.

David Smith: If I recall correctly—forgive me if I do not—that particular language comes from the screen sector leadership group report, which refers to the portal. I would be more assertive and confident in saying that we expect that the portal will address those concerns and needs.

As I touched on earlier, we have spent a lot of time in working on and mapping out the existing support landscape. Through Creative Scotland, we are getting close to a position in which the portal can be launched and will act as a route map for the one-door approach.

On top of that, we expect that, through the work of the screen unit, we will add to the support that is on offer, especially to earlier-stage businesses. Establishing supplier development programmes through strategic partnerships with broadcasters is very important on that front. That will give a lot of companies in the screen sector more insight into the approach that commissioners, and particularly broadcasters, are taking, which will help them to figure out what actions they need to take to win more business from public sector broadcasters. Crucially, alongside that is additional growth in the marketplace, particularly through the planned increase in spending that the BBC will make for new commissions in the coming year, which will provide a bigger local market for such companies to go after and give them more confidence to invest in their own business growth.

I am not sure whether Iain Munro wants to add anything to that.

Iain Munro: No.

Stuart McMillan: Clearly, we all want this to succeed.

David Smith: So do we—absolutely.

Stuart McMillan: With new money going in and there being a unique way of delivering such service, the portal will be crucial and will need to be a one-stop-shop facility rather than something that “may” be able to provide assistance.

Iain Munro: We are committed to the point that you make. I will give a similar response to one that I gave earlier. We will be up and running as soon, as confidently and with as comprehensive an offer as we can. However, that will be kept under review and will grow and build as the unit does over time. We recognise that we must be able confidently to land something that works. Of course, we will seek and receive feedback and will respond to it as best we can, as and when we can, throughout the implementation period.

Stuart McMillan: My final question is for Mr Munro and relates to the festivals part of the submission from Creative Scotland, which speaks about the

“£60,000 which supports Creative Scotland’s presence under the We Are UK Film banner”.

Can you provide examples of how that money has helped to bring productions to Scotland?

Iain Munro: I am not as familiar with that as my colleagues will be. I will answer as best I can, but I

will be happy to take the question away and give you a fuller answer in due course.

Stuart McMillan: Okay. I appreciate that.

Iain Munro: We make sure that we have strong representation from the experts at Creative Scotland, who have a presence in selling Scotland and its screen sectors. We often do so in partnership with industry representatives who go along with us, and we host and take part in industry events.

It should be remembered that, beyond having a physical presence at stands at such festivals and other receptions and events that we host, we also have the Screen Commission, which is a major part of the global offer that we promote.

That is all that I can say for now. I will take the question away and give you a fuller answer, which I can probably illustrate with firm examples of how we translate those early interventions into a business return for Scotland, whether that is for the indigenous sector or for incoming production.

10:00

The Convener: I think that Claire Baker has a supplementary question.

Claire Baker: Yes—it follows on from Mr McMillan's question. To go back to basics, the committee's interest comes from a feeling that Scotland has fallen behind not just in the United Kingdom but in Europe. There is a feeling that we cannot compete in the global market as we should be doing. The whole point of all this work is to raise Scotland's profile and take advantage of what is out there. When we met industry experts, a few weeks ago, one issue that again came up was the need for a film studio and the fact that we do not have capacity. One of them told us that it is not rocket science and that Scotland needs a proper film studio. Is that the key priority of the screen unit? If so, are you confident that it will deliver that?

Iain Munro: I will start on the screen unit per se, and David Smith might want to pick up on the point about the studio.

There is a confident plan that has vision and ambition, and we absolutely want to translate that into reality. It is a step change, although we should not forget the growth that there has been, in recent years, in the screen industry through the work that has been possible so far. The upscaling of financial and human resources is part of the equation. The new very senior post that the convener asked about, which will be advertised shortly, is globally important. It is intended for that person to be out in the marketplace, actively positioning Creative Scotland, the partnership, the screen unit and the screen industries in Scotland

internationally in a confident way, to offer Scotland's opportunities to the world and to bring opportunities back in. A key part of that role will be to be out in the world, selling Scotland and bringing business back in.

Claire Baker: I appreciate that you are at an early stage in the recruitment process, but you are trying to recruit internationally for a high-profile senior role when it is still not clear what level of decision-making ability and autonomy that person will have. From the description of how decisions will be made through the Creative Scotland board, it seems that it will be difficult to sell that to people, as they will be expecting a senior role in which they have a level of decision-making ability.

Iain Munro: To be absolutely clear, that person is going to lead the screen unit. They will be accountable to the partners, to the Creative Scotland board and, beyond that, to ministers and the industry interest for the delivery of the objectives, targets and business growth that are set out in the plan.

Claire Baker: I am not sure how other members feel, but I still have concerns about that. We need a balance between the necessary public accountability and an overly bureaucratic approach. The person who is coming in needs to feel that they have the authority that is required for the leader of the screen unit.

Iain Munro: I hear that point, and I am happy to take it away. If the issue would benefit from further conversation, we will be happy to have that conversation. We want to ensure that, when we advertise the role, people understand exactly what it is, why it is necessary, what it is intended to achieve and how it is intended to work across the partnership and the unit and on behalf of the industry. That is the intention but, if we can do more to provide assurance to the committee on that, we will be happy to discuss the matter further beyond this meeting.

Dean Lockhart (Mid Scotland and Fife) (Con): I will follow up on some of the conclusions of the screen sector leadership group. One of the findings was that the screen sector in Scotland "suffers from divisions and fragmentation"

across the agencies. Following the enterprise and skills review of last year, a strategic board has been set up to achieve more alignment between the agencies, and it has been considering how to do that. Given the importance of the strategic board, what discussions have the agencies had with it on the screen unit and what plans are there to involve that board in the implementation of the screen unit?

Iain Munro: Forgive me, but I am not clear about the strategic board reference.

Dean Lockhart: The strategic board has been set up to oversee the enterprise agencies.

Iain Munro: Forgive me—I understand now.

Dean Lockhart: I guess that the question is more for the agencies. It is about their policy and the implementation of their strategy.

David Smith: As part of the work on the strategic board and all the different workstreams that we and the other agencies are contributing to, one of the areas of focus—as Dean Lockhart has touched on—is further streamlining and continual improvement of the overall support system for businesses and companies, to make it as joined up and aligned as possible. We have tried to ensure that there is alignment and learning through the development of the screen unit proposals, the work that we have undertaken to ensure a one-door approach for screen companies and the work that has taken place in the workstreams and the enterprise and skills review. We want the streamlining of business support services to be fed into the operation of the one-door approach and the delivery of services to screen companies.

David Martin: As the committee will know, one of the key requirements of the enterprise and skills review is that there is clear evidence of demands across the sector. That is why Skills Development Scotland, in partnership with Creative Scotland, has funded and commissioned a research programme to look at exactly what is going on within the company base of the screen sector and, much more significantly, what is going on within Scotland's freelance workforce. There has not been a review of Scotland's freelance workforce in the screen sector since the early 1990s. Although there is an expectation of and a demand for growth, we do not really know where Scotland's strengths are across the entire skills base. We will establish those strengths through the review process. One of the key outcomes of that research will be that it will tell us clearly where the priorities and demands for action are. That will then allow us to co-ordinate and cohere, in partnership with the screen unit, our response to that research through our planning and investment processes. Michael Cross might want to add a bit more on that.

Michael Cross: I will supplement what David Martin has said. In microcosm, that is part of a wider effort that is under way to better align the services of Skills Development Scotland and the Scottish funding council. The Government's phase 2 report on the skills and enterprise review includes a section on skills alignment, which, in essence, asks us to adopt a joint model of provision of skills demand assessment. That is what David was talking about. In short, the provision that is suggested by that skills demand

assessment is provided by, in our case, Scotland's colleges and universities. David has set out a good example of work that is under way anyway on a wider front across the economy.

David Oxley: The whole reason for the strategic board is to get collaboration among the agencies. That is pretty much what the screen unit is trying to do in that particular sector. I suspect that the strategic board has not done a deep dive into any individual sector in detail at this stage, because it has met only a couple of times. However, the principle of what we are all trying to do in working with the screen sector very much accords with the board's views and the views of any other sector that we deal with.

Dean Lockhart: I will very briefly follow up on what Mr Oxley has said. Given the important role of the strategic board, I suggest that the screen unit get on to the board's agenda quite soon, because it will, as you say, prioritise resources. If the unit is to get the agencies' full attention, I suggest that the matter be cleared and discussed at the strategic board sooner rather than later.

The Convener: Before Mr Munro arrived, I asked Mr Smith about the partnership agreements that were recommended in the SSLG report. Can Mr Munro share with the committee some information on where we are with partnership agreements between the various agencies?

Iain Munro: Do you mean the agency partnership agreements?

The Convener: Yes.

Iain Munro: I am not as close to that matter. My understanding is that there was discussion of the partnership agreements at a recent meeting, but I do not have any further information at this point.

The Convener: Was that a recent board meeting?

Iain Munro: No, it was a recent screen committee meeting.

The Convener: Okay. You are not able to answer any questions on the partnership agreements.

Iain Munro: Not today, but I will happily take the question away and provide the committee with an answer.

The Convener: It would be very useful if you were able to share that information with the committee.

David Smith: I can add to that, as I was present at the recent discussion at the screen committee. Work is under way to develop a memorandum of understanding between all the bodies, and I hope that we will shortly be in a position to finalise that agreement.

The Convener: There is not yet an MOU between the agencies.

David Smith: That work is under way at this point.

The Convener: Many people will be very concerned about that, because 1 April is not far away. The whole basis of the approach is a partnership involving the agencies, but there is no MOU yet. Do you understand why the sector will be concerned to hear that?

David Smith: Members can be assured that all the partners that have fully signed off the screen unit proposal at the screen committee level are fully committed to supporting the proposals and the implementation plan. That will be very much reflected in the final memorandum of understanding.

The Convener: I go back to the letter that we received from the Association of Film and Television Practitioners Scotland, which says:

“AFTPS are concerned about the lack of engagement with key industry stakeholders in the development of the Screen Unit proposal.”

Will you respond to that? How will you involve the industry going forward?

Iain Munro: That involvement takes a number of forms. We have offered a meeting with the AFTPS, and the door is always open. We could then understand its particular points in a wee bit more detail.

The SSLG, under the chair of John McCormick, was a measure to ensure that there was an industry grouping with a voice that could have representation on the partnership, the development of screen unit proposals and the implementation plan. Further discussion is taking place about what form industry advice should take to have the most effective input into the on-going work of the unit when it is up and running. That is currently being considered.

On a practical level, as we are developing the funds that I mentioned earlier—the content fund, in particular—there is a commitment in the implementation plan that we will share the draft proposals with industry representatives to test them and get their input and advice on how they might be refined further before we go live with them. In that way, we will ensure that industry representatives have that input in advance and, when the funds go live, they will have the most impact when they land and are open for business. We seek to do that as soon as we can.

The Convener: Can you give us a timescale for that?

Iain Munro: The content fund, which is the biggest and newest one, is under development

now. We have capacity challenges that we have been honest about, and that fund has not moved as quickly as we might have wanted at this point. Nevertheless, we are seeking to move it forward as fast as we can, with partnership help. I cannot give members an absolute date, but we are clear that, when the portal goes live, funding will be one of the four things that we will focus on, as I have said. The funding offer is in place and is confident, and there is much attention around the content fund. We want to take the time to get that right. We are not in a position to launch the fund quite yet, but we are endeavouring to do that as soon as we can. I hope that that will be done in April.

David Martin: Under actions A5 to A7—the skills and talent actions—in the collaborative proposal, we have directly consulted most of the associations that are involved in Scottish screen business. We have asked them to comment on and assist with the refinement of the tools that we will use for the survey work. In addition, we will undertake 70 structured interviews across the value chain of screen and television. That means that we will necessarily talk directly again to those associations and others about the interim findings. There is an item on the agenda of the upcoming screen sector leadership group meeting under which the group will discuss the research at its interim stage. At the final stage, we will pull together a wider grouping to consider the recommendations and will start to detail the actions. Therefore, there is deep, live and vital engagement with the sector in that area.

The Convener: That is very encouraging. How will the screen unit take that work forward? How will it improve on that, given that Creative Scotland does not have a specific sector skills development remit?

David Martin: That will be directly achieved in two or three ways. For the first time, there will be a unique, Scotland-owned and Scotland-held set of data that is live, real and robust, so that there is on-going engagement with the sector. We are also building in survey panels that will allow on-going review and testing of themes and actions.

Much more strategically and structurally, the evidence from the survey work will lead to the formation of the skills strategy for the screen unit. That, in itself, will ensure that there is a very direct partnership in how we construct the strategy and, more important, how we respond to the survey work. In that sense, we will again bring the industry to the table, in partnership with further and higher education and, indeed, the private sector industry training provision—for example, the national film and television school Scotland. We will follow that work through, and the screen unit will activate that strategy.

The Convener: Thank you very much. Unfortunately, we are out of time. I thank all our witnesses for coming to the meeting. There will be a brief suspension before we move to our next evidence session.

10:15

Meeting suspended.

10:22

On resuming—

UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill

The Convener: Our next item is an evidence session on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. The Parliament agreed to designate the Finance and Constitution Committee as the lead committee and the Culture, Tourism, Europe and External Relations Committee as the secondary committee in consideration of the bill.

I welcome our two witnesses, Dr Tobias Lock, a senior lecturer in European Union law and co-director of the Europa institute, and Professor Nicola McEwen, a research leader at UK in a changing Europe.

I would like to go back to the statement to Parliament that was made by the Lord Advocate, James Wolffe, on 28 January, in which he confirmed that he had cleared the certificate of competence in relation to the bill, which is, of course, required. He said that the bill falls within the legislative competence of the Scottish Parliament. In his statement, he said that the bill had been carefully framed

“to ensure that nothing will be done that is incompatible with EU law before withdrawal from the EU”.—[*Official Report*, 28 February 2018; c 27.]

He also said:

“The bill does nothing that will alter EU law or undermine the scheme of EU law while the UK remains a member of the EU”

and that

“if, contrary to the view of the Scottish Government, the continuity bill is incompatible with EU law, the same reasoning would apply equally to the UK Government’s bill.”—[*Official Report*, 28 February 2018; c 21.]

What are your views on that position? Would you like to start, Dr Lock?

Dr Tobias Lock (University of Edinburgh):

The test is set out in section 29 of the Scotland Act 1998, which says that the Scottish Parliament does not have competence to legislate in a way that is “incompatible with ... EU law”. Therefore, the question is whether the bill is incompatible with EU law.

The bill does two main things. First, it retains EU law as it will be on Brexit day and puts us on a new legislative footing—the current legislative footing is the European Communities Act 1972, but that will be repealed, in all likelihood, by the European Union (Withdrawal) Bill, which is currently going through Westminster. Secondly,

the bill gives powers to the Scottish ministers to amend that retained EU law. From an EU law perspective, neither of those things is incompatible with EU law. EU law does not care very much about what basis EU law has in a particular legal order as long as it applies, and the powers to amend—even if they existed before Brexit—would not, in and of themselves, be contrary to EU law; they would be contrary to EU law only if they were used.

From an EU law perspective, given the tests that are set out in section 29 of the 1998 act, I do not see an incompatibility with EU law in the bill, as such.

I should quickly comment on the argument that is made in relation to the withdrawal bill. The question of whether the withdrawal bill would be incompatible with EU law is not a question of UK constitutional law, because the Westminster Parliament can, as a matter of principle, under the UK's constitutional settlement, legislate contrary to EU law—that does not invalidate its legislation. In contrast, section 29 of the Scotland Act 1998 limits the powers of this Parliament. The question of compatibility with EU law is one that must be asked in relation to legislation that is introduced in the Scottish Parliament but it does not have to be asked in relation to legislation that is introduced in the Westminster Parliament. That is probably all that I can say on the matter at the moment.

Professor McEwen: Before I start, I should confirm that we are here with the consent of our union, despite the industrial action.

As a humble political scientist, I am not qualified to give a legal ruling, so I will not try to do that. Clearly, there are different opinions. I appreciate the difficult situation that that puts members of the Scottish Parliament in, and I accept that there is every possibility that the process will end up with the Supreme Court determining the competence or otherwise of the legislation. I do not want to say any more than that.

The Convener: As you indicate, there have been suggestions that the UK Government would seek to challenge the Scottish and Welsh bills in the Supreme Court. I know that the Welsh Government has been taken to the Supreme Court on several occasions by the UK Government, but a joint referral would mark the first time that the Scottish Parliament had been challenged by the UK Attorney General. What are the implications for devolution if that happens?

Professor McEwen: It would be a high-risk strategy, whoever did it. You are right to say that Welsh legislation has previously been referred to the Supreme Court. Sometimes, the rulings of the Supreme Court have been more devolution friendly than the UK Government might have liked

them to be, although, at other times, that has been less the case. It would be extremely risky for whichever Government chose to go down that route, because it would set a precedent that could determine the scope of devolution.

One of the fundamental issues is that there are differences of view on what the devolution settlement is. I think that the UK Government genuinely thinks that it is enhancing the powers of the devolved institutions, because it does not consider those areas that have previously been EU competences to have been devolved, despite their inclusion within the devolution settlement. I think that the UK Government thinks that any additional powers would be an enhancement of devolution.

Clearly, the devolved Governments do not share that view, and it is not the prevalent view in the devolved legislatures, which consider that those powers are already devolved and that, therefore, any alterations made through the withdrawal bill to, in a sense, re-centralise authority in the UK would be a weakening of the devolution settlement.

The Governments are, therefore, starting from quite different places. The fact that there is a lack of shared understanding of what devolution means and of its scope is part of the problem.

10:30

Tobias Lock: Challenging the continuity bill might be a risky thing to do in political terms, as one side would have to lose because there would be an either/or outcome. However, it would also be very risky not to put the bill before the Supreme Court, because it is a very important constitutional bill. For example, perhaps two years after Brexit, somebody could challenge the legislation in the Supreme Court as an individual claimant and the Supreme Court could say, "Well, actually, there is no legislation." There would then be a big gap in the law. I therefore think that there is almost a public interest in getting the bill's competence confirmed.

The Convener: It has been widely suggested that, if there are no changes to the European Union (Withdrawal) Bill, it will not get the legislative consent of the Scottish Parliament. The explanatory notes for the withdrawal bill state that the UK Government would seek the legislative consent of the Scottish Parliament and of other devolved legislatures in relation to certain aspects of the bill. However, it has been suggested, particularly in the Scottish Parliament chamber yesterday, that there might be a change of position on that and that the UK Government might not seek legislative consent. What do you think of that suggestion?

Professor McEwen: There is a commitment to seek legislative consent, but there is no compulsion to act on the outcome of that. As I understand it, the convention suggests that those aspects of the withdrawal bill that did not receive legislative consent would be removed, leaving space for the devolved legislatures to fill the gap. However, I find it difficult to see that being the outcome here. It is entirely possible that the UK Government and the UK Parliament—ultimately, it is a decision for the UK Parliament—will decide to proceed as they see appropriate while heeding the views of the devolved institutions.

The policy memorandum contains a paragraph that states that, if the continuity bill is passed and legislative consent to the withdrawal bill is withheld, certain things will have to happen and the offending parts of the withdrawal bill will have to be removed. However, I do not really see the “have to” necessarily coming into being in the way that is envisaged. If that were the case, that would be, in effect, an acceptance of the Scottish and Welsh Governments’ amendments, which those Governments have so far failed to get accepted through negotiation. I am struggling to see that scenario unfold in quite the way that is set out in the policy memorandum.

Tobias Lock: I have nothing to add.

The Convener: Okay. I will pass over to Claire Baker.

Claire Baker: That is a helpful explanation from Professor McEwen. I was going to ask about paragraphs 16 to 20 of the policy memorandum, which set out the three options or possible scenarios. The first option is that the UK Government could change the withdrawal bill and we could accept it. The second option is that the withdrawal bill and the continuity bill could be merged, which is the option that I would like you to comment on, because I am struggling to understand how that could be done. The final scenario is that we could rely on a bill when legislative consent has not been granted.

As I said, I am most interested in the second option of relying on a combination of the continuity bill and the withdrawal bill, if both are passed and there is qualified withholding of legislative consent. Can you give more explanation than is in the policy memorandum of how that would work?

Professor McEwen: That is a really good question, but I am afraid that I cannot answer it, because I am struggling to understand that option myself.

Tavish Scott: Nobody understands it.

Professor McEwen: I have not read everything that has been said, but that did not seem to be an option in the comments that the minister made. I

would like to know more about why it is not the preferred option in the event of a failure to agree an amendment with the UK Government. Perhaps there is a legal reason.

Tobias Lock: No. The Scottish Government has outlined the provisions that it thinks require legislative consent in the European Union (Withdrawal) Bill in a list somewhere. The UK Government disagrees slightly with that list of provisions. The main bone of contention is clause 11 of the withdrawal bill, which deals with devolved powers. It may be that paragraph 18 of the policy memorandum could refer to a situation in which the Scottish Parliament gives consent to every aspect of the withdrawal bill except clause 11. That is a possibility. In such a scenario, both bills would govern the situation here in Scotland. However, I am just guessing, as I am not quite sure how that would work.

Claire Baker: Professor McEwen, you said that, although a legislative consent motion is preferable, it is not a requirement and the UK Government could proceed with the withdrawal bill and pass it at the UK level. It could ignore an LCM even though there is a convention that it would not do so. Is that possible in legal terms?

Professor McEwen: As we know from the Supreme Court ruling of last year, the convention is not a matter of law. As I understand it, there is nothing that the Scottish Parliament can do that would constrain the room for manoeuvre of the UK Parliament. An LCM is a requirement in the sense that conventions are an important part of UK constitutional practice, but it is not a legal requirement. Any decision to ignore or to consider and then reject a refusal to grant consent from devolved legislatures may have quite serious political consequences, but I am not sure that it would necessarily have legal consequences.

Tobias Lock: The Supreme Court was quite clear in the Miller case, which was decided about a year ago, that, although the Sewel convention is now referred to in the amended section 28 of the Scotland Act 1998, it is not justiciable. That means that there is no legal remedy against the UK Parliament ignoring a refusal of legislative consent. There might be a political remedy, but there is not a legal one.

Professor McEwen: Politics matters, and not just for the wider debates that frequently rage around constitutional issues. The UK Government does not want that to be the outcome, because it is not just about the withdrawal bill, which is just the first of a series of bills. As we have seen in the Trade Bill, and as we can expect to see in the proposed agriculture bill and other Brexit-related bills, there will be interdependence between UK law and devolved competence and the UK Government will not want to have the same fight

every time. Although it is not a legal matter, the convention does matter. The phrase “constitutional crisis” is bandied around a little too readily; the situation may not become a crisis, but it would certainly be a prolonged headache that the UK Government would rather avoid.

Tavish Scott: I want to ask the political scientists about section 13 of the continuity bill, which has loosely been described as a bill to keep pace with European regulations after March 2019. What do you make of the bill in the context of ministerial powers?

Professor McEwen: Tobias Lock and I talked about that before we came into the meeting. Section 13 seems to be quite a broad power. I note that the minister referred to it as a “technical measure” at the Finance and Constitution Committee meeting yesterday, rather than the broad power that many people have expressed concerns it may be. If it is purely technical, its time-limited nature seems difficult to understand. If it is purely about technicalities, there should be some redrafting and rewording.

I am not sure that the power is necessary in this bill. Is it a matter of continuity? Is it central to the primary purpose of preparing the statute book for exit day? I am not a lawyer, but I am not sure that it is such a matter, because it seems to be about what happens afterwards.

Tavish Scott: Could that be done at a later stage?

Professor McEwen: Perhaps it could be done at a different stage. Given that this is emergency legislation, that might be wise to do.

Tavish Scott: Absolutely.

Professor McEwen: If the measure is more than technical—what is and what is not technical can be quite a bloody distinction—I would be concerned at the extent to which this section affords ministerial powers, rather than legislative powers or appropriate scrutiny by Parliament. There may be lots of very good reasons why you would want to keep pace with EU law after Brexit, but doing so may have consequences and it is appropriate for those to be explored with proper scrutiny and consultation.

Dr Lock: I have a point on the technical argument. Section 13(1) says that

“Scottish Ministers may ... make provision”

and so on. Therefore, there is discretion as to whether a minister, or ministers as a collective, want to keep Scots law in step with EU law. That is different from the situation now under the European Communities Act 1972; that act has a similar power, but there is, of course, an obligation to keep UK law and Scots law in step with EU law

as long as the UK is a member of the EU. There is a difference in the nature of the power and, therefore, the process may not be quite as technical as it is now—it is not automatic.

Tavish Scott: Is your point that the issue is not technical at all? Is it much wider than that, because there could be major issues of public policy in whatever policy sphere is being considered in the future?

Dr Lock: There is political discretion. It has to be filled somehow, and ministers tend to fill it.

Tavish Scott: Do you share Professor McEwen’s assessment that there is a different way to bring effect to this need—if, indeed, there is a need—for ministers to take powers post-March 2019?

Dr Lock: If the policy aim is to allow Scotland to keep pace with the development of EU law in devolved areas as much as possible, and if that were to be put into a separate act of the Scottish Parliament, it would probably need to be done by secondary legislation, at least partly. A lot of this stuff, especially in devolved areas such as environment and agriculture, is highly technical material that the Parliament does not need to debate fully. However, it could probably have more robust scrutiny provisions.

Tavish Scott: Do witnesses think that there is a reasonable argument that there is an interest in Cardiff, Belfast and, indeed, London in keeping pace with European regulations about things that we would wish to do in Scotland, in lots of policy spheres? In other words, should there be a mechanism to ensure that there is proper discussion with the other Administrations and Parliaments of the United Kingdom to ensure that we keep pace consistently across the UK?

10:45

Professor McEwen: Yes. I suppose that the provision on keeping pace with EU law may have unintended consequences. It might be a good thing to do, but it might have the knock-on effect of causing Scotland to diverge from law elsewhere in the UK. It might not, and the way to avoid that is to work co-operatively. It also seems to me to be highly dependent on the nature of the UK-EU relationship that is negotiated, and we simply do not know enough about that yet.

Tavish Scott: Many thanks.

Stuart McMillan: Good morning. I feel as if it is groundhog day, because some of this came up in the Delegated Powers and Law Reform Committee on Tuesday.

Dr Lock, you made an extremely important point a moment ago about the use of the word “may” in

section 13(1) of the continuity bill. There have been some assertions that the Scottish Government wants to extend the opportunity for up to 15 years, but the bill is clear that it is about “may” and not “will”, and I note the time-limited nature of the power which, under section 13(7) may be exercised only for up to five years. I also note that, as we heard in the Delegated Powers and Law Reform Committee on Tuesday, regulations will be made by affirmative resolution rather than any other mechanism in the Parliament.

Given those aspects, is it your opinion that, although section 13 is wide, it is also quite measured? It is not as if the Government can railroad anything through. The decision will have to be taken in the Parliament.

Dr Lock: You are, of course, right that the power under section 13 is time limited to five years, and the time limit can be extended only with the consent of the Scottish Parliament by way of the affirmative procedure.

The powers that are conferred under section 13 are not limitless. A number of conditions have to be met, and there are limits. First, the matter has to be something that comes out of EU law in the first place. Secondly, it has to be within devolved competence. Thirdly, there are limits in section 13(5) in relation to taxation, criminal law and so on.

My point was simply that, under the continuity bill, it is still up to the minister to decide whether he or she wishes to keep up with EU law, and the Parliament seems to have no involvement at that point. If the minister decides not to bring in new animal welfare laws that are coming out of Brussels, that is the decision made. Obviously, somebody else could introduce a bill to the Scottish Parliament and so on, so there are other ways of effecting things.

My point was that it is not just about the technical power. A policy decision would be made as to whether we should or should not do something. After that, it becomes relatively automatic.

Stuart McMillan: Irrespective of which ministers are in place, ministers and parties are elected by the population on a manifesto of policies, so it would be—correctly—a policy decision depending on which Government was in power at the time.

Dr Lock: Probably, yes.

Stuart McMillan: Another aspect that you both touched on a few moments ago is the complete lack of clarity from the UK Government on what it actually wants to get out of an agreement with the EU and what deal will be signed. The Scottish Government may or may not want to introduce

things to mirror EU legislation, but much of that will be dependent on what the final agreement is between the UK and the EU.

Professor McEwen: Yes.

Dr Lock: Yes. The guidelines that came out of yesterday’s European Council say that there should be free trade, no tariffs, no barriers to trade on all goods—and that seems to include agricultural goods. However, if that happens, there will have to be some basic agreements on standards and, of course, that will impact on these powers.

Dean Lockhart: Following the questions on section 13, can you clarify how the legislation would operate in practice? In the first five years after exit day, the Scottish ministers could bring into Scots law any piece of European law without the need to get the consent of the Scottish Parliament, subject to the limitations that are set out in section 13(5)—is that right?

Dr Lock: Section 14 contains the scrutiny provisions. Certain issues would be subject to the affirmative procedure—the list is there, but I will not bore you by reading it out. They are mainly to do with the functions of public authorities. All others would be subject to the negative procedure, and members know better than I do how well scrutiny functions under that procedure.

Dean Lockhart: That is very helpful. Thank you.

On the impact of the continuity bill, the Law Society of Scotland has raised concerns about new concepts being introduced into Scots law. For example, it says that the new concepts in the continuity bill that talk about retained devolved EU law are not currently recognised under Scots law. That will make it more difficult to understand the law and it will create uncertainty if the continuity bill is brought into Scots law. If, as described in the Law Society’s feedback, both bills are passed, is there a risk that we could have conflicting concepts and provisions of Scots law in reserved areas and devolved areas.?

Professor McEwen: Yes. One of the many criticisms of the withdrawal bill has been the uncertainty surrounding the status of retained EU law and where it sits alongside primary legislation. If both bills are passed and we have two new categories of law alongside the existing and recognised categories, that will inevitably add to the complexity. We are already undergoing an extremely complex process and that will be amplified somewhat. It will be difficult for the courts and, ultimately, citizens and stakeholders to navigate such a complex environment.

Dr Lock: I agree with that. If both bills go through—and let us assume that they will—Scotland will have retained devolved EU law and

retained EU law, and then we will have ordinary acts of the Scottish Parliament and ordinary acts of the Westminster Parliament. We will have a host of different sources of law.

It will not be impossible to find out which is which but, in some cases, a problem will arise if the continuity bill and withdrawal bill enter into law in an unco-ordinated manner. For example, the continuity bill will claim that the environmental impact assessment regulations for Scotland are retained devolved EU law, and the EU withdrawal bill will claim that they are retained EU law. Somebody could then make changes; for example, a minister might say, “We have to change a few words in this”—it could be a Scottish minister on the basis of section 2 of the continuity bill or a UK minister on the basis of section 2 of the withdrawal bill—and there might be a judicial review three years later in which someone challenges those changes and these questions then have to be unpicked. There is an issue in that respect.

Dean Lockhart: How would a Scottish court approach those conflicting provisions? Is there any precedent showing, say, the legislation to which a court would give precedence? Moreover, if the two bills go ahead, are there any examples that we can turn to of conflicting law on trade or areas where EU law has a common framework across Europe at the moment but where the UK might have conflicting laws that would impact on trade here?

Dr Lock: On the first question, such a situation is normally avoided, because of legislative consent motions. If the Scottish Parliament agrees to a Westminster bill, it will not usually enact any parallel or contrary provisions. That seems to be the understanding, and it is why we have the LCM mechanism. I am therefore not aware of any cases in which the exact scenario that you have highlighted has occurred.

As for your second question, I think that you are referring to trade in agricultural or food products to which the regulations that apply in Scotland might be different from those in the rest of the UK—or, at least, in England. It is the reason why everyone seems to be quite keen on common frameworks on such matters; they want to avoid different standards, and it does not make much sense to have standards if you are not going to enforce them in some way to ensure that products that do not comply with them cannot be sold. That seems to be a danger that is out there.

The Convener: We are almost out of time, but there are other members who need to ask questions.

Ross Greer: Instead of taking in the full range of principles as derived from the treaties, the continuity bill includes

“general principles of EU law”

in so far as they have been recognised in rulings of the European Court of Justice. What are the implications of that? Dr Lock has already mentioned animal sentience, which is covered by the treaty of Lisbon, and environmental principles, which are covered in article 191 of the Treaty on the Functioning of the European Union. What are we including or, indeed, missing by transposing into this bill general principles on the basis of European Court of Justice rulings instead of trying to explicitly bring in treaty principles such as environmental principles?

Dr Lock: As far as I understand it, the reference to

“general principles of EU law”,

which is actually in both bills, seems to be a technical reference to what EU law itself understands as its general principles. By that, I mean that EU law has a number of sources that include not just the EU treaties and all sorts of EU legislation but those unwritten general principles that have been developed by the Court of Justice of the European Union to fill certain gaps. Before we had the European charter of fundamental rights, there were certain things that did not exist in writing anywhere. For example, the principle of proportionality had not been written down anywhere, and principles such as equality before the law and basic procedural rules on fairness and so on could not be found either in the treaties or in legislation. I think that that is what the bill means by

“general principles of EU law”,

and it explains why there is a reference to the case law of the Court of Justice. Otherwise, you will not be able to determine what the general principles are, and it will become an academic dispute. The principles found in the treaties are not, in my reading, general principles in that sense.

Professor McEwen: It would be enormously helpful if there was a bit more clarity on what the bill meant by

“general principles of EU law”.

They are not named, and maybe they are not named for a reason. As it is drafted, the bill is designed to evolve as case law in the EU evolves, but I think that it would be very helpful, both for Parliament and for wider society, to know what we are talking about. Are we talking about subsidiarity or not? Those are things that we need to know.

11:00

Ross Greer: I am glad that it was not just me who was unsure of what was meant by that. Returning to environmental issues and to the precautionary principle and the idea that the polluter pays, I presume that it would be practically possible for us to transpose such principles and put them into the bill. Organisations have highlighted that area to us as being explicitly missing, but surely it would be entirely possible for those principles to be transposed?

Dr Lock: In a way, that will not be necessary. Because those principles are written down in EU law and because they are largely within devolved competence, they would be captured anyway by sections 2, 3 and 4. The question is how far you want to make them susceptible to change by ministerial decree, but the principles themselves will become part of Scots law by virtue of the continuity bill.

Professor McEwen: The environmental lobby, as you know, has also raised numerous concerns about our governance gaps, so the question is about the effect of having those principles written into Scots law and what recourse for action would be available if people felt that they had not been upheld. That could be clarified as well.

Mairi Gougeon: I would like to ask a couple of questions relating to the Francovich case. How does that differ between the European Union (Withdrawal) Bill and the continuity bill? Can you explain the differences and say whether you think it will present any problems if there is a difference in operation across the UK?

Dr Lock: The rule in Francovich is a decision by the European Court of Justice from the early 1990s. It introduced a new remedy into EU law, whereby a person who sustained a material loss because of a member state breaching or acting in contravention of its EU law obligations could, if the breach was sufficiently serious—that is the condition under EU law and it is a high hurdle to get over—claim damages from the state. Scots law does not have an equivalent to state liability law as such; we just have the normal law of delict.

Both bills say that there is no right to damages under Francovich after exit day. The difference in the Scottish bill is that it says that that subsection

“does not apply in relation to any right of action accruing before exit day.”

So, if the material facts had happened before exit day, you could still bring a claim after exit day and introduce it into the Scottish Parliament. That could be significant, because those breaches might not be detected for many years, or even decades; they might have happened back in the day. I am talking about breaches involving wrong transposition of an EU directive, which can

happen—a directive might not be transposed correctly or it might be applied badly by the authorities because it is a highly technical matter and they make a mistake, and as a consequence somebody suffers a loss.

Is it in the public interest to keep that rule? I am a slight sceptic on that front, because it really is not the most effective remedy that you can imagine. It is difficult to get a Francovich claim through the courts successfully. The hurdles are very high and a sufficiently serious breach has to be shown; that means that it has to be an obvious breach of EU law, which does not happen that often. Mostly such breaches are small mistakes that are made and are not deliberate, and in such cases there is no chance of a remedy.

I once did a study on the success rate of those kinds of claims. It is very low in the UK, because, for a start, access to judicial review is very expensive and the claimants are often corporations or companies. If your concern is on individual rights, that provision will not present the biggest loss that we can imagine to the legal order.

Mairi Gougeon: So, if those different approaches are both implemented, you do not envisage that being too much of an issue

Dr Lock: Probably not. There will be very few cases, if any, overall.

Mairi Gougeon: Thank you.

The Convener: Section 6 provides that the principle of supremacy of EU law will cease to apply to legislation made after the UK has left the European Union, but at the same time it ensures that the supremacy of EU law will remain for legislation made before the UK leaves the EU. Can you explain how that is likely to work?

Dr Lock: I have asked myself the same question and I think that I have an answer. It took me a few hours—well, overnight last night I came to a conclusion.

The principle of supremacy of EU law basically says that, at the moment, if there is a conflict between a piece of UK legislation—even if it is an act of the Westminster Parliament that is normally immune from any judicial review—and EU law, the latter prevails. That will be carried over in the withdrawal bill for all enactments that happen before Brexit and, obviously, it will not be carried over for enactments that happen after Brexit.

The Scottish continuity bill takes the same approach—it has basically copied that same provision into section 6. In the Scottish context, we have to ask ourselves what the practical application of the provision is, because an act of the Scottish Parliament already has to be

compliant with EU law. If it is not, it is ultra vires—it is not law.

Where could the provision come in? There are two theoretical situations. The first would concern an act made by the Westminster Parliament preceding devolution that applies to Scotland, which would now be in the competence of the Scottish Parliament. If that act conflicted with EU law as retained under the continuity bill—retained devolved EU law—the EU law would prevail over it.

The second situation would arise because the provision applies not only to enactments but to a “rule of law”. Unfortunately, “rule of law” is not defined in the bill, but I assume that it means the common law. Therefore, if there is a conflict between retained devolved EU law and the common law, I am guessing that the former would prevail.

Those are the practical applications of that provision. There is not very much because, as I said, any act of the Scottish Parliament already has to be compliant with EU law, so there cannot actually be a conflict.

The Convener: Thank you.

Claire Baker: We received a submission from the Law Society of Scotland, which raised some issues around section 10, which is about the interpretation of retained and devolved EU law. The briefing argues that

“Section 10 does not currently reflect what was agreed between the EU/UK negotiators December 2017 joint agreement”,

so it is outdated, in the light of that agreement. Do you have any views on that analysis? Is that something that has been identified by anyone else?

Professor McEwen: I read that in the Law Society’s submission as well, and I have no reason to doubt it. The Law Society has far more expertise on that than I have. It illustrates one of the challenges of the continuity bill, in that it will be enormously difficult to keep pace with developments—not just that interim agreement, but the transitional arrangements, the further trading agreements between the UK Government and the EU and, indeed, any changes that are made to the withdrawal bill as it goes through the Westminster Parliament.

There is no answer to that, other than to ensure that the legislation can be amended appropriately, and there are at least the regulatory provisions in the bill. I think that, on that point, the minister conceded in committee that amendments could be made in light of such matters. However, that points to the need for scrutiny. In emergency legislation, things might well be missed because there has not

been enough time to identify them. It is notable that the Government seems open and amenable to suggested amendments, but there is just the challenge of time.

Claire Baker: The preferred option of the Scottish Government and the Scottish Parliament is for agreement to be reached on the withdrawal bill. Over the next few weeks, where are the opportunities for the UK Government to table amendments and get them through Parliament?

Professor McEwen: We will see today whether there is any movement in the joint ministerial committee on EU negotiations. The UK Government has suggested that it is not willing to go any further. We do not know how far it has gone because we have not seen the amendments, which I think the Government has indicated will be published next week.

David Lidington’s speech gave us some clue as to the nature of the concession that the UK Government has made. The stumbling block is the issue of agreement or consent. Ministers of the Scottish Government and the Welsh Government have said that they need the word “agreement” or “consent” written into the withdrawal bill. I note that, in his speech, David Lidington said that he would expect the new proposal to be through a process of agreement. Therefore, it does not seem that they are a million miles apart but there seems to be an issue about whether “agreement” or “consent” is written into the bill.

That goes back to the principled difference in interpretations of devolution that I spoke about and it speaks to the lack of trust between the UK Government and the devolved Governments. The UK Government does not want to find itself in a situation in which it cannot do what it thinks that it needs to do to preserve the UK internal market, or negotiate and implement trade agreements post-Brexit, if it feels that it has conceded a veto power to the devolved institutions. The devolved institutions do not want to cede ground on what they perceive to be already within their competence.

It is very difficult to see a way through the impasse, but that points to the need to really get to grips with how we operate and govern within the much more complex and interdependent system of multilevel government that Brexit introduces. The machinery of intergovernmental relations has long been recognised as not being particularly robust or effective, but that is much more of a problem in the context of Brexit than it was before.

The Convener: Since the Brexit vote, the flaws in the JMC process, in particular, have been highlighted. Has that contributed to the lack of trust?

Professor McEwen: Yes, it probably has. There has been an incredible intensification of intergovernmental relations since the Brexit vote. That has created a lot of administrative and bureaucratic challenges because we do not have the machinery and processes in place, but it has also revealed some of the more cultural or political—with a small p and a big P—differences that exist and which are a barrier to co-operative working. They already existed but they have absolutely been highlighted and made more problematic by the Brexit process.

The Convener: Stuart McMillan indicated that he had another question. We are over time now.

Stuart McMillan: I will be brief.

The Convener: Be as brief as possible, please.

11:15

Stuart McMillan: Professor McEwen spoke about the time constraints on the bill. It is anticipated that in the region of 300 pieces of secondary legislation will need to be passed in Scotland. If the bill had not followed the emergency procedure but had gone through the normal process, getting 300 pieces of secondary legislation through the Parliament in the very short timescale before we leave the EU would have been nigh on impossible.

Professor McEwen: I am not saying that the bill should not be dealt with through the emergency procedure. I understand the rationale that has been presented for that and I am sympathetic to it, but I think that it is regrettable all the same. With the benefit of hindsight, we probably would not start from here. The continuity bill, or at least the documentation for it, could have been introduced earlier, but nobody quite envisaged the situation that we are in now. However, you are where you are and you have to deal with the context as it stands. That is all the more reason to ensure that the bill includes only those things that it absolutely has to include, and that there is a mechanism for utilising the Parliament's post-legislative scrutiny procedures, which will become extremely important. There must also be a facility for fixing things that may need to be fixed, partly because things might develop that we cannot foresee but also because things may have been missed as a result of the rapid nature of the scrutiny process.

The Convener: I thank both of our witnesses for giving evidence at such short notice and in their personal capacity.

We move into private session.

11:16

Meeting continued in private until 11:26.

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