Economy, Energy and Tourism Committee

7th Report, 2013 (Session 4)

Legislative Consent Memorandum on the Energy Bill (LCM (S4) 20.1)

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Economy, Energy and Tourism Committee

Remit and membership

Remit:

The remit of the Committee is to consider and report on the Scottish economy, enterprise, energy, tourism and renewables and all other matters within the responsibility of the Cabinet Secretary for Finance, Employment and Sustainable Growth apart from those covered by the remit of the Local Government and Regeneration Committee and matters relating to the Cities Strategy falling within the responsibility of the Cabinet Secretary for Health, Wellbeing and Cities Strategy.

Membership:

Marco Biagi
Chic Brodie
Murdo Fraser (Convener)
Rhoda Grant
Alison Johnstone
Mike MacKenzie
Margaret McDougall
Dennis Robertson (Deputy Convener)
David Torrance

Committee Clerking Team:

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Economy, Energy and Tourism Committee

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The Committee reports to the Parliament as follows—

Background

The Energy Bill

1. The draft Energy Bill is a UK Government Bill, published on 22 May 2012 for pre-legislative scrutiny by the House of Commons Energy and Climate Change Committee. The main purpose of the Energy Bill is to implement the legislative proposals of the Electricity Market Reform (EMR) White Paper 2011. The main policy objective is to drive the necessary investment needed in the electricity sector by 2020, to ensure reliable, diverse and low-carbon power.

2. The UK Government’s proposals are wide ranging; amongst these it aims to establish an emissions performance standard (EPS) that will prevent coal-fired power stations being built unless they are equipped with sufficient carbon capture and storage to meet the EPS. It will apply to new, individual, fossil fuel plant with a capacity of 50 MW or over, and will set an annual CO$_2$ emissions limit equivalent to 450g/kWh.

3. Whilst the emissions limit, the type of emissions which will be caught and the kind of installations the limit will apply to are matters for the Secretary of State for Scotland, Scottish Ministers along with their counterparts across the devolved administrations will have responsibility for ensuring that operators of relevant plants operate within the EPS.

4. Clause 40 of the Energy Bill places a duty on Scottish Ministers to make arrangements for monitoring compliance with, and enforcement of, the emissions limit duty.

Procedure for dealing with legislative consent memorandums

5. Section 28(7) of the Scotland Act 1998 prevents the UK Parliament from legislating on matters which are within devolved competence unless the Scottish Parliament has given its consent (by agreeing to a legislative consent motion). The Energy Bill engages the convention by virtue of the inclusion of delegated powers conferred on the Scottish Ministers.

6. It is usual practice for the Parliament to have expressed a view on an LCM in time for the final amending stage in the House in which the Bill was introduced, i.e.
report stage in the House of Commons or third reading in the House of Lords. It is anticipated to be mid-May 2013 for this Bill.

Legislative Consent Memorandum

7. The Energy Bill requires a Legislative Consent Memorandum (LCM) because it will extend the executive competence of Scottish Ministers by conferring regulation-making powers on them. Specifically, Scottish Ministers will have a duty to design and implement an appropriate EPS enforcement regime for Scotland. These changes to their functions will require the consent of the Scottish Parliament.

Clause 40 – Monitoring and Enforcement
8. Clause 40 of the Energy Bill places a duty on Scottish Ministers, as the appropriate national authority for Scotland (defined by clause 40(4)(b)), to make arrangements for monitoring compliance with, and enforcement of, the emissions limit duty. Clause 40(2) allows Ministers to make regulations which contain any of the provisions listed in Schedule 5. Clause 42(12) requires that Ministers consult with such persons as they think appropriate before making such regulations. Principally, this power will permit Ministers to determine which organisation (the “enforcement authority”) will be responsible for monitoring and enforcement of the emissions limit duty.

9. The Scottish Environment Protection Agency (SEPA) will administer the monitoring and enforcement scheme for Scotland. Monitoring compliance will be based on the annual CO\textsubscript{2} emissions data reported for the purposes of the EU Emissions Trading System (EU ETS) which is already collected by SEPA. For most operators, there should be no more additional steps in the process, and they will not be required to undertake any reporting in addition to their annual ETS emissions reporting.

Schedule 5
10. Schedule 5 enables Scottish Ministers to create an enforcement scheme, which may include the imposition of civil penalties and the taking of preventative and remedial action through the civil courts in Scotland. The Schedule envisions a system of enforcement notices whereby the enforcing authority may serve an enforcing notice on an operator who has breached the emissions limit. Such a notice may require the operator to provide undertakings in respect of the breach (which may include remedial action) or require an operator to comply with a modified emissions limit duty which takes into account any excess emissions in earlier years.

11. In addition to, or instead of, such requirements, a financial penalty may be imposed by an enforcing authority where an operator has breached the emissions limit. The level of the penalty itself, or a means for calculating it, will be decided by Scottish Ministers. In imposing such a penalty, the enforcing authority should have regard to any guidance published by Scottish Ministers.

Clause 39
12. Clause 40(3) requires that any regulations made under clause 40 by Scottish Ministers must include arrangements for giving effect to such directions made by
the Secretary of State under clause 39. Clause 39 provides that where the Secretary of State considers that there is an electricity shortfall, or a significant risk of shortfall, he may make directions that the emissions duty be suspended or modified for a specified period.

Scottish Ministers’ Consultation Role under the UK Energy Bill
13. Energy matters are generally reserved under Head D of the Scotland Act 1998. However, the control and regulation of emissions, and the consenting of thermal power stations are devolved. Therefore, given the complex nature of competences in relation to the promotion of renewable energy and environmental protection, Scottish Ministers have reached agreement with DECC that they are to have a statutory consultation role in the:

- Design and delivery of the Contracts for Difference and underlying Institutional Framework.
- Move to the operation of a fixed Renewables Obligation Certificate from 2027.
- Interpretation of the Emissions Performance Standard, how it will apply in additional cases and following modifications, and where the Secretary of State may temporarily suspend the EPS.

14. At its meeting on 24 April 2013 the Minister for Energy, Enterprise and Tourism explained that the Scottish and UK Governments “will proceed with a joint concordat to set out roles and responsibilities under EMR [electricity market reform] and to embed the principles of good working practices in an enduring framework”. In addition the Minister confirmed that a Parliamentary debate will be held on 16 May 2013 on the wider Energy Bill proposals.¹

Scrutiny of the Memorandum

15. The Cabinet Secretary for Finance, Employment and Sustainable Growth lodged a Legislative Consent Memorandum (LCM) on 11 December 2012. It included a draft legislative consent motion, to be lodged by the Cabinet Secretary for Finance, Employment and Sustainable Growth, as follows:

“That the Parliament agrees that the relevant provisions of the UK Energy Bill introduced in the House of Commons on 29 November 2012 relating to a duty on fossil fuel plant not to exceed annual CO₂ emissions limits and the regulation making powers for monitoring compliance with, and enforcement of, the emissions limit duty, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of Scottish Ministers, should be considered by the UK Parliament.”

16. The LCM was referred by the Parliamentary Bureau to the Economy, Energy and Tourism Committee as lead committee. The delegated powers were also considered by the Subordinate Legislation Committee (SLC) at its meeting on 8 January 2013. The SLC reported its views on 9 January 2013 confirming that it was content with the powers conferred on Scottish Ministers.

17. In its report the SLC notes that where primary legislation is not being amended by regulations made under the UK Energy Bill, the negative procedure would apply. However, an affirmative procedure would apply where regulations seek to make consequential amendments to primary legislation. As a consequence there are opportunities for future scrutiny by the Scottish Parliament.

18. The Economy, Energy and Tourism Committee considered its approach to the LCM at its meeting on 23 January 2013 and then took evidence from the Minister for Energy, Enterprise and Tourism at its meetings on 27 February and 24 April 2013.

19. At the meeting on 27 February 2013, Scottish Government officials confirmed that SEPA is aware of the EPS provisions in the LCM and to the extent that it is possible, it is aligning its functions with those contained within the forthcoming Regulatory Reform (Scotland) Bill to avoid any duplication of work.

20. In response to questions regarding the effectiveness of the monitoring work undertaken by SEPA and others across the UK, Scottish Government officials commented that the monitoring framework is strict, with information collected by SEPA, and the Environment Agency for England and Wales provided to the UK-wide depository of data.

Recommendation

21. The Committee noted the LCM and agreed to recommend that Parliament approve the forthcoming Legislative Consent Motion.

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3 Introduced into the Scottish Parliament on 27 March 2013.
6 Agreed to by division: For: 6 (Murdo Fraser, Dennis Robertson, Marco Biagi, Chic Brodie, Mike MacKenzie, Joan McAlpine), Against 3 (Rhoda Grant, Margaret McDougall, Alison Johnstone), Abstentions 0.
ANNEXE A - EXTRACTS FROM THE MINUTES OF THE ECONOMY, ENERGY AND TOURISM COMMITTEE

3rd Meeting, 2013 (Session 4), Wednesday 23 January 2013

Energy Bill (UK Parliament legislation) (in private): The Committee considered the legislative consent memorandum and agreed to seek further evidence from the Scottish Government on this LCM at a future meeting.

7th Meeting, 2013 (Session 4), Wednesday 27 February 2013


12th Meeting, 2013 (Session 4), Wednesday 24 April 2013

4. UK Energy Bill (UK Parliament legislation): The Committee took evidence on the legislative consent memorandum LCM(S4) 20.1 from—Fergus Ewing, Minister for Energy, Enterprise and Tourism, Mike McElhinney, Head of Electricity Markets, Katherine White, Team Leader: Electricity Market Reform, and Norman Macleod, Senior Principal Legal Officer, Scottish Government.

The Committee agreed to consider a draft report in private at a future meeting.

13th Meeting, 2013 (Session 4), Wednesday 1 May 2013

3. UK Energy Bill (UK Parliament legislation) (in private): The Committee considered and agreed a draft report. Three changes were agreed to by division.

Rhoda Grant proposed that the following text be added in after paragraph 20. The proposal was disagreed to by division: For 3 (Rhoda Grant, Margaret McDougall, Alison Johnstone), Against 6 (Murdo Fraser, Dennis Robertson, Marco Biagi, Chic Brodie, Mike MacKenzie, Joan McAlpine), Abstentions 0.

**Emissions Performance Standard**
The Committee notes that the Scottish Government have set grid decarbonisation targets of 50gCO2/kWh by 2030 which is different from the UK. It is therefore perplexed as to why the Scottish Government are passing the power to set emissions performance standards for Scotland to the UK Government. The Scottish Government could not say how they would reach their target were this power passed back to the UK Government; neither could they say whether they were able to take back this power should the EPS set by the UK Government prove to be a block to us meeting the 2030 target.
The Committee therefore wishes to bring this anomaly to the attention of the Parliament.

Alison Johnstone proposed that the following text be added in at the end of paragraph 21. The proposal was disagreed to by division: For 3 (Rhoda Grant, Margaret McDougall, Alison Johnstone), Against 6 (Murdo Fraser, Dennis Robertson, Marco Biagi, Chic Brodie, Mike MacKenzie, Joan MacAlpine), Abstentions 0.

“But in doing so calls on the UK Government to set a lower Emissions Performance Standard in line with advice from the UK Committee on Climate Change, and, if the UK Government fails to do so, that the Scottish Government should use what powers it has to set a domestic Emissions Performance Standard that helps deliver its existing electricity decarbonisation target.”
ANNEXE B: ORAL EVIDENCE

Wednesday 23 January 2013

Official report

Fergus Ewing, Minister for Energy, Enterprise and Tourism, Katherine White, Team Leader: Electricity Market Reform, and Mike McElhinney, Head of Electricity Market Reform, Scottish Government.

Wednesday 24 April 2013

Official report

Fergus Ewing, Minister for Energy, Enterprise and Tourism, Mike McElhinney, Head of Electricity Markets, Katherine White, Team Leader: Electricity Market Reform, and Norman Macleod, Senior Principal Legal Officer, Scottish Government.
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