



OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 8 November 2017

Session 5



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FINANCE AND CONSTITUTION COMMITTEE

26th 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)
*Emma Harper (South Scotland) (SNP)
*Patrick Harvie (Glasgow) (Green)
*James Kelly (Glasgow) (Lab)
*Ivan McKee (Glasgow Provan) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Scott Mackay (Scottish Government)
Derek Mackay (Cabinet Secretary for Finance and the Constitution)
David Mundell MP (Secretary of State for Scotland)
Robin Walker MP (Parliamentary Under Secretary of State at the Department for Exiting the European Union)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 8 November 2017

[The Convener opened the meeting at 09:30]

European Union (Withdrawal) Bill

The Convener (Bruce Crawford): Good morning and welcome to the 26th meeting in 2017 of the Finance and Constitution Committee. I would have liked the opportunity to have thanked Maree Todd in person for her contribution to the committee's proceedings, but that is not to be the case. We wish her well in her new role. In Maree's place, we welcome Emma Harper. I am sure that you will find your time on the committee to be rewarding, Emma. Do you have anything to declare?

Emma Harper (South Scotland) (SNP): Thank you, convener. I refer members to my entry in the register of interests, which shows that I am a partner in a bed and breakfast business.

The Convener: Thank you.

I ask everyone to remember to switch their phones at least to a state so that I cannot hear them. That would be helpful.

Agenda item 1 is to take evidence as part of our consideration of the Scottish Government's legislative consent memorandum on the European Union (Withdrawal) Bill. We are joined by two United Kingdom Government ministers: David Mundell, the Secretary of State for Scotland, and Robin Walker, Parliamentary Under Secretary of State at the Department for Exiting the European Union. Welcome to the meeting. We are running a fairly tight timetable this morning and we need to conclude this session by 11 am at the latest to allow Mr Walker to appear before our Delegated Powers and Law Reform Committee, you lucky man.

Robin Walker MP (Parliamentary Under Secretary of State at the Department for Exiting the European Union): It is always good to have something to look forward to.

The Convener: I am keen to get to questions but, before we do so, I will give the two ministers the opportunity to make any short statements that they have.

David Mundell MP (Secretary of State for Scotland): Thank you, convener—it will be very short.

I am pleased to be here today with the parliamentary under secretary to support the committee's scrutiny of the European Union (Withdrawal) Bill. It is an essential bill that will ensure that the statute book across the UK is ready on the day that we leave the European Union. The UK Government wants all parts of the UK to back this essential bill. We have been clear since the bill's introduction that important elements of it engage the legislative consent process, and I very much welcome the scrutiny that the committee is undertaking as part of that process. I acknowledge the current position that the Scottish Government has taken regarding the legislative consent memorandum for the bill. However, there has not yet been a vote in the Scottish Parliament and I remain confident that we will reach a position that the Scottish Government and Parliament can support.

Although the timing of any vote is, of course, a matter for the Scottish Government and Parliament, the UK Government is proceeding on the basis that a legislative consent motion will be lodged before the third reading of the bill in the House of Lords. In that vein, we are pressing on with our engagement with the Scottish Government. The First Secretary of State and I have had bilateral discussions with the Deputy First Minister and Mike Russell to drive forward the work. In tandem, UK and Scottish Government officials will be meeting for technical discussions on the amendments to the bill that the Scottish and Welsh Governments have proposed.

I have always made clear the importance that I place on the scrutiny of the Scottish Parliament and the value that it brings to our legislative process. I look forward to hearing the committee's views on the withdrawal bill and we will do our best to answer any questions that you might have.

Robin Walker: As Parliamentary Under Secretary of State at the Department for Exiting the European Union with responsibility for devolution, I am part of the team that will be taking this essential piece of legislation through the UK Parliament over the coming weeks. I appreciate that the bill is very detailed and I am pleased to be here to support the committee's scrutiny.

We are still in the early stages of the parliamentary process, as you will recognise. The committee stage in the House of Commons begins next week. I look forward to that debate and to addressing in it the detail of the various amendments that have been put forward. Of course, the committee will understand that we cannot pre-empt too much of that debate today, but one of the main functions of the bill is to prepare the ground for the great deal of technical detailed work that needs to be done to prepare our statute books in every part of the United Kingdom.

for European Union exit. That means essential work for the Scottish Parliament to help to prepare for exit and it is in all our interests that we work together pragmatically to allow the Scottish Parliament to manage the process. I am pleased to also have the opportunity, as the convener mentioned, to discuss the work with the Delegated Powers and Law Reform Committee this afternoon.

The bill and the work surrounding it on frameworks and to prepare our statute book are of vital importance to deliver an orderly exit from the European Union and I greatly welcome this committee's contribution to that task.

The Convener: Thank you.

I want to begin with clause 11, which continues to be the main stumbling block to the approval of the LCM. I am confident that the Scottish Parliament and this committee as well as the National Assembly for Wales and its committees, will want an early solution to the impasse that currently exists over clause 11. In my letter to Mr Walker on 24 October, I said that I would welcome his views on what amendments to the bill the UK Government intends to bring forward to respect the devolution settlement. Given that the Scottish and Welsh Governments have tabled amendments to the bill that would remove clause 11, which is an obstacle to progress, the ball is patently in the court of the UK Government, and has been for some time, to lay out what it sees as an acceptable way forward.

I sincerely hope that you can do that today, because that would properly respect and recognise the role of this committee but, more importantly, time clearly is running out and you may leave this committee with no alternative but to recommend in our report on the issue, which we intend to produce before the end of the year, that Parliament should not support the LCM. On that basis, do you accept that clause 11, as drafted, is unsustainable?

David Mundell: I will allow Robin Walker to comment on the technical aspects of the bill, as he will be taking that part of the bill through Parliament. We accept that we are in a discussion with the Scottish Government and that we are here today as part of the parliamentary process. As Robin Walker said and as he indicated in his letter to you, amendments have been lodged and it would be wrong to pre-empt those amendments ahead of the committee stage in the House of Commons. However, there is a very detailed ongoing discussion between officials from the UK Government, the Scottish Government and the Welsh Government to look at those amendments.

The First Secretary of State and I made clear to Mr Swinney and Mr Russell when we last met

them that the amendments that have been put forward by the Scottish and Welsh Governments would be looked at very seriously, because we want to take the issue forward. When the Parliament finally comes to vote on the issue, we want this committee, the Scottish Government and members across the Parliament to be able to support the bill for the essential reasons that it facilitates the statute book. We will inevitably disappoint you today if you anticipate that we will give you a definitive position on particular amendments. We are not going to be able to do that, but we can set out our commitment to work to resolve the issues that you highlight.

The Convener: I do not expect you to lay out your view on the amendments, because that process is still to come, but I asked whether you think clause 11 as drafted is sustainable. That is the nub of the issue and what it is all about, so the quicker we understand the UK Government's position on that the better. That was the question that I actually asked.

David Mundell: The nub is in fact about what is to happen in relation to the 111 areas of responsibility that are returning from Brussels and how those areas are to be dealt with once the United Kingdom has left the EU. That is an essential part of taking forward the issues because, if we are very clear about what is to happen to those 111 areas, that puts the debate on clause 11 in context. That is why I am keen to ensure that we take forward that discussion as expeditiously as possible so that, when this committee and the Scottish Parliament, the UK Parliament and others are considering the bill, that is done in the full understanding of the view on those areas of responsibility, because I think that gives a context to clause 11.

Robin Walker: It might be helpful if I set out some of the justification for the current drafting of clause 11, although I accept absolutely that, in the coming weeks, we will be debating in detail the proposed amendments, including those that have been backed by the Scottish Government.

As we leave the European Union, we want to respect and strengthen the devolution settlement in Scotland and we expect significantly more powers for the devolved institutions as a result of the process. It is important to recognise that clause 11 as drafted contains the order-in-council procedure for releasing powers where common frameworks are agreed not to be required. Therefore, the clause starts from the premise of the existing devolution settlements but allows for further devolution as powers return from the European Union, and we should discuss it in that context.

The frameworks discussion is absolutely essential to seeing how the process will work in

practice. We already have agreement in principle on the frameworks, which respects the devolution settlement and focuses on the principle, which the Scottish and Welsh Governments have accepted, that there will be a need for common frameworks in some places. Moving forward on the detail of that is important to ensure that clause 11 works appropriately.

The Convener: Let me put it differently: do you recognise that, if clause 11 remains as drafted and if we cannot get the issue resolved, you are potentially creating a constitutional crisis?

David Mundell: I am determined to get agreement so that we can get a legislative consent motion agreed by this Parliament. That is what I am working to achieve. You and I, convener, have been round the houses on a number of issues where it has been suggested that legislative consent would not be given, for various reasons, in relation to processes in previous Scotland bills. It has always been possible to find a way through, and I believe that it will be possible to find a way through in relation to the withdrawal bill. Both Governments are coming from the same place, in that we recognise that there are areas where responsibility will, as soon as is practicable, be directly operated by the Scottish Parliament, and that there will be areas that will be the subject of a common framework. In the process, some areas will be the subject of discussion. There might be a view that a framework is not necessary in some areas but some other form of agreement is necessary.

We have a common objective, and if we can focus on achieving that, and make significant progress in relation to the discussions on frameworks, I am confident that we can reach agreement. That is the objective that I am working towards.

The Convener: The committee will have to produce a report before the end of the year. Will the matter be resolved in the way that you have laid out in time for our report being published?

David Mundell: I cannot give that undertaking. I hope that we will have made significant progress by the next meeting of the joint ministerial committee (European Union negotiations), which is being planned for before Christmas, although I do not think that there is a definitive date. For obvious reasons, we are keen to expedite the process, because that clarity and context will be vital to the consideration of the bill.

The Convener: Finally, in a broader sense, why is clause 11 required to achieve the Government's objectives in the bill?

Robin Walker: The primary objectives that the Government has set out for the bill are providing certainty and stability at the point of exit. As you

will appreciate, we currently operate under common frameworks under EU law, and clause 11 ensures that there will be certainty and stability because those common frameworks will remain in place, except in the areas where we have agreed that they will not be required. That provides the certainty and stability that businesses and investors are looking for. It also, of course, underpins the certainty with which we can negotiate with our European Union partners. If the bill did not have the capability to provide, on those issues, a degree of common frameworks, we would not necessarily be able to achieve the market access that all parts of the United Kingdom want us to achieve for our future partnership.

The Convener: Yes, but why is clause 11 required for any of that?

Robin Walker: Where EU common frameworks currently exist, they need to be preserved in some form. As I say, and as the secretary of state has said, discussions are going on between the Governments about where common frameworks are and are not required to be maintained. It is quite possible for the scope of clause 11 to be substantially reduced through agreement between the Governments, but it is important to recognise that we need to provide certainty that we can keep those frameworks in place.

09:45

The Convener: That is a slight change of emphasis—you talked about

"the scope of clause 11"

being

"substantially reduced".

Robin Walker: I think that that is implicit in the discussion around the JMC.

The Convener: That is accepting that the existing clause 11 is not going to stand the test of time.

Robin Walker: Clause 11 makes very clear that the order-in-council procedure can be used to release powers from the shared frameworks. That is written into clause 11, the point being that putting that into action will reduce the scope of its impact. I do not think that it is a controversial thing to say.

Adam Tomkins (Glasgow) (Con): Good morning, and thank you for being with us today. It is incredibly important that UK ministers regularly attend committees in the Scottish Parliament to help us with the issues. I share the secretary of state's optimism that the bill can be put into legislation by Westminster with the consent of the devolved Administrations. I also share his determination to do everything that we can to

ensure that that happens. We have already talked a lot about the problems with clause 11, but could we turn to some of the solutions? Secretary of state, you said in evidence to the House of Commons Scottish Affairs Committee a couple of weeks ago that powers will either be with the Scottish Parliament or subject to a UK-wide framework to which the Scottish Government is a party. You said that that is what will happen. Will you expand on that and help us to understand whether that is your interpretation of what clause 11 currently says or whether that is your interpretation of where clause 11 will have to move to in order to obtain the consent that we both want to achieve?

David Mundell: As I think I said in response to the convener, it is important to make progress on the framework issues in order to put clause 11 into context and, as Mr Walker has said, in order to fully understand its scope. Clearly, it is important that the maximum amount of agreement is reached as soon as possible on the areas in which there will be frameworks, the areas where there will be no frameworks and the areas in which there might be looser arrangements such as memorandums of understanding or concordats. I am very clear that it will not be possible to achieve legislative consent and agreement from the Scottish Government unless we have agreed the process by which those frameworks will be agreed. That is an important thing that needs to be done. Within the timescale, we will not be able to agree the content of those frameworks, but we will be able to agree how frameworks should be agreed.

I want to put on the record again, as I did at the Scottish Affairs Committee and at Scottish questions, that a UK framework is not a framework that is imposed by the UK Government on devolved Administrations in the United Kingdom; it is a framework that is agreed. We have to have mechanisms by which we reach that agreement, and different views have been put forward on that. For example, the JMC operating effectively is one possible route. We will be seeking not just to get agreement on what areas fall within frameworks but how frameworks are to be agreed. Clearly, the Scottish Parliament will want to know that before considering giving consent.

Adam Tomkins: That is helpful and it is important to underscore the point that it is the UK Government's understanding that frameworks will be agreed across the Governments of the United Kingdom—or across the Governments of Great Britain as the case may be—and not imposed top down from Westminster. Thank you for putting that on the record again.

I feel a little bit in the dark on how discussions about how we agree the common frameworks are

progressing. Where are those discussions taking place? Are they taking place at an official level or at ministerial level or both? In your view, how can the two Governments ensure that committees such as this, and the Parliament generally, are kept fully informed of the progress of the discussions? It seems to me that we have been talking about talking about agreements for quite a long time, and now might be the time to advance that a bit more rapidly.

David Mundell: I agree. We have made progress lately, and I do not think that it serves any useful purpose at this point to go over why we had not made as much progress before we got to here.

Adam Tomkins: No—I am trying to look forward.

David Mundell: I think that both sides are now committed to going forward.

Right now and over the next few days something that has been called a deep dive is taking place, and that has been agreed with the Scottish and Welsh Governments. Three areas have been identified as requiring investigation as to what frameworks and direct devolution might look like. At one end is justice, where, given that Scotland has its own distinct legal system, the anticipation—I emphasise that word—is that there would be very few issues with frameworks for the powers listed in the 111 areas that impact on justice. On the other hand, there is agriculture, where a large number of areas might have a UK-wide application. Because justice and legal issues are not separate in Wales, at the request of the Welsh, it was agreed that public health would also be considered. Officials from all three Governments are looking in detail at the implications of having frameworks or not having them and the structure to take the issues forward, with a hope that they will be able to come back to the JMC(EN) at its next meeting to report on how the process has gone and how we can take that forward in the context of the other areas. That is where we are in relation to the frameworks.

I want us to get to the position that I outlined in my initial response to the convener, which I think is fairly reasonable. There would be an area where everyone is in agreement that there would be no frameworks and the powers would return as expeditiously as possible; there would be an area where everybody agrees that there should be frameworks; and inevitably there would be some to-ing and fro-ing in areas where Governments may have different views, and there would have to be a discussion in that regard.

Ash Denham (Edinburgh Eastern) (SNP): Good morning. I do not know whether you have seen any of the previous evidence sessions that

the committee has undertaken. Last week, for instance, we had academic experts in to give us their opinion. As you might imagine, we spent quite a bit of time talking about clause 11. I will give you a flavour of some of the comments that were made. Professor Keating said that the UK Government had approached the issue in the wrong way and he felt that it could and should dispense with clause 11. The feeling was that it is not ultimately necessary.

Mr Walker, you have just said that you believe that clause 11 is necessary in order to meet the bill's objectives. In my view, it is not necessary because the bill's objectives could be met using the existing tried and tested conventions, such as the Sewel convention and the various concordats and agreements, which are being used quite successfully at the moment. Why is it that, at this point, those mechanisms are not enough?

Robin Walker: Let us not forget that we are talking about the approach to exiting the European Union and to coming out from under a set of common laws and common frameworks that we have had from the European Union. We think that there is a need in some areas to establish legislative frameworks across the UK. Clause 11 gives the scope for that but, importantly, it also gives the scope for the release of further powers through the order-in-council mechanism, which is modelled on the approach taken in the Scotland Act 1998. It gives scope to ensure that, as powers return, where there is an agreement that common frameworks are not required, the powers in those areas can be handed on to the devolved Administrations. The Government's aim is to establish common frameworks only where they are needed. It remains our expectation that the outcome of the process will be a significant increase in the decision-making power of each devolved Administration.

Ash Denham pointed to some of the evidence that the committee has received, and we will certainly take that on board and make sure that it is taken into account when we debate the issues during the committee stage of the bill. However, there has of course been a range of evidence on those matters. Stephen Laws QC has given evidence to the Exiting the European Union Committee, arguing that the framework in the bill is required but that conversations between the Governments, the JMC process and the discussions about frameworks ought to be able to make its application limited.

Ash Denham: I believe that recently the UK Government and the devolved nations have signed up to a number of principles in the form of a letter. Part of that was that the UK Government has agreed that the common frameworks will respect the devolution settlement. However, I feel

that the bill does not respect the devolution settlement. The UK Government has been aware for some time that the Scottish Government certainly will not be able to sign up to the bill with clause 11 as drafted. I find it startling that you have come here this morning knowing that and you seem to be telling me that the UK Government still has no plan as to how to resolve the impasse.

David Mundell: With due respect, I do not think that you have been listening to the evidence that I have given over the past half an hour or so.

Ash Denham: I have been listening carefully.

David Mundell: I have said that we are absolutely committed to finding a way forward on the issue. We fully respect the Scottish Parliament and the contribution that this committee will make as well as the detailed discussions that we have sought with the Scottish Government. Those discussions are on-going. We have committed to look in detail at the amendments that have been brought forward and we are doing that. We are looking to expedite the process in relation to the frameworks, which I believe is the nub of the issue, so that there is a context to the process and people understand exactly which of the powers and responsibilities that are being brought forward will come directly to the Scottish Parliament, which of them will be the subject of frameworks and which might be the subject of some other agreements. That is what we are looking to do. We are looking to ensure that there is clarity on how the UK frameworks will be agreed and that those frameworks are to be agreed, not imposed. I do not see how we can deliver more respect than to say that the frameworks must be agreed and that, in areas where there is no framework, the Scottish Parliament will have responsibility.

Patrick Harvie (Glasgow) (Green): Good morning. You have said that you do not see how more respect could be shown to the devolution settlement. I am not sure if those were precisely your words, but I think that that was the meaning. The consent that you are asking us to give to the bill and to clause 11 as they stand is consent to constrain the Scottish Parliament's ability to legislate on devolved matters. As you know, the tradition is that what is not reserved is devolved. Is there any reason in principle why matters that are not reserved and which are currently not UK competences should become UK competences?

David Mundell: Do you want to take that one, Robin?

10:00

Robin Walker: What we are specifically talking about here is powers that are currently held in common at European level, and what we are saying is that clause 11 is a temporary measure

while decisions are taken on where common approaches are or are not needed.

It is important to look at some of the wording that has been agreed by the JMC in the outcome on frameworks principles, which says:

“Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will ... be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent”

and

“maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules”.

We are not talking about anything here that impinges on the current decision-making power of the devolved legislatures or the devolved Administrations; instead, we are talking about areas where powers are currently held at EU level and about putting in place a temporary measure while we agree between ourselves—between the Governments—the appropriate places for common frameworks. I think that that is a reasonable approach that reflects the devolution settlements as they stand and it is clearly our intention—which I am very happy to repeat—that the outcome of this whole process should be an increase in the decision-making powers of each of the devolved legislatures.

Patrick Harvie: You both keep using the word “agreed” as if what will come out of this at a UK-wide level, including in some devolved areas, will only be agreed and never imposed. Surely the way to express the greatest respect for the devolution settlement, as Mr Mundell says he wants to, is to ensure that the bill does not grant you the ability to impose anything. How can a negotiation take place in good faith between the different Governments in the UK if the UK Government ultimately has the legal power to impose a settlement on a common framework where no agreement has been reached? Is not the only way to do it to ensure that you do not have that kind of power and that an agreement is required?

David Mundell: I understand the point that you are making but, as I understand it, your consent would be forthcoming only if it was clear how frameworks were going to be agreed. Consent is a demonstration of respect. The fact that this Parliament’s legislative consent is a vital component of this legislation is, in my view, a clear demonstration of respect, as are the commitments that we have given in relation to how frameworks will be agreed. I hope that we can continue to move forward in a mature way in the discussion and dialogue that take place between the UK and Scottish Governments. The convener has in his

time taken a great deal of interest in intergovernmental relations, and I am quite happy to put my hand up and say that we have still not got the process quite right and that we need to work towards continuing to improve the operation of those relations. However, this process is taking place with respect for both the Scottish Government and the Scottish Parliament.

Patrick Harvie: I do not mean to be ungrateful for the warm words—the warm words are nice. However, I am still not hearing a clear argument as to why this Parliament should give consent to a piece of legislation that constrains our ability to act in devolved matters or matters that are not reserved and thereby give the UK Government the ability to do something it says that it does not want to do, which is to impose a UK-wide settlement in a common framework when no agreement is reached. If you are not going to do that, should this legislation not prevent you from having the power to do it?

David Mundell: What I have said that we want to achieve before this Parliament considers whether to give consent is to give context to clause 11 by demonstrating what has been agreed in relation to the frameworks so that, as Mr Walker has put it, the scope of the clause is fully understood by the time this Parliament has to consider it.

Robin Walker: There is a broader point about consent, which is that we are seeking consent for the bill. The bill enables all parts of the United Kingdom, including each of the devolved legislatures, to take the necessary steps to ensure that the statute books are functioning properly at the time of exit. I think that that is hugely in the interest of all parts of the United Kingdom, and it is something that we need to be able to do. The Scottish and Welsh Governments have signed up to principles that accept the need for common frameworks in some areas; the question, now, is how we move forward and recognise some of the concerns that have been raised. We will, of course, engage with the concerns about clause 11 in the upcoming committee stage in the House of Commons.

As you would expect, I cannot make commitments at this stage with regard to specific amendments, but I think it very important that we bear in mind that clause 11 is not something that works only in one direction. The orders-in-council procedure is there to enable those powers to be released where there is agreement that common frameworks are not required.

Patrick Harvie: When the UK Government is good and ready.

Robin Walker: When there is agreement that common frameworks are not required.

Patrick Harvie: It sounds as though you are not ultimately going to ask us to consent to the bill as it stands. I presume that, once we know what you are asking us to consent to, you will come and try to persuade us again.

David Mundell: Mr Harvie, I am always happy to come to this committee or any other committee of this Parliament.

Murdo Fraser (Mid Scotland and Fife) (Con): Secretary of state, you have told us that you are working very hard to secure legislative consent from the Scottish Parliament. In your view, is it unthinkable that the bill would proceed without legislative consent?

David Mundell: It is very difficult—and unhelpful—to envisage such circumstances. We are committed to achieving legislative consent. As I alluded to in my remarks to the convener, I have been round the houses a few times in relation to the 2012 Scotland Bill, the 2016 Scotland Bill and the fiscal framework. Throughout much of the discussion on those pieces of legislation and the framework, we were told that legislative consent would not be forthcoming, but we were able to find a way through. They all had very significant impacts on this Parliament, but, as you know, the Scotland Act 2016 was ultimately passed unanimously by this Parliament. That is the backdrop against which I am proceeding. There is a lot of noise, but there are also a lot of legitimate concerns being raised that I will listen to. However, instead of contemplating negative outcomes, I am endeavouring to actually achieve the result, and since the summer, we have made significant progress.

As I said when I appeared before the Culture, Tourism, Europe and External Relations Committee last week, I very much welcome the Deputy First Minister's direct involvement in this matter. He has brought his experience of previous involvement in the Smith commission and the fiscal framework to the negotiation process, and that has been very helpful.

Murdo Fraser: You will be aware from what has been said previously and at the committee this morning that, as it stands, clause 11 is a barrier to legislative consent being granted. Are you and the UK Government prepared to do what is necessary to secure the legislative consent of this Parliament, including looking at amending clause 11?

David Mundell: As Mr Walker has indicated, eight days have been set aside for the consideration of this bill in the House of Commons, with eight guaranteed eight-hour sessions. I think that days 4 and 5 are devoted to clauses 10 and 11. There will be very significant debate on the floor of the House of Commons in

relation to the bill. Without prejudicing what might be said about the clause in that process, I give you the commitment that I am prepared to do whatever is necessary to achieve consent from Parliament within what you would understand to be reasonable parameters.

James Kelly (Glasgow) (Lab): I think that you have been left in no doubt about the committee's anxieties over clause 11 and the need for you to make some movement if you are to get the support of the parties that is required to achieve legislative consent. With regard to the deep-dive exercise that was mentioned earlier—it is a strange name for it—you said in your previous answer that eight days have been set aside for considering the bill, including two days for clauses 10 and 11. What is your timescale for the deep-dive exercise to resolve the issues around clause 11, and when will this be finally considered in the House of Commons?

David Mundell: Robin Walker will say more about the timetable in the House of Commons. I can write to the committee in a little more detail about what officials have done, but basically, it was agreed at the JMC(EN) that officials from the Scottish Government, the UK Government and the Welsh Government would look in detail at all elements of the areas in question—agriculture, justice and, particularly with reference to Wales, public health—to come to a full understanding of the form any framework might take and of other mechanisms that might be used such as concordats or other agreements, and they will report back to the JMC(EN) so to give us a feel for what the exercise involves.

In parallel with that, I want to get an idea of the areas that nobody is in any doubt would be devolved immediately or within an agreed timescale and the areas that everybody agrees should be subject to frameworks. It is clear that that will not be a difficult discussion. In any discussion, there will be areas on which there are a selection of issues and different views, and they will have to be discussed and negotiated. That has to happen in parallel with the parliamentary process, because neither Mr Walker nor I control the timetable of the parliamentary process.

As I said to the convener just before we started, there is, as you might know, no timetabling in the House of Lords, so we would never be able to give you a clear idea of what the timescale for progression would be there. I want to expedite our processes as quickly as possible so that we are able to fit in with the parliamentary process, but we do not control the timescale in that regard.

Robin Walker: Perhaps I can fill out a little bit of the detail with regard to timing. The second reading of the bill took place on 11 September, after a two-day debate; it returns to the House of

Commons on 14 November for day 1 of committee stage; and day 2 will be on 15 November. As the secretary of state has said, the programme motion, which the House of Commons has approved, sets out eight days of committee consideration, with eight hours guaranteed for each day. The later days of committee consideration have not yet been announced; the process in that respect is that the leader of the House uses their business statement on a Thursday to set out the business for coming weeks, and the next opportunity to do that will be on 16 November. We would expect the debates on the bill's devolution elements in those crucial fourth and fifth days to be progressed within weeks, but I cannot give you any more precise detail at this stage.

Neil Bibby (West Scotland) (Lab): I do not know about parliamentary timescales, but you said earlier that the JMC(EN) will be discussing the 111 areas of overlap. When will that meeting take place?

David Mundell: At the moment, we do not have a scheduled date. However, the JMC is in the process of arranging the meeting, so it will take place between now and Christmas.

10:15

Emma Harper: I have a question about timetables for the passage of the bill and the creation of secondary legislation. The whole process is taking time. I know from recent conversations that I have had with NFU Scotland that it is starting to get really nervous because the exit time is looming. With regard to the secondary legislation, what will the impact be, given that the transition period is upon us?

Robin Walker: It is right to say that part of the point of passing the bill and creating the secondary legislation powers is to make sure that we have time to put the necessary corrections into the statute book in time for our exit. One of the reasons why we want to make sure that the bill progresses, and think that it should be in the interests of each of the devolved legislatures to give consent to it, is that it contains powers for the legislatures to get the secondary legislation process right and to have the correct scrutiny of that.

We want to move forward with the bill as quickly as possible, but we respect the need for parliamentary scrutiny in that process. That is why a balance has been struck, whereby we are getting on with the bill and the surrounding debate as quickly as we can while recognising that we could not cut short the committee stage of such an important bill, particularly when we have—I think—400 amendments to respond to. We have struck

that balance by allowing the House to have eight full days of consideration and making sure that the Government is able to respond to each of those amendments in time.

However, Emma Harper's basic point is right. We need to make sure that, in each of the legislatures, there is time for adequate scrutiny of the secondary legislation that will follow. As you will know, delegated legislation is not legislation without scrutiny. It has to go through proper scrutiny processes, and that takes time. The sooner we can move forward with the whole process, the better that will be for the degree of scrutiny that can take place. There are some powers in the bill that will be sunsetted on exit day, but there are others that will be sunsetted beyond exit day, in recognition of the fact that there might be some areas in which we will need to take action after exit day.

Emma Harper mentioned the issue of transition and implementation, which is, of course, a slightly separate issue. It requires negotiation to move forward on that front, and we are looking forward to negotiating on the implementation period. That is a very clear part of the UK Government's position. As we have said to a committee in the House of Commons, if it were necessary to introduce further legislation for that, we would.

David Mundell: I want to briefly make the point that there will be a separate agriculture bill. There are certain aspects of leaving the common agricultural policy that cannot be dealt with by secondary legislation. There will be an agriculture bill, which it is anticipated would require the consent of the Scottish Parliament.

Alexander Burnett (Aberdeenshire West) (Con): Good morning. It is good to hear that many of the 111 issues will be resolved through common frameworks, and it is good to hear from the secretary of state that he feels that the discussion on identifying those will be relatively straightforward. How many common frameworks have you already been able to identify and in what areas?

David Mundell: I think that that is a variation of the "Name one power" question. I have been very keen not to do that, because we are in discussion with the Scottish Government about such matters.

As I have said in answer to other questions, I hope that we can make clear as soon as possible those areas in which everyone agrees that there is no need for a framework and those areas in which everybody agrees that there is a need for a framework. There might be an area in the middle about which there is some discussion and in relation to which, if a framework is not agreed, some other mechanism is agreed. I want to get to that point as expeditiously as possible, but I

declined in front of the Culture, Tourism, Europe and External Relations Committee and the Scottish Affairs Committee and at Scottish question time to give examples, and I am afraid that I am going to do the same today.

The Convener: How many will there be?

Alexander Burnett: We have heard evidence that there might be between six and 12. Would you like to—

David Mundell: Six and 12 what?

Alexander Burnett: Common frameworks.

David Mundell: It depends on the nature of the frameworks. I know that that is a politician's answer—I can tell from the way that the convener is looking at me.

The Convener: It sure is.

David Mundell: I ask you to cut me a little slack. If you look at the document, you will see that around 15 areas begin with the word "Environmental". A framework on environmental matters might cover all 15 areas or there might be 15 frameworks. There will be discussion about what the structure is. It is not straightforward; I like to say the reverse. As I have said previously, what that means is that a significant number of areas of responsibility will come directly to the Scottish Parliament.

Ivan McKee (Glasgow Provan) (SNP): Thank you for coming along to talk to us this morning.

Before we talk about common frameworks, I want to pick up on something that Mr Walker said earlier. You said that we are starting from the existing devolution settlement. I think that part of the issue from our point of view is that that is not what we are doing, because the key underpinning principle of the existing devolution settlement is that what is not reserved is devolved. Clause 11 cuts right across that. I want to check whether that is understood.

Robin Walker: I understand the position, but our understanding is that the competence of devolved institutions is currently defined in relation to EU law and that the rules in each of the existing pieces of legislation on devolution define devolved competence in terms of the common frameworks that are provided by EU law. Therefore, we are starting from the position of keeping that settlement precisely the same and providing the tools, through orders in council, for making sure that those powers increase. I understand the position and where people are coming from on this, but our position is not the same.

Ivan McKee: That is clear. You say that the common frameworks will replicate the EU common frameworks, but there are a couple of EU principles to do with subsidiarity and

proportionality that are not included in the list of starting principles for the proposed UK common frameworks. Would you like to comment on that?

Robin Walker: In the areas in which we function under a framework of EU law and there are powers for the devolved legislatures, those powers absolutely remain in place. The power of implementation and the power of interpretation will not be affected in any way. It is the frameworks that sit over the top that we are talking about dealing with. As I said, there will be a mixture—as is reflected in the approach that is set out in clause 11 to orders in council—of areas in which there is agreement that powers should be released and dealt with at the level of the devolved legislatures and areas in which we agree that common frameworks are required, which will be dealt with at the UK level.

However, it is important to reiterate the secretary of state's point that, where the UK Parliament acts on behalf of the UK, that does not mean cutting the devolved Administrations and legislatures out of the process. That would be done very much in consultation.

Ivan McKee: In reference to the common frameworks, you talked about them being not imposed but agreed. What happens if agreement is not reached, given the timescales that we are having to work to, which are rapidly approaching?

Robin Walker: Given the timescales that we are having to work to, it is in the interests of all parts of the United Kingdom to make sure that we have functioning statute books at the point at which we exit the European Union. That is also in the interests of the deal—which I think is in all our interests—to make sure that we have strong market access between ourselves and the EU. Therefore, there should be a very strong incentive to reach agreement on these things.

Ivan McKee: But that does not answer the question, which was about what happens if agreement is not reached.

David Mundell: I have already set out that, rather than focus on that scenario, we must work to get agreement. I have also stated clearly that I would not expect legislative consent to be forthcoming unless we had a basis on which the frameworks would be agreed. I fully understand that, and I think that it is incumbent on us to work to find such a basis. Various suggestions have been made about how that might be achieved, and we need to put significant effort into reaching a conclusion on that.

The Convener: I want to tease that out a bit further. I think that you are talking about agreement on the procedure, which does not necessarily mean agreement on the content of the frameworks. Is that the case, or are you saying

clearly that you want agreement to be reached on the content of the frameworks, which you do not want to be imposed?

David Mundell: It was the former. I am sorry—I thought that I had made that clear. Within the timescale, we will not be able to agree the content of the frameworks. What I have said about the frameworks is that they will not be imposed. By the time we get to the legislative consent process, we need to find a basis on which we all agree that the frameworks will be agreed. I am talking about the process that we need to go through to agree a framework.

The Convener: That brings us right back to Ivan McKee's question. If there is no agreement on the content, how will that be resolved?

David Mundell: That is a very important part of the process of agreement.

The Convener: That is why I am asking the question—I realise that it is an important part of the process.

Patrick Harvie: What is the answer?

David Mundell: That has to be resolved.

The Convener: I want to get this clear. You expect a process for agreement of the content to be in place before an LCM is granted by this Parliament.

David Mundell: I do, but not in relation to the content with regard to what should be happening on, say, the environment. If—this is just an example—there was to be a framework on the environment, I would expect there to be agreement in relation to how that framework would be agreed.

The Convener: Given how much emphasis is being put on the frameworks by the UK Government—and, probably, the Scottish Government—that begs the question of why there is no mention of the frameworks in the bill.

Robin Walker: The bill sets out the order in council process for making sure that, where we agree that common frameworks are not required, the relevant powers can be released. I would say that that is an implicit focus on the frameworks.

The Convener: That enables the UK Government to agree what powers that come out of the EU it will eventually give back to the devolved legislatures. That is not the same as making reference to the frameworks in the bill. If they are so important, why are they not mentioned in the bill?

Robin Walker: What the bill is talking about is retained EU law where EU law returns. I would argue that the order in council mechanism provides precisely what you are talking about in

circumstances in which we agree that frameworks are not required and the powers can be released down to the appropriate level. That is written into the bill. There is a focus on the treatment of retained EU law.

Patrick Harvie: I appreciate that you are not going to be drawn into talking about what specifically the frameworks will cover or how many there will be, but can you tell us what existing common frameworks you have looked at that might serve as models?

David Mundell: As each of the areas is slightly different, we are undertaking the deep-dive exercise that I mentioned to have a comparator of areas that might be considered relatively light touch.

Patrick Harvie: Forgive me—perhaps I was not being clear. What examples of existing common frameworks between the Governments of the UK—not in relation to the EU—have you looked at?

David Mundell: We are in the process of having that discussion, but we are not necessarily going to proceed on the basis of existing frameworks.

Patrick Harvie: Can I make a suggestion, then? The issue of marine planning is largely devolved, but the different Governments sat down, worked together on a memorandum of understanding and decided what their shared goals and the process should be, and then each legislature separately made its own marine legislation. There was no need for constraints on devolved powers, as has been proposed in the bill; in fact, the only rebalancing of powers that occurred was that UK ministers passed to Scottish ministers the power for planning in offshore waters further than 12 nautical miles. A matter that had not been devolved before became devolved. The result was consistent goals, a consistent approach to marine planning and a common framework, all within the context of existing devolution arrangements. Does that not sound like the ideal model?

10:30

David Mundell: I think that it is a very good model, and I am sure that it can apply to some of the areas on the list.

Patrick Harvie: The approach that I have outlined also gives something that what this bill makes possible does not. I have heard nothing about the transparency of the process of negotiation between two Governments to come up with a common framework and the ability for stakeholders or civil society to contribute in a transparent, open and democratic way. What space do you envisage for that in this process of negotiating common frameworks?

Robin Walker: Both the Scotland Office and our department have been doing a huge amount of stakeholder engagement on these things, and we have been listening to the views of civil society, business groups and a huge range of groups up and down the country. In a number of those areas, people are pointing towards solutions that might require common frameworks and, in other areas, they are not. We will certainly take that on board as we develop our thinking on this and as we go into the discussions around the JMC process.

It is important to recognise that clause 11 as currently drafted would allow for exactly the approach that you have set out with regard to marine planning if there was an agreement that a common framework was not required in an area that was returning from the EU. It would allow for an agreement to be reached between the Governments to move forward on that and for the order-in-council process to be used to make it clear that there was no need for a legislative common framework in that space.

Patrick Harvie: It would allow for that approach, but it would not require it. The advantage of having separate legislation in the separate Parliaments is that external organisations and individual constituents can give evidence on record and in public; parliamentarians can debate the various amendments and different approaches that might be taken; and instead of this being a deal between two Governments, which might be somewhat open but might not, the whole process is open and democratic.

Robin Walker: I absolutely understand that, and it is something that we very much take on board. However, the whole purpose of the bill in the first place is not to make changes but to provide continuity and certainty as we exit the European Union. It makes it very clear that there will be a number of areas where devolved legislatures and the UK Parliament might want to make changes, but that is not the bill's focus. It is about making sure that the statute book functions on the day that we exit, that things continue to work and that any deficiencies are put right. On the future issues where we might want to make changes, it would be absolutely right for stakeholder engagement to take effect, for policy to be formed and, where there are policy changes, for most of that to be delivered through primary legislation, with the full scrutiny that that would involve.

Patrick Harvie: If the bill was about ensuring consistency and that there was no change, things that at the moment look like they might be discussed under some future common framework—the precautionary principle, for example, or the polluter pays principle—would be on the face of it. Such environmental principles

that are used to develop EU law would be on the face of the bill to act as constraints on ministers in their very powerful use of secondary legislation. If you wanted to ensure consistency and no change when the bill was passed and the UK withdrew from the European Union, would those things not be on the face of the bill as well as some answers to Michael Gove's questions about governance in the absence of the European Commission's enforcement role in relation to environmental law?

Robin Walker: You have asked a number of different questions. With regard to jurisprudence and the development of EU law, we are absolutely making sure that the bill writes in the existing jurisprudence of the EU so that, as part of the approach to preserving EU law, our courts have regard to those judgments and, indeed, their seniority as far as the EU institutions are concerned. That is in the bill.

As for your point about the environment, it is an issue that we are looking at very closely. Clearly mechanisms in that respect exist in the UK structure, but I know that the Secretary of State for Environment, Food and Rural Affairs is considering whether there is a need for more.

Patrick Harvie: Will that include looking at placing environmental principles on the face of the bill?

Robin Walker: As I have said, the bill takes into account the jurisprudence of the European Court of Justice and its approach, and it is written into the bill that we will be writing in that jurisprudence as we exit and that it is there for our courts to pay heed to. Clearly what we are doing is ending the jurisdiction of the European Court of Justice as we exit the European Union, because the European Court of Justice is the senior court of the European Union.

Adam Tomkins: Secretary of state, I want to go back to the exchange between you and the convener a few minutes ago, because I think that you made a very important point and I want to ensure that I have understood it.

David Mundell: Good.

Adam Tomkins: I think that you said that you would not expect this place to give its consent to the bill until and unless there was agreement about how common frameworks will be negotiated, agreed and policed in the event of a disagreement. The follow-up question was why, if that was the case, the bill said nothing expressly about common frameworks. It seems to me that practically everybody agrees—certainly the two Governments agree—that common frameworks are going to be absolutely central to the repatriation of powers from the European Union to the United Kingdom.

I just want to piece all of this together, to see whether I have it right. The job that we in this committee and in this Parliament have with regard to this bill is very simple and limited: we have to give consent to this bill or not. We cannot give consent to a general theory of common frameworks or a policy that there should be common frameworks; we have to give consent to this bill. Am I right in reading you as saying that, in your view, this bill will have to make express reference to common frameworks before you can legitimately expect us to consent to it?

David Mundell: I did not say that.

Adam Tomkins: I know that. I am just trying to piece all of this together.

David Mundell: I did say what you said at the beginning of your remarks.

Adam Tomkins: I am just trying to understand the consequences of what you are saying.

David Mundell: I would also say that, looking at the way in which other constitutional bills of this nature that have been dealt with, there is a reason why the legislative consent process in this Parliament takes place before a bill's final amending stage. That is the convention and the basis on which I am proceeding: this is the point at which the bill will be considered by Parliament for consent. Mr Walker and myself would be showing complete contempt for our own Parliament if, at this moment, we were to suggest that the bill would be exactly the same as it appears now when it reached that process. We have to respect Parliament and how it might apply itself to the bill.

That is why I have put such emphasis on the need to agree the process around the frameworks and the areas for those frameworks. They will provide much greater context and, as Mr Walker has said, scope when we get to the stage of this Parliament actually considering the legislative consent motion.

The Convener: I have a final comment about the frameworks and then we will move on to Willie Coffey, who wants to ask about the issue of deficiencies in EU law.

Secretary of state, thank you for making it very clear that the Scottish Government and the UK Government will have to agree on the process for agreeing the frameworks. I understood that—it was very clear. However, I am not so clear about what will happen if the content of a framework cannot be agreed and what the process will be for remedying that.

David Mundell: That will have to be agreed as part of that process.

The Convener: I understand that. That point has emerged a bit more in today's discussion than

had previously been clear to me, and it is certainly something that the committee will want to address. We will probably write to you following this meeting, but you can be sure that we will raise that specific point, because we need to be confident that, whatever the process is, it is an agreement process that can be shown to be an agreement process, for want of a better way to describe it. I think that that puts the issue in a nutshell.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): On correcting deficiencies in EU law, the Law Society of Scotland has expressed concern about the conferment on ministers of powers that could be used to make more wide-ranging changes to policy and could perhaps impact significantly on Scotland. Surely they should be for Parliament to make and not ministers, as the bill proposes. What is the justification for that?

Robin Walker: The power on deficiencies, which is a clause 7 power, is very strictly limited to correcting deficiencies where they arise as a result of our withdrawal from the European Union. We expect most of those to be very technical. The power is for things such as references to other member states and specific EU institutions. A number of people who have given evidence to various Westminster committees have suggested that the process is certainly appropriate for secondary legislation. We think that the negative procedure will be used for purely technical matters but it is clear that, if a policy decision is involved, the affirmative procedure will be used so that there will be a debate and a response.

In light of the number of areas that require attention, we would not want the process to be for making policy changes. It is very much about correcting deficiencies and ensuring that the law continues to work in the way that it was previously intended to. It is certainly not our intention—indeed, I do not think that it would be physically possible—that the Government should seek to make sweeping policy change across all those areas in the time that we have available. The deficiencies power will really only work if it is applied to correcting deficiencies and nothing more than that.

Willie Coffey: But it is still a ministerial power; it is not a power that the Parliaments will have.

Robin Walker: It is a power to bring forward delegated legislation, which, of course, then has to have parliamentary approval. If legislation is required at a devolved level, obviously that would go through the devolved legislature's appropriate scrutiny processes.

Willie Coffey: Who will be involved in identifying all those deficiencies? Dare I ask whether there will be agreement between the

Governments and Parliaments on how they are resolved?

Robin Walker: Across the whole Government, we have been looking at the body of law. As you can imagine, a great deal of work has been done at the official level to go through the statute book and see where deficiencies may arise. The estimate at the UK level is that between 800 and 1,000 statutory instruments will be required to deal with that, but we have not yet seen precise estimates at the levels of each of the devolved Administrations. We will continue to work closely with the devolved Administrations to scope out the needs in each.

Willie Coffey: Will you seek joint agreement before proceeding with those in the same spirit of the questions that we have asked today?

Robin Walker: We will have to work closely together to ensure that we have statute books that work in every part of the United Kingdom. However, I go back to the fact that the deficiencies power is very much about making things work and maintaining continuity in the way that the law works rather than trying to make any policy changes. That is not something that we would or could try to do under that power.

Willie Coffey: I want to ask about clause 7 specifically. Why do the regulations on dealing with deficiencies that are set out in clause 7 exclude the power to

“amend or repeal the Northern Ireland Act 1998”,

but do not exclude the power to amend or repeal the Scotland Act 1998 or the Government of Wales Act 1998?

Robin Walker: That is a good question, which I was also asked at the Committee on Exiting the European Union the other day. Across a whole range of legislation, there are references and provisions that would not make sense when we leave the EU. We recognise that, as with other pieces of legislation that will predominantly be corrected using the powers in the bill through secondary legislation, the standing of the three devolution acts is very important, which is why the bill corrects as many deficiencies as possible. Part 2 of schedule 3 goes through each of the three key devolution acts and sets out where we see the deficiencies right now.

A correcting power to the Government of Wales Act 1998 and the Scotland Act 1998 is retained. That is limited to correcting deficiencies and is provided as a contingency to prevent the creation of gaps in the statute book. Because the Northern Ireland Act 1998 is the main statutory manifestation of the Belfast agreement, which was agreed by the UK Government and the Irish Government, any changes to it beyond those that

are already set out in the schedule to the bill would have to be delivered by primary legislation.

Neil Bibby: We know that there are 111 areas of overlap in Scotland that affect EU law and 64 in Wales. Is there a number for the areas that affect Northern Ireland?

Robin Walker: There is, but I am afraid that I do not have that to hand. It is a large number because of the scope of the Northern Ireland Act 1998 and the legislation there. I apologise for not having that in front of me, but I am not going to try to remember it off the top of my head.

Neil Bibby: Will you write to us about that?

Robin Walker: Absolutely. I am very happy to write back to you about that.

Neil Bibby: Thank you.

10:45

The Convener: On secondary legislation, I have beavered away on the situation in which the UK Parliament passes secondary legislation that changes primary legislation in Scotland under the devolved settlement. Currently, no process is available to the Scottish Parliament to be able to consent to that; the Sewel process is for primary legislation that might change primary legislation. Under clause 7, a significant number of amendments could be tabled that would potentially amend primary legislation or devolved legislation in Scotland. Should we have in place a process that is at least similar to the Sewel convention which allows us to deal with that?

David Mundell: I am quite happy to look at that. I understand the point that you have made. We have committed to work in a consensual way with both the Scottish Government and the Scottish Parliament because of the scale of activity that might be required. However, I understand the specific point that you have made in relation to Parliament. Let us take that back and consider it.

The Convener: Thank you. We have a small amount of time in the bank. Patrick Harvie wanted to raise a slightly wider issue about the European Union (Withdrawal) Bill and the process.

Patrick Harvie: It is certainly a connected issue. As you will be aware, there has been a great deal of discussion about the impact that the whole process will have on our society and our economy. A great many individuals, families and businesses are experiencing a dearth of information and a great deal of uncertainty. It appears that the UK Government has conducted impact assessments on various sectors of the economy. The number of sectoral impact assessments that is generally floated is 58. The two of you—a DEXEU minister and a secretary of state—may be among the very

small number of people who know what exists and its level of detail.

Two weeks ago, David Davis told a committee of the House of Commons that the Prime Minister had seen “the summary outcomes” but had

“not necessarily read every single one. They are in excruciating detail.”

Yesterday, he said:

“it is not the case that 58 sectoral impact assessments exist.”

Was Mr Davis right when he said that the

“summary outcomes ... are in excruciating detail”,

or was he right when he said that they do not exist?

Robin Walker: I ought to answer that question first.

As you will appreciate, there is a huge amount of analysis. What we set out—I set this out first in a debate on an Opposition day motion about a week and a half ago, and my colleague Steve Baker reiterated it to the House of Commons yesterday—is that the information does not exist in exactly the form that has been requested, which is sectoral economic impact assessments, but we have done a very broad sectoral analysis, which we published to the House of Lords Committee on the European Union. The headings under which that was done cover 58 sectors and a number of cross-cutting regulatory issues. The motion that the House of Commons has approved requires us to share that information with the Committee on Exiting the European Union.

As my colleague made clear yesterday, we are making sure that the information is in the correct format and that it can be shared. We are under a number of different obligations. The House of Commons has voted a number of times that we should not publish anything that is prejudicial to our negotiating position. We also have a legal obligation not to publish anything that is not in the public interest and legal obligations when it comes to confidentiality. However, we are working to ensure that information is available.

The other point, which I know David Mundell can touch on, is that we have already discussed the sectoral analysis that has been conducted in the format of the JMC.

Patrick Harvie: It is clear that summaries exist, because Mr Davis said that they had been given to the Prime Minister. Will they be published?

Robin Walker: I think that the summaries that Mr Davis referred to were at an early stage of the analysis when our department was first set up and the information was commissioned. Since then, we have said that the information has been regularly

updated and all Government departments are looking at the opportunities and risks through the process and how they can be mitigated. That analysis will take some time to fully compile. We absolutely will be ensuring that our policy on the future relationship with the EU as well as our withdrawal from it are informed by the best analysis across the board.

Patrick Harvie: You will never be at a point at which waiting another month and doing some more work will not give you more detailed analysis. You will have to publish at some point. When will you publish and what will be published?

Robin Walker: At this stage, we have been asked to provide information to a select committee of the House of Commons. We have made it clear that that will be done within three weeks.

Patrick Harvie: I presume that that will also be available to the Scottish Parliament.

Robin Walker: We need to agree with the select committee of the House of Commons the terms on which that information will be provided. We will certainly then look at what can be done with regard to other Parliaments, and we will seek to ensure that whatever information can be provided within our legal constraints is brought forward.

The Convener: Okay. I think that we have gone far enough on that.

I thank Mr Mundell and Mr Walker for coming to the meeting. We have covered a lot of ground, and I am very grateful for that.

Before the final amending stage at the House of Lords, we will have to complete our final report, so it is more than likely that we will look for UK Government representatives to appear before us again before that. I hope that you will be able to give us a commitment to do that.

I suspend the meeting for 10 minutes to allow a changeover of witnesses.

10:52

Meeting suspended.

11:03

On resuming—

Subordinate Legislation

Budget (Scotland) Act 2017 Amendment Regulations 2017 [Draft]

The Convener: Agenda item 2 is consideration of the Scottish statutory instrument that provides for the 2017 autumn budget revision. Before we come to the motion that seeks our approval of the regulations, we have an evidence-taking session. We are joined by the Cabinet Secretary for Finance and the Constitution, Derek Mackay, who is accompanied by two officials, Bill Stiitt and Scott Mackay. I invite the cabinet secretary to make an opening statement.

The Cabinet Secretary for Finance and the Constitution (Derek Mackay): Thank you, convener, and good morning. The autumn budget revision provides the first of two opportunities to formally amend the Scottish budget for 2017-18. In order to assist the committee with its scrutiny, I provided a brief guide to the autumn budget revision, which sets out the background to and details of the main changes proposed. I hope that the committee has found the guide to be helpful.

This year's autumn budget revision deals with four types of amendments to the budget. First, there are a couple of funding changes. Secondly, there are a few technical adjustments that have no impact on spending power. Thirdly, there are a couple of Whitehall transfers. Finally, there are some budget-neutral transfers of resources between portfolio budgets.

The net impact of all those changes is an increase in the approved budget of £19 million from £39,300.2 million to £39,319.2 million. Table 1.1 on page 4 of the supporting documents shows the approved budgets following the changes sought in the autumn budget provision. The supporting documents to the autumn budget revision and the brief guide, which was prepared by my officials, provide background on the net changes.

The first set of changes comprises deployment of financial transactions to support the Scottish growth fund offset by a transfer to central resources from the coastal communities fund to be held until required. In total, those changes increase the budget by £7.7 million. The second set of changes comprises a few technical adjustments to the budget. They are non-cash adjustments and therefore budget neutral, as they cannot be redeployed to support discretionary spend elsewhere, and have a net positive impact of £6.3 million on the overall aggregate position. It

is necessary to reflect those adjustments to ensure that the budget is consistent with the accounting requirements and with the final outturn that will be reported in our annual accounts.

The Scottish budget aligns with the accounting requirements under the Government financial reporting manual; accordingly, a budget provision is included within the Scottish budget for the financial year to reflect the recognition of relevant assets with revenue finance infrastructure schemes in accordance with the accounting requirements. The adjustment to the budget at this autumn budget revision is £9.9 million.

Other technical adjustments are a transfer of £1 million to the judicial salaries budget, which sits outside the budget that is approved by the Scottish Parliament; a £2 million transfer of non-cash budget from the National Records of Scotland to Historic Environment Scotland; and a couple of minor adjustments to allow Skills Development Scotland and the Risk Management Authority to access cash reserves.

With regard to the Whitehall transfers and allocations from Her Majesty's Treasury, there is a net positive impact in the budget of £5.2 million in relation to the coastal communities fund and the Edinburgh cultural summit.

The final part of the budget revision concerns the transfer of funds within and between portfolios to better align the budgets with profiled spend. In line with past years, there are a number of internal portfolio transfers that have no effect on portfolio totals but ensure that internal budgets are monitored and managed effectively. The main transfers between portfolios are noted in the supporting documents and the guide.

As we move towards the financial year end we will continue, in line with normal practice, to monitor forecast outturn against budget and wherever possible we will seek to utilise any emerging underspends to ensure that we make optimum use of the resources available in 2017-18 and to proactively manage the flexibility provided under the fiscal framework agreement between HM Treasury and the Scottish Government. I will provide the committee with a mid-year report on revenue and spending to date, alongside the spring budget revision, when published, to improve transparency of the budget management process and the decisions we will take in year, in line with the budget process review group recommendations.

Also, in response to the recommendations of the budget process review group on the transparency of budget information, two new tables have been added to this year's supporting documents on page 8. The tables show the sources of funding that support the changes I have flagged and the

movement of available resources. I hope that members find them useful.

The Convener: Thank you, cabinet secretary. Neil Bibby has a question.

Neil Bibby: You mentioned allowing bodies to access cash reserves, and you mentioned Skills Development Scotland and the Risk Management Authority. Can you tell us a bit more about that?

Derek Mackay: Scott Mackay can expand on that.

Scott Mackay (Scottish Government): That is a technical adjustment, which is about the source of cash for these bodies. It will not affect the bodies' overall spending—it is just the split in cash that they will utilise across the year between what they receive from the Scottish Government and what they use from their reserves. Because they are accessing the reserves, we are reducing the amount of funding that we are providing them but the overall spend in the year will be the same.

Murdo Fraser: In the list of portfolio transfers, a sum of £55 million—a substantial sum—for midwifery education is being transferred from health and sport to education and skills. That transfer has appeared in the autumn budget revision in every year since 2008-09. Given that the transfer is happening annually, would it not make more sense for the sum to be incorporated into the education and skills budget when you publish your draft budget for the year rather than an annual revision being done in the autumn of every year?

Derek Mackay: Mr Fraser makes a valid point. He is correct in saying that there has been a practice that a portfolio that ultimately has responsibility can determine that resource, and can be a beneficiary if there are savings in that line as well. That has been the position in terms of the line. A portfolio with responsibility is transferring to another portfolio. That is certainly a significant example, but it has been consistent with that in previous years.

At the start of the financial year, there might not be absolutely clarity on what that figure will be and as it is developed over time there is the certainty that allows me to bring it to the autumn budget revision. There could be a process in which it was all transferred into another portfolio, but in essence it is continuing the practice—it is not exclusive to that line—whereby the portfolio with responsibility makes a determination.

Murdo Fraser: The point behind my question is that by doing it in this way you are inflating the size of the health budget and deflating the size of the education and skills budget when your draft budget is produced. For the purposes of clarity and transparency, would it be better to

permanently put the spending in the education and skills budget?

Derek Mackay: I understand the analysis, but there is a principle around the portfolio with responsibility essentially commissioning that from another portfolio. Of course, cross-portfolio transactions work both ways as well. However, that has been the established practice and I am being consistent by following it. There can be an overall budget realignment, but there are many budget lines for which the principle applies that the portfolio with responsibility transfers the resource to another portfolio, and ultimately health would be the beneficiary of any savings in this line, if there were any.

James Kelly: In the list of technical adjustments, there are two changes in relation to international financial reporting standards requirements and bringing them in line with the Scottish year-end budget. The figures are £4.9 million for prisons and £5.5 million for motorway and trunk roads. Can you give us a bit of background on those changes?

Derek Mackay: Scott Mackay will come in on that.

Scott Mackay: This is about differences in the way that certain examples of these contracts are treated against Treasury budgets and disclosed in accounts. In the Scottish budget we need to approve an allocation that aligns with that accounting treatment, so we need to make these technical adjustments. As Mr Mackay said in his opening statement, the changes do not increase our spending power. They are about the way in which the accounting requirements mean that we need to show these contracts in our accounts.

James Kelly: Why has the change been made now? Why could it not be reflected when the budget was drawn up?

Scott Mackay: Because in-year adjustments reflect the movements on these contracts; the figures are not precisely clear at the draft budget period. As you are aware, at the budget bill technical adjustments are shown that are in line with this; these are in-year movements against those contracts in the accounting disclosure.

James Kelly: Does that mean that the values in the contracts have increased in the course of the year?

Scott Mackay: It can be a movement in the asset values that is reflected in the accounts.

James Kelly: In the prisons example, where the figure was £4.9 million, are you saying that there has been an increase in asset values linked to prison infrastructure projects?

Scott Mackay: It is an adjustment to the carrying value in the accounts. Obviously, that varies over time. That asset will be depreciated across the year. The net carrying value in the accounts will change and that adjustment can reflect that.

James Kelly: What was the adjustment? Is it an adjustment because the asset value has increased, or an adjustment because of depreciation policy or because the depreciation value has changed?

Scott Mackay: I am sorry; bear with me a second.

The Convener: Take your time. It is quite a detailed question. If you cannot find it just now, it is okay if you write to us.

11:15

James Kelly: It is not a point that would be leaked to the Opposition in an order, but I am keen to understand why the values have increased. We are talking about £10 million, which is a reasonable sum of money.

Scott Mackay: It is important to be clear that it is not a change in the underlying contract. The actual payments from the prison service to the contractor are not changing as a result of these adjustments. It is purely about the accounting disclosure.

James Kelly: I understand what you are saying—it is to do with change in the accounting disclosure, and that is what was said in the order. However, I am still not clear what it was.

The Convener: Perhaps you could write to us and let us know what the outcome is. It was right to ask that question.

As there are no further questions, we move to agenda item 3, which is consideration of the motion.

Motion moved,

That the Finance and Constitution Committee recommends that the Budget (Scotland) Act 2017 Amendment Regulations 2017 [draft] be approved.—[*Derek Mackay*]

Motion agreed to.

The Convener: The committee will provide a short report to the Parliament setting out our decision on the order. I thank the committee and the cabinet secretary.

Meeting closed at 11:17.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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