OFFICIAL REPORT
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Finance and Constitution Committee

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FINANCE AND CONSTITUTION COMMITTEE
24th Meeting 2017, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Adam Tomkins (Glasgow) (Con)

COMMITTEE MEMBERS

*Neil Bibby (West Scotland) (Lab)
*Alexander Burnett (Aberdeenshire West) (Con)
*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)
*Ash Denham (Edinburgh Eastern) (SNP)
*Murdo Fraser (Mid Scotland and Fife) (Con)
*Patrick Harvie (Glasgow) (Green)
*James Kelly (Glasgow) (Lab)
*Ivan McKee (Glasgow Provan) (SNP)
*Maree Todd (Highlands and Islands) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Simon Collins (Scottish Fishermen's Federation)
Kate Houghton (Royal Town Planning Institute)
Isobel Mercer (RSPB Scotland)
Robin Parker (WWF Scotland)
Dr Serafin Pazos-Vidal (Convention of Scottish Local Authorities)
Professor Colin Reid (University of Dundee)
Clare Slipper (NFU Scotland)
Daphne Vlastari (Scottish Environment LINK)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 25 October 2017

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Bruce Crawford): Good morning and welcome to the 24th meeting in 2017 of the Finance and Constitution Committee. At this point, I usually tell members to switch off their mobile phones, and I extend the same invitation to our invited guests. I wish everyone here this morning a very warm welcome.

Agenda item 1 is to decide whether to take item 3 in private. Are members agreed?

Members *indicated agreement.*

European Union (Withdrawal) Bill

10:00

The Convener: Agenda item 2 is a round-table evidence-taking session on the European Union (Withdrawal) Bill, and we are joined for the discussion by Simon Collins, executive officer, Scottish Fishermen's Federation; Kate Houghton, planning policy and practice officer, Royal Town Planning Institute; Isobel Mercer, policy officer, RSPB Scotland; Robin Parker, public affairs manager, WWF Scotland; Dr Serafin Pazos-Vidal, head of the Brussels office, Convention of Scottish Local Authorities; Professor Colin Reid, professor of environmental law, University of Dundee; Clare Slipper, political affairs manager, National Farmers Union Scotland; and Daphne Vlastari, advocacy manager, Scottish Environment LINK. That is a lot of names. I welcome one and all.

I suggest to those who are here for the first time that, for the purposes of the record, you give your name at the start of your first contribution. That will help me, too, because I cannot see all the nameplates from where I am sitting.

This round-table session is structured around five themes, and I intend to allow around 20 minutes for each discussion. I will invite one of our external participants to initiate the discussion on each theme by outlining their views on it. Inevitably, it will be a free-flowing discussion; one theme might well lead into another. I realise that we will have to be flexible, and we will try to manage things as best we can. When you want to contribute, please feel free to catch my eye or the eye of the clerk. If we can do it that way, we can let the discussion flow instead of my having to guide things the whole way. That would be incredibly helpful.

The first theme for discussion is current arrangements in the European Union, and I invite Daphne Vlastari of Scottish Environment LINK to provide an overview of her views on this topic. Over to you, Daphne.

Daphne Vlastari (Scottish Environment LINK): Good morning and thank you very much for having us today. As this is rather a big topic, I thought that I would look at it from the environmental protection side and the legislation that pertains in that respect, and perhaps others can speak to the issues in their sectors.

For Scottish Environment LINK members, the EU has been the key mechanism for introducing environmental protection legislation in Scotland and across the United Kingdom. The figure usually quoted is that about 80 per cent of the environmental protections that we enjoy today are because of EU-derived law. The clear need—and

the clear ask on behalf of our members—is for those protections to be retained as we move forward with the UK's exit from the EU. There is also a clear need to convert faithfully, through the withdrawal bill, those pieces of EU legislation and to give them the status of primary law to ensure that they cannot be amended by secondary legislation.

Ensuring that our environmental laws are converted into domestic law is a huge task. Some directives are already incorporated in Scots law, but there are also regulations and Council decisions. Given the really complex matrix of legislation that we have today in Scotland and across the UK, the task is not an easy one.

I understand that, at the moment, the Scottish Government is looking at which EU legislation will be affected by the UK's exit from the EU. The Department for Environment, Food and Rural Affairs has already issued some numbers for the legislation that will be affected, estimating that about 150 pieces of EU legislation will be affected and that we will need about 100 statutory instruments to ensure that the statute book is correct. Those numbers can help to inform discussions in Scotland, too.

The other aspect to highlight about how EU environmental law works today is that clear guiding principles are enshrined in the treaties. The treaties clearly say that we should work towards a more sustainable world and sustainable development and that legislation not only on the environment but on public health and safety should be based on key international principles of environmental law, including the precautionary principle, the principle of polluter pays and so on, which are quite commonly found in international conventions. You can look at the Rio summit or at climate change, but the EU treaties essentially provide a legal requirement for those principles to be taken into account when legislation is developed at EU level and it is important to us that those principles be preserved as we go forward.

The other aspect of EU law is that different EU bodies, in co-ordination with functions taken forward at a domestic level, have enabled robust implementation and enforcement of EU laws. Obviously, there have been times when Governments or other actors have not fully implemented EU laws but, at the EU level, the relevant functions are in place to ensure that the European Commission can monitor when that is happening or be alerted to such activity and take appropriate action when needed. That process allows for much wider concerns to be raised compared with what happens, for instance, in judicial review in Scots and UK law. We feel that there will very likely be a governance gap as we move forward, and we need to look into that.

Finally, there has been a lot of discussion not only in Scotland but across the UK about the importance of maintaining our international ambitions and continuing to be part of international agreements. That is absolutely very welcome, but it is important to highlight that the UK has implemented its international commitments primarily via membership of the EU. That has been very true for Scotland, of course. The negotiating position of the UK as a whole has been developed at EU level, and it is through EU mechanisms that we have been able to implement those international obligations. Assuming that the commitment of the UK Government and the Scottish Government continues to apply, which we are sure will be true, we would, in terms of maintaining international ambitions, have to replicate some domestic mechanisms to ensure that that continues in the future.

The Convener: Thank you, Daphne. I will get the ball rolling with a question on one of the issues that you have raised. I should say that I am keen to get practical examples of some of the things that you have talked about as part of the evidence so that we can build that into our report, when it comes.

On the general principles of international law, which Daphne Vlastari mentioned, I note, Robin Parker, that in the evidence provided by the RSPB, you say:

"The Bill does not provide sufficient clarity that these principles will be converted alongside other EU law. This is critical to ensure environmental legislation, including any jointly agreed frameworks between the UK Government and devolved administrations, is applied and developed correctly in the future."

Robin Parker (WWF Scotland): Can we go to Isobel Mercer on that question?

The Convener: Sorry—it is Isobel Mercer I should be putting that question to. Why did I think you were from RSPB, Robin? I apologise, Isobel.

Isobel Mercer (RSPB Scotland): No problem at all.

The Convener: Can you take that question on?

Isobel Mercer: Can you repeat it?

The Convener: Yes. No wonder you are asking me to repeat the question, given that I did not address it to the right person in the first place.

In your evidence, you say with regard to the general principles in international law that

"The Bill does not provide sufficient clarity that these principles will be converted alongside other EU law. This is critical to ensure environmental legislation, including any jointly agreed frameworks between the UK Government and devolved administrations, is applied and developed correctly in the future."

It would be helpful if you could expand on that and give us examples of what you mean.

Isobel Mercer: There are a few key points to make about the principles, the first being the interpretation of retained EU law. At the moment, the principles articulated in the EU treaties play a key role in the interpretation of European legislation, and that should continue once that law has been brought over.

The second point is about the creation of future environmental legislation in the UK. At present, all legislation created in the EU is based on those founding principles, and we obviously expect that to continue for any future environmental legislation that is created within the UK and in any of the UK countries. That would include the creation of any new common frameworks across the UK, which should have those founding principles at their heart.

Just to give a bit of context, I note that one of the principles that Daphne Vlastari mentioned was the precautionary principle. That has been utilised in EU legislation in the banning of neonicotinoids, which are harmful pesticides that affect bees and which were basically banned on the basis of the precautionary principle, as it was not proven that there was no risk to the bees. At that time, there was no conclusive evidence that they were affecting colony populations, but their use was outlawed on the basis that there was no conclusive proof that they were not proving to be harmful—if you see what I mean. That is one example of where those principles have been used to bring environmental protections.

The Convener: Where do you think the withdrawal bill needs to be improved to give it the clarity that is being sought?

Isobel Mercer: At the moment, our position is that there is no clarity on whether and exactly how those principles will be brought over. The advice that we have received is that they would be brought over where they had been interpreted in Court of Justice of the European Union case law, but the situation is just not clear at the moment.

The Convener: Do you want to contribute this time, Robin?

Robin Parker: Yes, convener. I just thought that it was better for Isobel Mercer to get in first.

The point is that these environmental principles are in the treaties rather than in the body of EU law. The withdrawal bill is clear about bringing over directives and existing EU laws, but it does not bring the EU treaties over. Obviously there are lots of parts of the EU treaties that it would not make sense to bring into domestic law but, as Isobel Mercer has outlined very well, the environmental principles in particular are very closely ingrained. They are part of the environmental legislation, and all the environmental legislation that we have been operating in Scotland needs them. Because they are integral, they need to be brought over as one. It is simply because they come from a different place—the treaties—that the withdrawal bill has not sucked them over.

The Convener: Does anybody else want to comment?

Simon Collins (Scottish Fishermen's Federation): Obviously we have no problem with retaining principles that are clearly expressed in whatever is retained or rolled over from the EU, but it will come as no surprise that we are less enamoured of EU law in general on the fisheries side.

The current arrangement, if I can explain from the fisheries point of view, has two parts. The EU has two roles: first—and this is the role that will disappear—it acts as what is termed a coastal state and negotiates quota on behalf of member states, including us; and secondly, it plays a management role. Underneath the great mass of EU legislation, we have principles on which we can all agree. However, there is also an enormous mass of inertia, even with regulations that made sense when they were invented, and it is extremely difficult, through co-management, to change those things. What we are looking for is a far more flexible management system. Whatever is transferred across and whatever is retained after exit, it is very important that, while respecting the principles, we do not get bogged down in the kind of inertia and cumbersome mechanisms that we had in the past.

As an aside, it is interesting how often we are told about how successful the common fisheries policy has been in saving fish stocks. What I find it remarkable is that the only place where it seems to have worked is Scottish waters. It certainly has not worked anywhere else, which makes you wonder whether we in Scotland have been doing something different from the rest of the EU. The fact is that there are things that we have been doing differently, totally aside from and outwith the EU, and we will continue to do them. As we all know, we have had great success in a number of stocks.

We are looking for a far more reactive management system, so it is important that, when we transfer principles across, we do not get too excited about the mass of detail. That sort of approach really has not produced the kind of reactive system that a dynamic ecosystem needs.

Daphne Vlastari: Convener, I think you also asked for practical ways of addressing the issue of principles. I listened to Simon Collins's point about

the details; there are, of course, plans to review some EU legislation, but it is good to hear that he generally agrees with the principles.

As for how we convert the principles, I point out that, as part of a wider UK alliance of non-governmental organisations, we are proposing specific amendments to the withdrawal bill to place a duty on public bodies to bear the principles in mind. As Robin Parker has said, there is obviously no intention to bring all the EU treaties with us as we exit the EU, but there needs to be some acknowledgement of and reference to those principles if we are to make policy in the right way.

10:15

Dr Serafin Pazos-Vidal (Convention of Scottish Local Authorities): I have a couple of points from COSLA, specifically on international obligations and general outcomes, rather than general principles. I do not want to sound pessimistic, but we have an early indicator that things might be a bit challenging, given the current culture in Westminster and perhaps here in Scotland.

I refer specifically to the sustainable development goals, which are very wide international outcomes in environmental sustainability that go well beyond the EU. The UK has signed up to them, and the First Minister has committed to implement them in Scotland, but, compared with many other countries in Europe and in other parts of the world, work on them has not yet really started. In other countries it is very advanced. That is an early indication that, while we would like to abide with general global principles, with the UK being a global partner for stability, it is likely that there will be cultural resistance to getting many commitments on them. As you know, we have concerns about the fact that the UK has not ratified in any way—in Scotland or in the UK as a whole—the European charter of local self-government, which the UK agreed to. That is an early indication, but I hope that that is being too pessimistic.

The Convener: Does anyone else wish to contribute on the issue of international law? Do any members want to ask a question or make a point? Patrick, I see that you do.

Patrick Harvie (Glasgow) (Green): I suppose that there is a comparison with other attempts to place into law principles that constrain the actions of Governments. The most obvious example is that we have the long-standing principle in the Sewel convention that the UK Government will not legislate in devolved areas without the devolved Parliament's consent. We can see how much the attempt to place that on a statutory basis is worth now. There is a real question, in the absence of a written constitution that would constrain Governments in what they are allowed to do and how they may legislate in future, about whether there is any way in which we can place a constraint on ministers to apply such environmental principles to the future development of law. Can anyone give an example in the UK context of a successful way of constraining ministerial actions or future legislation, other than through international treaties?

Professor Colin Reid (University of Dundee): Although I accept what you say about constraining, there may still be a value in enshrining the principles to some extent, as it would mean that they would be relevant things to consider and Government ministers would not be able to say, "No, you cannot think about that. You cannot alter your economic goals to take account of environmental or other principles". If they are there as things that have to be taken account of, at least they can be on to the table so that ministers have to consider them. That would not be the same as a constraint, but it may still achieve something.

Robin Parker: We are skipping ahead in the agenda here, but, if the purpose of the withdrawal bill is to be a kind of salvage operation to bring into domestic legislation EU law as it works in Scotland and the UK, it is really important to bring across the environmental principles—with a capital P—through the amendments that have been proposed. Incidentally, we do not yet have any Scottish MPs supporting the amendments. There are no Scottish MPs here, but maybe there are some listening. If they could get on board, that would be great.

The other thing is that, as those principles function currently, they are not applicable only to ministers; they can be referred to in legal cases. I am afraid that I do not have an example from Scotland with me, but we can come back to the committee with further examples. Greener UK, the body with which we have been working on this at Westminster, has an example from Northern Ireland, where a company was illegally taking sand out of Lough Neagh. The environment minister in the Northern Ireland Executive issued an enforcement notice telling the company to stop. Friends of the Earth then said that, because the minister did not order an immediate halt to the activities while it could be further investigated to see whether they were having an impact on the habitats in the lough, the minister had failed to use the precautionary principle. That was what it argued in court, and it was on the basis of that precautionary principle that the court reached its judgment that there should have been a halt to the activities while further investigation was undertaken. That is just to say that, at the moment, those environmental principles have a

force beyond simply informing other law and so on; they can be referred to in a legal setting.

If what we are trying to do in the first instance is simply bring the legislation across and keep things working as they are, which is what I understand the principle of the withdrawal bill to be, we need to do as much of that salvaging as possible. Later on, we can have the conversation that Simon Collins talked about, on whether the legislation is the right thing that will work for Scotland, whether we can improve on it and whether we can develop it in different ways. The purpose of the withdrawal bill should be to keep things, as far as possible, as they are.

Adam Tomkins (Glasgow) (Con): You are right to say that the principles are drawn from provisions in a treaty, but they are given life, as you just illustrated, not by a treaty but by court decisions or, indeed, decisions by regulators. Is it not already in the withdrawal bill that the general principles of Community law, as it used to be called—the general principles of EU law—that have been given life in decisions of the European Court of Justice in Luxembourg or any court or tribunal in any of the legal jurisdictions of the United Kingdom will continue to have force in the legal systems of the UK after exit day? Has that problem not already been solved in the bill?

Daphne Vlastari: You are right that that is the case for existing ECJ rulings. There will be recourse to them and, when there is reference to the principles in ECJ rulings on specific cases and specific existing laws, that will be the case. The point that we are making is that a specific ruling applies to a specific piece of legislation in a rather narrowly defined way, as it should for a specific legal case. The principles as they are enshrined today in EU treaties are broadly applicable so, should a crisis arise or should there be a new policy decision to make, recourse would still need to be able to be had to those principles. The ECJ rulings in and of themselves would not allow for that, because their scope is much more limited.

To give an example that is quite different, do you remember the Norwegian volcano that erupted? I will not even attempt to pronounce the name of it. On the basis of the precautionary principle, flights were halted at that time.

Adam Tomkins: It was Icelandic, not Norwegian.

Daphne Vlastari: I am sorry—that is correct. That impacted on flights in the entire EU, and there was a lot of backlash at the time from people saying, "Why did you do this? It was overly precautionary." In the end, it turned out that that decision was right, because the ash would have severely affected flights coming in.

Adam Tomkins: Are you saying that that decision could not be taken for UK airports or airlines because some provision of the withdrawal bill means that UK regulators would no longer be able to take such a decision?

Daphne Vlastari: I am saying that there was a much more direct course of action because of the principles that are enshrined in the EU treaties. We would like the same confidence and certainty moving forward across the UK.

The Convener: I will move on to something else that you raised in your opening remarks—the policy framework that exists in the European Union, which I notice is one of the strong themes that have come from the evidence from all sides. We have a policy-making framework in the EU, and concerns have been expressed in evidence to us that there may be a risk to that process and how it has evolved, because some of the certainty and the regulation that comes from it could be lost. Others see it as an advantage to be able to change policy in the future. I would like to understand a bit more about that. I do not know who would like to pick up on that element before I leave this theme.

Simon Collins: We certainly do not want a legal vacuum—nobody does. For that reason, we accept the reasons of time that apply to the bill. We see where the Department for Exiting the European Union and DEFRA in the UK are coming from about having the bill as a necessary first step; we entirely agree with that. The question for us is what happens afterwards.

The fishing industry has always been keen on devolution. The closer management is to where the people are fishing—the fishing grounds—the more likely it is to work and the more likely it is that we will meet the objectives that are set higher up, on the principles of which we would not disagree. The question then is how we ensure that the devolution of powers passes smoothly after, or through, the withdrawal bill. We will come on to that in a minute.

As I have mentioned, there are two parts to the EU competence that concerns fisheries. One is the EU acting as a coastal state and negotiating on our behalf. That responsibility will come to the UK, which is the natural place for it, and we are happy with that as long as there is an arrangement with the devolved Administrations to make sure that the UK speaks for everybody.

We are keen on devolved fisheries management. If the withdrawal bill does not propose passing those powers through quickly enough, which is our concern, we would like some mechanism to make sure that that happens, which we suggest might be an amendment—brighter brains than ours can figure out whether there is

some other mechanism to achieve the same aim. It is the outcome that we are interested in, not the point of legal scruple.

We would like to get the devolution of powers through the bill. We accept that the bill is probably the necessary first step, but it is only the first step.

The Convener: Simon Collins has naturally taken us into the next bit of the process. Does anyone want to touch on that issue and on the policy framework that exists? A theme that came through to me is that there is a fear that some of that could be lost in decision making. The RSPB has reflected on that, so does Isobel Mercer want to say anything about it?

Isobel Mercer: Naturally, we fear that there may be gaps in environmental protection as a result of the legislation being brought over. I can go over some of our key concerns about the bill in a minute when I give an introduction to that.

A headline point to highlight is about the benefits that the EU framework has provided for environmental protection. For instance, the birds and habitats directives protect priority species and habitats in the UK and across the EU. It is key to bring over those provisions in their entirety not only for the protections that they provide to the environment but for the regulatory stability that that would provide to businesses and developers.

The regulatory fitness and performance programme check of the birds and habitats directives that the European Commission carried out last year clearly showed strong evidence about the benefits that have been provided; the directives have created a level playing field and limited competitive deregulation across the EU. It is imperative that that continues to operate in the same way once we are out of the EU.

The Convener: Why will that not be the case? I am struggling to understand why that will be the situation after the bill. Why will the regulatory stability not still be there?

Isobel Mercer: If it is okay, this is where I will start to go into the detail. We have three main concerns about the bill. Daphne Vlastari has touched on some of them, so I will not go into them in a lot of detail. The first is about environmental principles, which have been discussed. The second is about the governance gap, which is key when it comes to stability. It is about the effectiveness of the implementation of environmental legislation and ensuring enforcement and compliance—that is a key role. Daphne Vlastari touched on that, but I will go into a bit more detail.

EU bodies and institutions have played a key role in enforcement and compliance but also in things such as monitoring and reporting requirements under environmental legislation. Mechanisms that the Commission and the Court of Justice provide do not exist in the domestic context in exactly the same way as they do in the European context. We are concerned that, with the loss of those oversight and accountability mechanisms, even if the entire body of EU environmental legislation is brought over as it is, it will not operate as effectively as it does at present. That is one of the key issues that we are really interested in looking at solutions for. We do not feel that the bill provides for all those functions to be replicated in a domestic context.

Our final point is about the scope and scrutiny of powers that are conferred under the bill, which will be discussed quite a bit today. Many stakeholders across many sectors have brought up the fact that the scope of the powers is extremely broad and there will be insufficient parliamentary scrutiny of some of the regulations that will be created under the bill. We are concerned that, as a result, the bill could lead to what we would consider to be non-technical changes—substantive policy changes—as opposed to technical changes. The powers that are conferred under the bill give ministers the scope to make more substantive policy changes without the correct parliamentary scrutiny.

10:30

Alexander Burnett (Aberdeenshire West) (Con): You mentioned gaps in the bill; there have also been gaps in EU legislation—I think particularly of the soil directive, which never happened. What thought have you given to the frameworks? How would they work for future opportunities to deal with aspects such as soil?

Isobel Mercer: Our immediate priority is to ensure that the frameworks that exist under the EU arrangements are carried over, and then, at some future date, we can look at how to improve them. The immediate priority is to ensure that current protections are not weakened. That has been our focus and our starting point.

If you are starting to think about areas where we might need common frameworks across the UK in the future on the environment, we feel that there is so much uncertainty about our future relationship with the European Union and what frameworks might be included in a deal that it is not really worth while looking into specific areas at this time. We are more interested in looking at the process for developing the frameworks across the UK countries in a way that will be agreed fairly and jointly between all four countries so that the frameworks are not imposed. That will lead to legislation that functions more smoothly and is better complied with. That is where we are coming from on those issues.

The Convener: You raised the potential for less oversight and less enforcement. I want to get practical examples of that. The suggestion is that the structures that may exist in the UK in the future will not be the same as the structures that exist in the EU. Will you or somebody else give us a bit more detail on a practical example of where that might occur and what that might look like?

Isobel Mercer: I will give one example of where we feel that EU oversight has been integral in ensuring environmental protection. With the knowledge of the UK authorities, there has been a lot of burning of blanket bog across special areas of conservation in England. An appropriate assessment of the burning in those areas should have been done under the habitats directive framework, but it has not been. The European Commission is now taking action to ensure that the UK authorities take appropriate action. In that instance, the Commission is providing a kind of free forum for citizens and organisations to bring a complaint about how a member state is implementing environmental legislation. We do not feel that such a forum exists in the domestic arrangements.

I do not know whether somebody else wants to add examples.

Adam Tomkins: That is incredibly helpful and is exactly the level of detail that we need to understand. If you are right that the bill opens up a regulatory gap so that something that is currently regulated at EU level will not be transposed into the domestic legal arrangements of the United Kingdom, what kind of remedy do you propose? What amendment to the bill would be necessary to plug the gap that you have identified?

Isobel Mercer: Greener UK drafted specific amendments, which have been laid. I do not have them with me, but I can—

Adam Tomkins: Can you send them to us?

Isobel Mercer: Yes—I am sure that we can get them to the committee.

Dr Pazos-Vidal: I will comment briefly on the remarks from my colleague from the RSPB. We have made it a necessity to have an act that will basically reverse the European Communities Act 1972, which is what this is about. The problem is that the UK is not what it was in 1973. The bill has genuine substance, but its form is simple. It does not provide sufficient guarantees about how to develop domestic UK-wide frameworks and international obligations. Some members have said, "Why not?" It could well be that the current bill might work well if everybody read it in the same way and if there was the same understanding of what it means across the UK. However, that is increasingly not the case in the UK as it stands.

There have been a lot of informal arrangements for intergovernmental co-ordination on EU matters. In some cases, there has been exquisite respect on the UK level for the different provisions and policies of the devolved Administrations, but it has always been informal. The basic principle of what Scotland's exclusive competence is has been very clear. Scotland is unique in the 60-plus devolved Administrations in Europe in having such clarity. A trust and a culture of intergovernmental relations could therefore be built, but it is questionable whether a climate exists in which we can assume that the existing implicit lack of legal detail will continue.

I will mention examples of regulation informing gaps. I am coming back not to an environmental issue but to competition issues and state aid. It is not clear to us whether the state aid guidelines, for instance, which say when a public authority can give a subsidy, are covered under the scope of the bill. Maybe we are wrong, but we do not see that. For a start, the approach is not in a legally binding piece of secondary legislation. Most of the European Commission's guidance on state aid issues, which are regulated and enforced at EU-wide level, is sort of political guidance, if you like. It is not clear to what extent the current state aid bodies will be incorporated through the bill.

In terms of enforcement bodies, the UK has changed with the EU and the UK has changed because of devolution. Perhaps we now need to consider whether Westminster as a whole needs to change as a result of those changes. We cannot just assume that we can have UK bodies on competition, for instance, as UK Government bodies. We can have UK-wide bodies, and the question is how we build the framework, because we cannot be in a position where one level of government is jury on and party to an issue of competition policy or state aid, for example.

The Convener: Simon, do you want to contribute before we move on?

Simon Collins: I have a quick comment. You asked earlier about concrete examples of how things work and what you might do. A number of us, certainly in fisheries, have often had the unhappy and extremely frustrating experience of going to the Commission to ask for this and that—things at a very technical level such as improvements in fishery policy—and having unelected officials in the lovely Berlaymont building in Brussels saying, "This can be done" or "This cannot be done", which can have an immediate and significant impact on Scottish businesses. When we have gone back to our friends in the European Parliament and asked them to question the relevant individual and get them or even their superiors to justify their decision, the answer has been, "No. Sadly, Simon,

we cannot". That comes from not just Scottish MEPs but friends that we have in other countries. It is a continuing frustration. We cannot question the individual about that decision or, indeed, a range of decisions.

I say that to put things in perspective. I am not an apologist for the bill—I did not draft it—but surely the UK and Scotland should be in a better position than that. If the committee wishes, you should be able to ask Scottish ministers or Scottish civil servants to come here, and they should have to come. I am sure that that happens already. We do not have that with the Commission.

Robin Parker: I will briefly come back to Adam Tomkins's question about improvements to the bill. The withdrawal bill gives powers to ministers—it is not 100 per cent clear whether that is UK ministers or UK and Scottish ministers, et cetera—to assign functions to do with governance, scrutiny, enforcement and so on to existing public bodies. A simple change that could be made would be the introduction of a requirement for ministers to do that and the removal of the power that exists in the bill that allows ministers to abolish some of the current requirements. If the bill is about providing continuity, requiring those changes to be made is really important.

The second thing is that although there is an immediate issue with improving the bill, there is the longer-term question of how we can develop better things for the future. Does that require new bodies to be created from scratch and so on?

Adam Tomkins: One would not expect to see that in the bill.

Robin Parker: No, not in the bill. As I understand it, the amendment simply says that ministers must find people to do that. There has also been a suggestion that there should be a sunset clause to allow the interim arrangement for only a certain period and that ministers should be required to find a long-term solution before that period ends.

Again, I will give a practical example. One of the roles that the Commission has been able to carry out in respect of the UK and, indeed, Scotland has been to act as a prod before things get fully into the legal process. The Commission was able to rattle the sabre, for example, around the implementation of clean air directives in the UK. That pushed the UK Government towards bringing out new clean air plans. The Commission saying that we need to look more closely at clean air has also been one of the pressures that led to the Scottish Government pushing it up the political agenda and to Parliament giving greater attention to the issue.

The Convener: It is helpful to get those examples. Does anyone want to say any more about the policy framework before we move onto the repatriation of powers?

Daphne Vlastari: You mentioned specific examples, and we have touched quite a bit on the judicial and legal aspect. Of course, enforcement and monitoring require the more mundane tasks of collecting and publishing data. Questions have been asked about whether due consideration has been given to whether the UK as a whole would like to continue being a member of bodies such as the European Environment Agency or the European Chemicals Agency, which collect a lot of data that a lot of British industry has invested in pulling together. That needs to be looked at. Of course, the final outcome will depend on how the Brexit negotiations go and the future arrangement between the EU and the UK, because it might be part of the final negotiating agreement.

As Robin Parker correctly pointed out, we want to see in the bill a duty on ministers to assign those important functions to domestic bodies or look into the possibility of creating new bodies where existing bodies cannot perform the functions, and we want a firm commitment from the Governments of the UK that that will be looked at. In particular, the legal and infringement aspect that the EU performs cannot be replicated either through the UK or the domestic Scottish legal system, because of the limits of judicial review. That is important.

The Convener: Daphne, you know that I am keen on practical examples. So that I can understand this, will you give me a practical example of a new body that might be required to be created in the UK or Scotland as a result of our leaving the European Union?

Daphne Vlastari: You could consider a variety of bodies, depending on what functions you would like to assign to them. You could consider expanding the role of the Joint Nature Conservation Committee in collecting, collating and publishing data. You could consider the development of environmental courts in Scotland or similar bodies across the UK. You could have an environmental commissioner or ombudsman who would take up complaints by citizens, businesses and stakeholders regarding the implementation of EU retained law. There is a host of options. At the moment, it is much more helpful to look at functions that bodies could perform, and assess as effectively as possible which existing bodies across the UK and in Scotland could perform those roles and whether there are any gaps.

The Convener: That would not necessarily be dealt with in the bill. It could be part of the

discussion that follows it and the environment bill that will go through Westminster.

Daphne Vlastari: Yes, of course there is a discussion about the UK environment bill. In the withdrawal bill we would like to see not only firm commitments that the existing functions and bodies will preserve the duties, but robust commitments for the future.

Patrick Harvie: I will pick up briefly on an aspect that, as has been said, would not be included in the European Union (Withdrawal) Bill but is an issue that arises as a result of it. Daphne, you have talked about the potential for a specialist environmental court in Scotland. My view is that there has been a case for that for some time, even aside from the European Union context that we are in now, but the Scottish Government has not, so far, been persuaded of it. Would it be fair to say—I wonder whether anyone would disagree with this—that even if the Scottish Government is not yet persuaded of the case for such a court, it would be premature to rule it out until the Scottish Government knows the reality of the environmental functions that will be the devolved responsibility of Scotland and the pressure that that will place on Scotland in terms of decision making?

10:45

Daphne Vlastari: I do not think that it is a surprise to anyone on the committee that Scottish Environment LINK members have supported the creation of environmental courts in Scotland exactly because we have been failing to fully implement a lot of the Aarhus convention requirements. We feel that environmental courts or tribunals would be a way of addressing that. In the context of the UK's exit from the EU, there is an even stronger case for environmental courts to address issues of access to justice. We were, of course, disappointed by the Scottish Government's decision, but I would like to read its decision in a slightly more optimistic vein. I hope that, in the future, given that we have identified this governance gap, the Scottish Government will reopen the door to examining the possibility of having environmental courts or tribunals. They are an important part of the solution.

The Convener: Let us leave that discussion in a mood of optimism. I could do with some. [*Laughter*.]

I want to move on to repatriation areas, otherwise I will not manage to cover all the themes that we have. Clare Slipper from NFU Scotland said that she was happy to contribute to the beginning of the discussion. Clare, over to you.

Clare Slipper (NFU Scotland): Thank you for having me.

On the repatriation of powers, our starting point is that NFU Scotland is very alive to the political and constitutional tensions that exist in the debate. Our position is not necessarily framed by an expert constitutional or legal perspective; rather, we come from the end of the telescope of speaking on behalf of our members on what they feel they need to survive and prosper after Brexit. What is important to establish as a starting principle is that agriculture has been in the domain of the Scottish Parliament and Government since 1999. Generally, that has worked very well for our members, and they wish to see no rollback on it. Essentially, it has allowed decisions that impact on their businesses to be made closer to the businesses that they implement. It is important to establish that starting point.

NFU Scotland members have said that their starting point or primary concern is not where the powers will sit after we leave the EU, but more about ensuring who can get the best deal for them to allow their businesses to prosper. A good deal for them would be: first, frictionless and barrier-free trade with the EU; secondly, access to a skilled and competent workforce for seasonal and permanent posts to work on farm and off farm, which is very important; and, thirdly—this is where the key arguments over the repatriation of powers come in—a new agricultural policy in Scotland that allows us to effectively target policy and money towards action, rather than inertia, to allow their businesses to grow. That is just a bit of context setting.

On the repatriation of powers, the point was made that the constitutional backdrop of the UK has changed a lot since we joined the EU in the 1970s. We can see no clear-cut way of defining where specific directives and EU policies can be cut and pasted into Scots or UK law after we leave. We know that, obviously, on the day that we leave the EU we will also leave the common agricultural policy. Since 1999, the Scottish Government has had powers to implement the CAP, and when we leave the EU it will be up to the UK Government and the devolved legislatures to decide and devise how we can support agriculture in the longer term.

Although those powers have just been about implementation, there is a widely held view—I believe that this was supported by the Scottish constitutional convention in 1995—that due to issues such as agriculture not being specifically reserved in schedule 5 to the Scotland Act 1998, the Scottish Government should retain the ability to frame policy in areas such as agriculture. However, it appears that the EU withdrawal bill turns that on its head and assumes that those powers are not absolute across the subject matter. That is where we run into some difficulty.

What we believe is likely to happen—we hope that it will—is that the Scottish Government will retain the ability to manage payment schemes, if, indeed, we do go down the road of having a future payment scheme to support agriculture, and will implement agreed schemes, policies and regulations in a manner that is very similar to what we have had for the past 20-odd years under the CAP. We need those management and implementation powers to be used in a way that will be subject to certain constraints, which will probably be set at the UK level. Those constraints will be the overarching areas of policy that cut across borders and make sense to be done on a framework basis, in a similar manner to the way that it has been done under the EU.

Areas of regulation that should be maintained by the UK single market are animal welfare, pesticides regulation, chemical regulation and things like that, where it would make no sense to have four differing and separate schemes of regulation. We see it as vital that anything that is managed on such a framework basis, in which issues are left within the mainstay of the devolved nations, is commonly agreed. I put an emphasis on that. From the outset, we have been very clear that any move to drop down a policy framework that is a DEFRA-centric view of the world on to Scotland would not be acceptable. There has to be consensus. That approach would not work for Scotland, Wales, Northern Ireland or, indeed, England.

Why is there an emphasis on it being commonly agreed? For us, it is vital that there is flexibility for the devolved nations to use more or less of different policy tools in manners that fit the differing agricultural systems across the UK. Here in Scotland, 85 per cent of our land is defined as less favoured area. In England, the opposite is true: fifteen per cent of England is defined as less favoured area. It is vital that we retain powers to support our less favoured areas and use elements of coupled support. Things such as protected geographical indication, for example the Scotch beef label, are also extremely important for us here in Scotland. Likewise, there will be issues in other parts of the UK that are more important to them and less important to us.

How do we ensure that it is commonly agreed? That has been the sticking point for us and it is really important. The arguments that seem to be on-going over the repatriation of powers suggest to us that UK and devolved ministers need to get a lot better at collective decision making. We need to try to find some resolution to that pretty urgently. I am not sure how it could be done; perhaps through having a beefed-up joint ministerial committee, emulating the EU Council of Ministers or having a better dispute resolution mechanism. Something of that sort needs to be devised quickly. The issue is not just policy-making powers. There are also issues with funding that we might touch on later in the discussion.

The issue is not really as clean-cut as saying that the powers will be cut and pasted into either UK or Scottish decision-making powers. For us, the emphasis is on collective decision making and ensuring that Scotland has the powers that it needs to devise a policy that is suited to it, in a manner that allows us to maintain the integrity of the UK single market, which is very important for trade.

I will leave it there for now.

The Convener: That was a helpful introduction, Clare. I should make it clear that we are talking about repatriation of powers just now, and I am keen to allow Colin Reid from the University of Dundee to talk about common frameworks in the next section. I realise that there is a close synergy between the two issues, but for the moment, can we keep the discussion on how the bill is structured to the issue of repatriation of powers? We can get into the framework stuff later.

Murdo Fraser (Mid Scotland and Fife) (Con): Clare Slipper's introduction was helpful as a practical illustration of some of the issues. I have two brief questions for you, Clare. First of all, you gave some examples of things that you or the NFUS thought should be decided at a UK rather than devolved level. Does the NFUS have a finely detailed proposal on exactly which level every piece of legislation should sit?

Secondly—and you sort of touched on this in your comments—how do we ultimately arrive at a settled view on where those things sit? What is the mechanism for actually getting to a point at which we can agree these things?

Clare Slipper: On your first question, we are in the process of putting together a detailed policy proposal. Starting next week, we are going out on the road to consult our members on what the die-in-the-ditch policy issues are and what they feel we need to build into a new agricultural policy after Brexit.

I do not think that the examples that I gave will change. There is consensus among us and our colleagues in the farming unions elsewhere in the UK that it makes sense to maintain very high standards on issues such as animal welfare as well as public health, which I do not think I mentioned.

This brings us back slightly to an earlier area of our discussion. It is very likely that what happens in such areas will be fairly equivalent to what happens under the EU anyway, because we have very high standards in them and have no desire to roll them back. From a purely technical or logistical

point of view, it makes no sense for us to split off into four and devise four different ways of doing things and then to try to find commonality. Instead, we want joint decision making over how we emulate that in UK law—it just feels like the easiest way.

As for your second question on how we get to that point of joint decision making, I am not a constitutional expert, but I do not believe that there is anything written into law at the moment that would allow that mechanism to take place. Clearly, we have the joint ministerial committee structure at the moment but if you read and believe the press reports, it does not seem as though we have been getting very good outcomes from that or a lot of progress in the discussions. Perhaps there has been a bit of a break in the deadlock over the past couple of weeks.

For us, it is a shame that the withdrawal bill is not about how things such as frameworks will be dealt with on leaving the EU; after all, issues such as the CAP are so massive and vast. Given that 40 per cent of EU spend every year is on the CAP, you would have thought that such an issue would have been referenced in the bill, but it has not been. That is just one detail that we need to work through.

The Convener: I want to widen out the discussion by bringing in Kate Houghton.

Kate Houghton (Royal Town Planning Institute): Just for context, I should say that the RTPI does not take a position on where devolved powers should sit; we are entirely neutral on that. Our priority is to work with our members who work as town planners throughout the United Kingdom in the public, private and third sectors to make sure that the system works in the best way possible.

It is worth jumping in here, because the planning system provides a really neat example—which, I am sure, is replicated elsewhere in policy—of why we need to make sure that there is more clarity in the bill about where devolved and repatriated powers are going to end up. The planning system itself is entirely subject to domestic law, and it predates the United Kingdom's membership of what is now the EU. That continues to be the case. It is also an entirely devolved issue and falls within the competency of the Scottish Parliament and Government.

That said, the town and country planning system exists in a context and is linked to other areas of process and legislation. A useful issue to highlight is environmental impact assessment and regulation. With the introduction of the EIA regulations, we essentially have a twin-track system, in which environmental impact assessment happens as part of the planning process but is obviously governed by the European directive transposed into domestic law.

With regard to domestic planning law, the system in Scotland, especially in the past 20 years, has really started to diverge from the English system, and it gives us a really nice example of how, constitutionally, the nations have changed over the past decade. In Scotland, you now have a quite different planning process to that in England, even though it is still founded on the same principles. It is worth highlighting the fact that, when the powers over environmental impact assessment are repatriated, there might—and we need to be cautious about this—be an opportunity to think about how we decide how that process will be integrated into the planning process. It will still have to happen, and I certainly hope that it does.

I do not want to get into frameworks—we will address that topic next—but, although we support a common framework across the UK, we feel that it is important to think about how the planning process works and how a new environmental impact assessment process will interact with that.

11:00

The Convener: I wonder whether, as we go round the table, folks can make it clear where they stand on clause 11, on which everyone is focusing. A lot of the evidence that we have received says that the bill goes too far, and at the end of the day, that is really the nub of the discussion. We will get to the issue of frameworks, but I wonder, Kate, whether you can reflect on clause 11 and whether you think that it is satisfactory or whether it should be amended, dropped or whatever.

Kate Houghton: I think that we ned to think a little bit more carefully about the outcomes to make sure that the process works effectively. There needs to be a little bit more clarity about whether the issues that are being discussed are technical or non-technical.

The Convener: Simon, do you want to address that issue in your remarks?

Simon Collins: Yes. Actually, it all starts where Murdo Fraser started—on the division between devolved and non-devolved powers. Helpfully, we can start with what David Mundell said yesterday about there being a presumption of devolution. We buy into that.

What we are looking for is an outcome. As far as clause 11 is concerned, what the fishing industry needs for the purposes of day-to-day management is powers being devolved back to Scotland. That is absolutely clear. It is the only way that we can see of having what we call proper reactive management.

As we suggest in our submission, even if we accept that clause 11 is required to be the way it is for reasons of time, for legal reasons or for any other reason—say, the massive amount of work that has to be done—and even if that is what has to happen on day 1 of Brexit, we see no reason why Scotland could not resume its ability to exercise the presumption of devolution as soon as possible afterwards on day two, week two or whenever. If someone—it would be much better if it were a constitutional lawyer instead of us—could devise a way of achieving that aim without having to amend the bill, so much the better, but what we are really focused on is the outcome, which is devolved management of Scottish waters.

The Convener: That is the nub of it, Simon, is it not?

Simon Collins: Yes, it is.

The Convener: Once statute is made, it is made. If this statute were to be passed, no one would have any certainty about when those powers would come to the Scottish Parliament.

Simon Collins: Yes, and that is a problem for us. That is what we would like to know, either through the statute—as you have suggested, convener—or through some other way. That is the outcome that we are focused on.

The Convener: Right. I wonder whether others around the table would like to comment on that.

Robin Parker: I am afraid, convener, that you are not going to draw me into taking a side one way or the other on clause 11, but—

The Convener: I am not looking for sides—I am just trying to get something that we can put in our report.

Robin Parker: I do not how to say any of this without getting into the common framework stuff, but as a starting point—and this predates the withdrawal bill—what WWF wanted was a common framework, given that environmental issues involving pollution, animals and so on do not reflect borders. We wanted that to be set out in the devolution agreement as it stands; the way that we have always approached constitutional issues has been to say, "This issue is up to this or that", but in this respect our starting point was the current devolution arrangement.

Let me offer an example of a common framework that we have built in areas across the UK: marine protection areas. They involve a mixture of devolved and reserved matters, and the different UK Administrations worked together on a shared UK marine act that set out common goals, of which a really important one was the achievement of good environmental status for the waters around the UK. It also gave freedom, if that is the right word—or, I should say, flexibility, which is the right word—to each of the different devolved Administrations. For example, the Scottish Government was able to develop that legislation to put in place its own marine planning framework and so on.

Maree Todd (Highlands and Islands) (SNP): I have another question for Simon Collins about the Scottish Fishermen's Federation position on fisheries management. You have made it very clear that such management will need to be devolved very quickly to the Scottish Parliament, but you have been a little less clear about quota negotiation and the way in which the EU acts as a coastal state. You said that you understood why that power might need to be exercised by the UK, but you went on to suggest that Scottish ministers should take the lead with regard to fish that are mostly caught in Scottish waters. Can you tell us a little more about that?

Simon Collins: Yes. Whether we are talking about day-to-day fisheries management or negotiating as a coastal state, what we are looking for is the thing that makes most sense to our members and which is most likely to get them what they need. For them, if the UK were the coastal state, it would have the negotiating power that would give Scotland a win-win. That is how they see the issue. The catch is that, as the predominant fishing nation in the UK, Scotland must ensure that its interests and priorities with regard to our fisheries and the stocks in which we have a dominant interest are translated into the UK's position.

However, this is not a one-way street. We expect situations to arise that the English, Welsh and Northern Irish fisheries will have a particular interest in—after all, there are species in the Channel in which we have no interest—and they will have the right to have the predominant say in framing the UK's position as coastal state on those matters. The situation should not be antagonistic; there is enough separation and enough of a bias towards Scotland in most of the important stocks to make that self-evident. I also do not think that that needs to be in legislation. There should be scope for sensible adults to get in a room and put together a memorandum of understanding. That might be one way of ensuring that the Scottish interest in framing the UK's position is understood and taken forward by the UK. Our members think that using the whole might of the UK's waters is the best way of guaranteeing the best result for them.

The Convener: I will bring in Serafin Pazos-Vidal next, but I must ask him to stick to the repatriation of powers issue, because I am keen to protect Colin Reid's space with regard to common frameworks. We have already strayed into that

area a fair bit, and I have probably totally failed to provide that protection, but we will keep going.

Dr Pazos-Vidal: I want to talk very briefly about the issue of repatriation and apportionment instead of common frameworks. Clearly, we agree that there should be UK-wide policies, bodies and enforcement for transboundary issues, in the same way that there are EU laws on things that are, by definition, transboundary. The problem is how we apportion responsibility between Scottish level and the UK level when all these powers come back, because it will completely change the dynamics of devolution in the UK.

What I find interesting is the bill's very open nature—it gives options. If you want to make sense of it, it is much better to refer to its explanatory memoranda as well the February and March white papers and, in particular, the 16 October joint ministerial committee communiqué, which sets out a number of principles on how this relationship might move forward and when that discussion should take place.

The problem is that it is all very general and implicit, and the relationship is much less clear and stable than what you see now in the EU treaties. In the EU treaties, you have something called the principle of subsidiarity, which sets out how shared responsibility should be apportioned between different levels of government. There is the principle of proportionality, which, of course, is not foreign at the UK level, but it is very clearly framed and the EU has to operate on it. Are those two principles implicit in, for instance, the 16 October communiqué? We have very different approaches, including an increasingly diverging approach in the UK, and it might not be enough for such things to be left implicit. It would be much more comforting if those principles were framed in very precise legal terms in the bill, because it would create a level playing field and give a sense of reassurance to everybody.

I want to veer into a small international example of present actuality—the Catalan crisis.

The Convener: Let us make it very small.

Dr Pazos-Vidal: It is very simple, convener. The issue has many dimensions, but one dimension that is perhaps not understood here is that a lot of the problems have arisen because of the different levels of government. All the powers are shared between the central and regional Governments, and because they do not agree most of the time, they end up—apart from the political discussions that we have seen—having a bonfire in the equivalent of the UK Supreme Court over what are called positive conflicts of competences. Almost no cases regarding the devolution of competences are coming up before the UK Supreme Court at the moment, but the risk is that, if the bill contains no clear guarantees, we will end up with a lot of litigation going to the UK Supreme Court.

The Convener: I will bring in Clare Slipper, and then I will move on to frameworks.

Clare Slipper: I have a quick point on your question regarding clause 11. This is not the view of NFU Scotland; it is just something that occurred to me when reading through the bill. Essentially, clause 11 means that the Scottish Parliament will not be able to

"modify, or confer power by subordinate legislation to modify, retained EU law."

This is what has been characterised as a land grab. An alternative view that occurred to me was that it would simply prevent the devolved Administrations from legislating incompatibly with the EU on areas such as agricultural frameworks, which would be retaining the status quo if we were to stay in the EU anyway. As I said, that is not the view of the NFUS; it is just something that occurred to me.

I understand that, in the explanatory notes of the bill, there seem to be warm words from the UK Government saying that it will work closely with the devolved Administrations in areas such as the repatriation of powers and the procedure for release by order in council. Again, that is not something that I am familiar with, but I think that we could perhaps do a little more examination into why that then cannot be put on the face of the bill, perhaps subject to a sunset clause, which there was talk of earlier, or a similar procedure that would give a date by which these issues need to be worked through to give clarity, because that is what industry needs.

The Convener: We will move to framework issues and hear from Colin Reid of the University of Dundee.

Professor Reid: As the discussion has shown, whatever decision is taken on repatriation and wherever the boundaries are drawn between devolved, reserved and retained EU matters, there is going to have to be collaboration, and that collaboration is going to extend upwards to international level and below national level to the local government mechanism. The current devolved arrangements have lots of examples of bilateral co-operation between the devolved Administrations and London. They are not very strong at all on arrangements for bringing all four Administrations together.

When you look at the communiqué from the joint ministerial council a couple of weeks ago, you see that it identifies a number of ways in which things could be done together in the future. It talks about common goals, minimum or maximum standards, harmonisation, limits on action and mutual

recognition. It has to be recognised that each of those may require a different structure and may require a different form of organisation. The extent to which you change things to achieve that can vary greatly. One option is to completely rewrite the constitution on to a federal model, in which there is an English Parliament and an English Government that will deal with things separately. It may simply require a different way of working in Westminster, recognising that it has to pass two sorts of legislation: one sort of higher-level legislation that is like an EU directive and deals with the UK as a whole; and, separately, more detailed legislation for responsibilities in England.

If we are going to have common frameworks, a number of questions arise. First, who will develop the policy, the standards and the goals of the framework? There is a range of options. It could be joint working between Governments, but that will require genuine willingness to co-operate, and the past few years suggests that that will not always be the case. It could be that one body has the power but does it by consultation with other bodies. You could give power to specialist groups such as the Joint Nature Conservation Committee, which would do a lot of the discussion and a lot of the hard work in doing things together but then pass on recommendations to the legally authorised legislators and so on. Maybe we need to create new bodies to fulfil functions. We have some bodies that stand above on specialist areas or, more generally, that link together the devolved and UK Administrations.

Whatever happens in relation to forming the policy, you then have to think about who has the power to legislate. Somebody has to have the power to legislate. Will that be strictly divided between the different Administrations, or will there be a wide area of shared competence? At present, under the European Communities Act 1972, either London or Edinburgh, Cardiff or Belfast can legislate. Are we happy to have large areas of shared competence and, if so, who will decide what is done where? What will the control mechanisms be for that? If we have UK-wide frameworks, how will compliance with them be enforced?

At present, if a member state does not meet the requirements of EU law, the Commission can take action and individuals can take action. What would happen if there was an agreed framework at UK level but the Welsh, Northern Irish, Scottish or English Government did not implement it properly or fully? What would the consequences of that be? Who will scrutinise what happens at any of the general policy-making levels? If we have new bodies that are devising the general framework, what will their accountability be and to whom? Will the Parliaments work separately, and should the Parliaments be thinking about new ways of coming together? Should there be joint commissions of the Parliaments to fulfil all the functions? That is an awful lot of questions—I am sorry—and not many answers.

The answers are complicated by further things such as cost—who will pay for whatever structures are put in?—capacity and expertise and how often we need to have separate bodies dealing with things. They are also complicated by the asymmetrical nature of British devolution. In the EU, it is easy: you have the EU and the member states, and all the member states are in the same position. In the UK, on all sorts of what, from the outside, often seem like fairly esoteric issues but I am sure, as soon as you start dealing with them, are actually very major ones, there are differences between the precise powers of the Scottish, Welsh and Northern Irish Administrations. Sorry—there are lots of questions rather than answers.

11:15

The Convener: I think that those questions are being asked by lots of people. You have explained it pretty well. We could get into trying to design a system here today, but that would not get us very far—it might be some sort of council of ministers or whatever.

The best thing that we can probably do at this point in the discussion is to try to agree what principles we need to establish to create whatever the frameworks might look like. It was outlined that there are 114 potential areas that need to be agreed. It is now becoming clear that there will be a hierarchical approach to that. Some sort of frameworks will be required at a national level. Some will require a memorandum of understanding; some may require only an exchange of letters. There are lots of mechanisms that we can use to deal with those, but I guess that the key question for me, which I hope we can address today, is this: on what basis should they be taken forward? Is that by consultation, or is it by agreement? I am sure that there will be others who want to add other thoughts into the process, but that is where my head is at the moment. I see Clare Slipper nodding.

Clare Slipper: I agree with what has been said. There are clearly very complex questions, and I raised some of them in my remarks, but it is not consultation or agreement; it is both. I do not have the answer by which structure you would ensure that, but there needs to be a bit more good will on both sides to escape some of the politics around this and look at where we want to be and then at what things need to be dealt with in the hierarchy to get there. If we are to leave the EU on 29 March 2019, that is a pretty solid timeline by which, I hope, we will have a bit more clarity on some of

those areas, but, for now, we seem to be at a stalemate.

Adam Tomkins: I think that there is a view—it was reflected in what Colin Reid just said, which I found helpful—emerging, but, before we just accept that it is emerging, I would like to test it. There is a view emerging that the solution to the disagreement between the two Governments about clause 11 is a solution that relies on common frameworks. We know what the position of the UK Government is; it is reflected in the bill. We know what the position of the Scottish Government is; it is reflected in its legislative consent memorandum and the proposed amendments that it has put forward. It seems—if I have misunderstood you, Colin, please say so—that you and a lot of people think that the solution to this disagreement between the Governments about clause 11 lies in common frameworks, so that there will need to be some recognition in the withdrawal bill that some of the common frameworks might just be exchanges of letters, but some of them might require to be enshrined or at least recognised in legislation in a manner that constrains the legislative competence or the devolved competence of Administrations. Is that broadly your view?

Professor Reid: Yes, I think so. The differences between the two Governments represent fundamentally different starting points. They are not going to abandon those quickly. If the bill is, essentially, a transitional measure—a way of getting things done quickly—the question is where we will be in however many years' time. My suspicion, without being deeply involved, is that, if the devolved Administrations had greater confidence that their position, freedom and powers would definitely be recognised in the future, the fact that the way towards that involves giving more power to London might not be as big a problem.

Adam Tomkins: That is interesting. Is it your view that clause 11 would work if it were subject to a sunset clause?

Professor Reid: Rather than having just a sunset clause, it might work if there were greater agreement and confidence on where it was going. Sunset clauses, by themselves, are potentially dangerous because, when you ride towards a sunset and have not got everything done, you hit a problem.

Adam Tomkins: We are trying to deal with legislation, as you know. How do you write that trust or hope into legislation?

Professor Reid: That is the fundamental problem on all these structural issues. Any structure, however ill designed, can work if there is good will. Any structure, however beautifully designed, will not work if there is no good will to make it work.

Adam Tomkins: Do any of our guests think that this idea that we can solve the problem through common frameworks will not work? Is there any dissent from that view? I see that there is not—thank you.

The Convener: Whether there is or not—I am not sure that that there is—we will test it. If you want to reflect on that in what you are going to say, Robin, please feel free. I know that Kate Houghton wanted in as well.

Robin Parker: I am not sure that I quite understand Mr Tomkins's question, but maybe he will get an answer from what I say.

Our starting point, which predates the withdrawal bill, is that common frameworks are a desirable outcome because there are issues that spread across our borders. Fish do not know which exclusive economic zone they are in, which territorial waters they are in and that sort of thing. We are also quite clear—this is partly about a starting point of wanting to respect the existing devolution settlement—that they need to be commonly agreed.

The other benefit of those common frameworks being commonly agreed by the different Administrations in the UK is that, when there is buy-in and involvement in creating common frameworks, there is a greater desire to make them work and to implement them effectively. They will also be things that allow better flexibility to reflect the different geography, politics or desires in each Administration.

We are keen that the common frameworks that we end up with, by their nature, allow an element of flexibility. We are quite keen, for example, that they end up being floors rather than ceilings. If one of the nations of the UK should want to go further and create higher environmental standards, it should be able to decide to go further and higher and so on. The key thing that we want is to arrive at common frameworks at the end point. We want them to be commonly agreed where they spread into devolved matters. One of the questions that Professor Reid asked—this is what I took from it—was about the different ways and paths to reach that conclusion.

Kate Houghton: You asked whether frameworks needed to happen through consultation or by agreement. I agree with Clare Slipper that it is both. To go back to devolved issues, economic and spatial development policies are devolved, and, therefore, there are different policies on either side of the border. You will need to have a two-way conversation about how you meet in the middle of those policies in order to create a common framework.

I will give you an example, because I know that you are looking for examples. Obviously, these issues often become crystallised out of the physical border. There are travel-to-work areas and functional economic areas that cross the Scottish-English border, and those are not restricted by the existence of the border. Local authorities along the border work very closely together in practical terms. That is just an example of how a common framework would behave in guiding the actions and decisions of those local authorities. Dr Serafin Pazos-Vidal will be able to add more detail on that point.

The Convener: I will get to Serafin, but Patrick Harvie wanted to say something as well.

Patrick Harvie: Thank you, convener. I have a very brief point about the language that we are using to describe these things. Adam Tomkins's question was very important and clear, with one exception: the term "common frameworks" can mean different things. If we talk about commonly agreed frameworks, there might be times when that is achieved by an exchange of letters between two or more Governments, and there might be times when it is done by legislation when it requires legislation. That in itself has two possibilities: one is that each Parliament or legislative body, in its own jurisdiction, passes its own legislation to achieve that commonality. The other is that the UK Government imposes legislation regardless of the decision-making authority of another body. To me, the term "common" means "agreed in common", but perhaps we need to be more explicit about that and talk about commonly agreed frameworks or imposed UK frameworks, because they are profoundly different in terms of the questions about authority and democratic accountability.

Professor Reid: There is, of course, a third option, which is commonly agreed, where it is agreed that it will be legislated on by London using any reserved powers.

Patrick Harvie: But surely that itself blows a hole through the argument about devolved democratic accountability, because if a common framework is separately legislated in an agreed way, then if, at some future time, that agreement no longer exists, it is down to each participant in that agreement to decide whether it wants to put up with it or change. If it is legislated at UK level, the authority to change the agreement in future has also been ceded.

Professor Reid: It is a question of whether it is ceded for ever or as a one-off convenient function.

The Convener: Before I bring in Daphne Vlastari—sorry, Daphne—I have a question on that point. Does that two-way conversation that we are talking about—that consultation, agreement or whatever it might be—need to be written into the bill at clause 7?

Professor Reid: It would certainly strengthen the arguments for co-operation to have something more firmly in there. It is odd that, prior to all this debate coming up, we had a situation in which the UK Parliament and Government were able to legislate on European Community matters for Scotland as well. Whereas we have the Sewel convention in relation to primary legislation, to the best of my knowledge no formal process to involve the Scottish Parliament was included when it was agreed that delegated legislation to implement EU measures in Scotland would be made on a Great Britain or UK basis in London, rather than in Scotland. I find that a bit strange. It is right that there should be a big concern, but the gap has been there since the beginning of the devolution arrangements, with the UK Government having wide powers to make law in EC matters.

Daphne Vlastari: I agree with Colin Reid's remarks about frameworks. There are a few points to make from a Scottish Environment LINK point of view. We would like to see the right process put in place for agreeing on what UK frameworks are and how they are agreed. There is a marked lack of debate on those issues.

It is indicative that in the joint communiqué that was issued last week, which I think Serafin Pazos-Vidal mentioned, there were a lot of good principles in terms of where UK frameworks can apply, but nothing about stakeholder engagement or a transparent and inclusive process. If we want to have a real dialogue about how this can work effectively, we need to include as many stakeholders as we can and take those views into account.

That is one important point. The second point is that we have been talking almost exclusively about UK frameworks. That does not necessarily acknowledge the specific problems that Northern Ireland will have on its border with the Republic of Ireland. From an environmental point of view, they are considered a distinct ecological unit, so you could imagine some UK frameworks actually being wider frameworks that involve the Republic of Ireland in some ways. That is perhaps a slightly separate topic.

You mentioned clause 7, convener. We have specific concerns with respect to clauses 7, 8 and 9, which reference deficiencies in EU law and how it would operate in a post-Brexit environment, and technical changes. It is very important to limit those delegated powers to ensure that they do what they are intended to do. At the moment, they are framed in a general and open-ended way, which means that there might be substantive changes that we do not necessarily want and are not within the line of the bill.

The Convener: We will come to the technical stuff in the next bit of discussion.

Daphne Vlastari: I am just flagging that.

The Convener: That gives me a good link to Serafin Pazos-Vidal, to whom we are going next. Serafin, you will introduce the topic of the withdrawal bill and the technical issues. I do not know whether you saw the general principles that came out of the JMC last week and that Daphne has already flagged up. If you could reflect on what you think of those as you make your contribution, that would be helpful.

11:30

Dr Pazos-Vidal: My colleague mentioned enforcement models and new common frameworks. If you look at our submission, which is a result of the exchange that we have had with our counterparts in other countries, you will see that we have identified a number of common frameworks—from Italy, Germany, the Netherlands, Sweden and Finland—that could be learned from or which could serve as inspiration for the UK and the devolved administrations. Even the Committee of the Regions can, funnily enough, provide good practice here.

This is an important issue, because the bill will in effect change the constitution of the UK because of the powers being repatriated. It is technical and serious, and beyond the political.

In our view, the withdrawal bill should contain provisions on how common frameworks will be developed and, perhaps, reflection on possible models. That would include not just the devolved administrations, but local government, as one of the three tiers of government of the UK. At the moment, that is not part of the discussion. I should mention a number of bilateral discussions that we have had with the different Governments and with the European Commission. We met Mr Barnier last Monday.

I will give you an example of a possible framework. In 2011, the UK Government passed the Localism Act. The Localism Act 2011 sets a number of conditions. If a local authority is to be liable for paying EU fines for environmental infringements, for instance, the act decides how responsibility will be apportioned. Originally, it was a bit like the withdrawal bill: the UK minister wanted to take the decision on his own. We managed to negotiate a system—the "Policy statement for Part 2 of the Localism Act 2011"—which is a more intelligent way of resolving such disputes. In the end, the UK Government will have the last word, but it allows local government to try to understand and agree with central Government on where the responsibility lies. That principle, which has already been agreed for the 2011 act, would be a good basis for the wider governance of the UK.

We have not talked yet about the Scottish Parliament. Given the changes that devolution has helped to operate in the UK as a whole, and the changes to come because of the withdrawal bill, the issue of whether Members of the Scottish Parliament should participate in joint policy-making in London should be a consideration. We have suggested expanding the House of Lords or creating a special chamber—there are a number of mechanisms. At the moment, the only mechanism that we are aware of for interparliamentary cooperation is on EU law. To be precise, there is an early-warning system in which the European committees of the four Parliaments discuss in an informal consultation mechanism called the UK forum. Clearly, that is not sufficient, given the scale of the change to come.

I will draw again on the role of the Scottish Parliament and how it could better scrutinise the withdrawal bill and subsequent acts. I will use the example of EU law and the parliamentary scrutiny provisions of delegated and implementing acts. These are pieces of EU secondary legislation on which MEPs effectively have a veto. They have a month to respond to whatever the Commission has done as an implementing act. If they reject it, that piece of law is not included. It would not be a bad thing to consider the role of the Scottish Parliament and the other devolved Assemblies in relation to those issues.

I will conclude on a number of small technical issues that are not being touched on.

The Convener: One thing that came through in the evidence was that quite a number of today's participants had concerns about the powers that the withdrawal bill would give ministers to make secondary legislation and how to scrutinise that. In the 10 minutes that we have left, we need to address that issue, otherwise we will have nothing on the record. Could you deal with that now, Serafin, in your closing remarks? Then I will go to a wider audience.

Dr Pazos-Vidal: Absolutely. I just referred to the scrutiny provisions that MEPs have at the moment on secondary legislation. That would be a good template to apply and include in the bill. It would give MSPs a wider say on whatever actions ministers or MPs in London take on issues of shared competence.

There are a number of other issues that, as the convener mentioned, are technical. We would like to see more clarity on reporting obligations. Those are outlined broadly in the bill, but they should be clearer. There are issues of reciprocity. What happens, for example with waste shipment legislation? There is EU legislation that needs the

EU and the UK to work together, and that is particularly important for local government. Will the UK report on a number of large goals like the new energy package that is currently being discussed at the European level? Structural funds have also been mentioned. It is not clear whether those rules will be included in the bill, and that will have an effect on how moneys are spent in the future.

Finally, I will just briefly say that if the Scottish and Welsh Governments manage to persuade the UK Government to agree their amendments to the bill, whereby Welsh and Scottish ministers will not just be consulted but will have to give their assent, that will de facto be the biggest constitutional change in the UK in the last 40 years. Thank you.

The Convener: Right. Serafin picked up on the scrutiny process of secondary legislation. I know that some organisations commented on that. Now is your chance to put something on the record.

Isobel Mercer: As I indicated, we are concerned that, at the moment, the powers in the withdrawal bill mean that it will not be constrained to the purpose of the faithful conversion of EU legislation. In particular, we are worried that what constitutes a technical or non-technical change is not clearly defined and that the word "deficiencies" is not sufficiently limited. There is an illustrative list of what might constitute a deficiency, but it is not limited and it is not clear whether there might be other examples that are not included. Again, that could lead to more substantive policy changes being made through those delegated powers.

We were very pleased to hear Michael Russell mention at the Delegated Powers and Law Reform Committee yesterday that the Scottish Government is considering the kind of sift-and-scrutinise mechanism that is also being proposed down at Westminster. Greener UK fully supports that mechanism. Perhaps a time-limited parliamentary committee could sift through some of the statutory instruments to identify which ones might necessitate an increased level of parliamentary scrutiny—if the change was considered non-technical, for example. That is a brief overview.

The Convener: That was helpful, and it was quite clear. Thank you. Does anyone else want to pick up on that issue?

Clare Slipper: I completely back up what Isobel said. There needs to be a strengthened role for the Scottish Parliament—that is clearly a major concern. It seems as though the parliamentary committee structure has been somewhat bypassed in the drafting of the legislation. We agree with recommendations being put forward for either a strengthened role for committees to decide where scrutiny of statutory instruments takes place or, indeed, for a parliamentary committee structure to look at those statutory instruments to give them better scrutiny.

Simon Collins: I have a very quick observation. In all this discussion, it is interesting that we are obviously trying to go towards a much better system than we have already. It would be helpful if the committee bore it in mind that, in many policy areas, certainly in fishing, we are coming from a very bad area indeed. I am talking not specifically about secondary legislation, but about a whole range of discretionary powers that are being exercised currently without any checks, balances or questioning at all. Anything that can do better than that would certainly be a great deal better than where we are at the moment.

Daphne Vlastari: I fully support what Isobel Mercer said. I think that these are jointly held positions. We have also requested that the delegated powers conferred on ministers across the UK are time-limited to the two years and that any further changes to retained EU law from that point onwards need to be made through primary legislation. That is quite important.

Professor Reid: On the time-limited period, if we are talking about a two-year transition period during which we are maintaining the status quo, what happens during that transition period? That is a big uncertainty because it is only at the end of that that we may need to make some of the adjustments. We could be talking about a four-year period if there are two years of the status quo and then two years of transition.

Daphne Vlastari: Time-limited, nonetheless.

The Convener: Thank you very much to everyone for coming along. The committee will be trying to draw a report together before the end of the year—certainly an interim report—on our position on the legislative consent motion and a general report on the bill. Your contributions will help us hugely in that. I am very grateful to everyone for coming along.

11:40

Meeting continued in private until 11:56.

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