OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 11 August 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 11 August 2020

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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
16th Meeting 2020, Session 5

CONVENER

*Gillian Martin (Aberdeenshire East) (SNP)

DEPUTY CONVENER

*Finlay Carson (Galloway and West Dumfries) (Con)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
*Angus MacDonald (Falkirk East) (SNP)
*Mark Ruskell (Mid Scotland and Fife) (Green)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)
Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Emma Lopinska (Scottish Government)
Ross Loveridge (Scottish Government)
Alice Mitchell (Scottish Government)
Francesca Morton (Scottish Government)
Euan Page (Scottish Government)
Charles Stewart Roper (Scottish Government)
Lorraine Walkinshaw (Scottish Government)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Virtual Meeting

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 11 August 2020

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Gillian Martin): Welcome to the 16th meeting in 2020 of the Environment, Climate Change and Land Reform Committee. We have received apologies from Annie Wells.

The committee is asked to agree to take in private items 4 and 5, and all future consideration of evidence on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill and the Climate Change Act 2008. No member is indicating that they are not content to take those items in private, so the committee agrees to do that.

UK Withdrawal from the European Union (Continuity) (Scotland) Bill: Stage 1

10:01

The Convener: Item 2 is evidence on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill. The committee has been designated as a secondary committee for consideration of the bill at stage 1. We plan to report to the Finance and Constitution Committee by the end of September.

I welcome the first of two panels today. From the Scottish Government we have Emma Lopinska, who is a constitution policy manager; Francesca Morton, who is a solicitor; Charles Stewart Roper, who is the head of the environment strategy and governance unit; and Lorraine Walkinshaw, who is a solicitor. I thank you all for providing a detailed written response to the committee's questions ahead of the meeting.

If we have signal problems or one of the panel drops out, I might suspend the meeting. I will take it as it comes. I might ask a panel member to fill in for another, but if that is not possible I will suspend the meeting and try to get the witness back.

I will address the first question to Emma Lopinska and Charles Stewart Roper. What are the intentions and rationale behind what the bill says about powers with regard to environmental standards and principles, and how will things work in practice? We are very aware that how European Union exit will look is a moving situation, and that the United Kingdom Government is introducing bills that might have implications for this bill.

Charles Stewart Roper (Scottish Government): The overall rationale is that the bill should enable us to cope with the gaps that are left as we leave the EU, by providing, as far as possible, for continuation of the system of environmental principles in domestic law, and for a system of environmental governance to replace the arrangements that are in place in the EU.

I take the point in the question: there is a lot of uncertainty. We think that the arrangements in the bill are robust and flexible enough to deal with changes that might come forward. In operation, the system will need a considerable amount of flexibility. In particular, joint working by the new governance institution and the institutions of the other nations of the UK will be needed to make everything work effectively as a single system. There will need to be co-ordination between the Administrations across the UK to make the system of principles work, but we think that the measures are flexible enough to enable us to cope with

changes that might come, as the new arrangements in the parts of the UK evolve.

The Convener: Can you give me an example of how the flexibility that you mentioned manifests itself in the bill?

Charles Stewart Roper: For example, we will, on the principles, flesh out the detail in guidance that we will bring before Parliament for approval. Scottish ministers will develop that guidance, which will allow us to be flexible in terms of how the Government and other public authorities bring the principles into effect. Through consultation and discussion with the other Administrations as necessary, we will be able to put in place a system that is coherent across the UK and which is robust and works well in Scotland.

Flexibility is built into the governance proposals. We have specified the powers and enforcement powers that will be needed by the proposed body, environmental standards Scotland, but in the strategy, which will be that body's own document and functioning system, it will be able to develop flexible ways of working with other public authorities in order to achieve environmental gains. That flexibility will, in order that ESS can work on issues that cut across the UK, allow it to develop its own relationships with the office for environmental protection—the new UK institution—and with the institutions that will be put in place in Wales and Northern Ireland.

We feel that not being overspecific on the details of the system, but instead providing flexibility through the new body's strategy and operation, will build an effective and robust system that can work—where necessary, in co-ordination and co-operation with the other new institutions in the UK.

The Convener: Some of my colleagues have specific questions that we will come to later on ESS and its relationship with other bodies. Mark Ruskell has a supplementary question.

Mark Ruskell (Mid Scotland and Fife) (Green): I note that the cabinet secretary's written response to the committee used some strong words. For example, it talked about easing

"the path to EU re-accession".

How confident are you that the bill will make us fully aligned with the European Union? There are some aspects of divergence. For example, it has been brought to the committee's attention that there is nothing in the bill that would commit Scotland to high-level environmental protection. That is in the Lisbon treaty, but not in the bill. How do you know that the bill will help to lead to re-accession, and that we will be fully aligned with the European Union, going forward, if that is the bill's objective? It seems that there are some gaps.

Charles Stewart Roper: I will talk about the environmental provisions, then I will hand over to my colleague Emma Lopinska to cover the general point about keeping pace.

On environmental provisions, it is not possible to have in the domestic legal setting exactly the same arrangements as exist in the EU. However, we believe—the Scottish Government's contacts with the European Commission have given us some comfort on this—that we are putting in place a system that is robust, and which the European Union will be able to see is a commitment to maintaining its standards and to keeping in place the role of the principles. We believe that the arrangements will allow us to maintain confidence in, and international credibility for, our environmental performance.

Emma Lopinska will address keeping pace, because it is more relevant to part 1 of the bill.

[*Temporary loss of sound*.]

The Convener: I think that broadcasting staff are having a wee issue with Emma's microphone. We will give them a couple of seconds. We will come back to Emma, once we get her microphone sorted, for her response to Mark Ruskell's question.

In the meantime, Stewart Stevenson has a question about the UK internal market.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I want to ask about what is in the white paper, "UK Internal Market", and the bill, and would like to hear opinions as well as an objective response. The white paper talks about accepting and respecting standards that are set by other jurisdictions. Does that mean that Scotland's being first to introduce legislation on a particular area of policy related to the internal market would legislatively force the UK Government to work within what Scotland had set? I am leaving aside, of course, the Westminster view of the overriding primacy of the UK Parliament and its view that it can basically do what it likes, and am focusing just on what the white paper states. Would the process work as I have suggested, or is it your view that we would, whatever we do, always have to fall in behind what the UK Government does?

Charles Stewart Roper: The internal market issue is more for Emma Lopinska to respond on, if her microphone is now working.

The Convener: We have Emma online now. We will deal with Stewart Stevenson's question first, then you can address Mark Ruskell's question.

Emma Lopinska (Scottish Government): Okay. I am not the best person in the Scottish Government to talk specifically about the UK internal market. Mr Russell made a statement to

Parliament on that last week, and will give evidence to the Finance and Constitution Committee tomorrow.

However, I will say that, at the moment, the UK Government's proposals are only proposals. We would have to look at the detail of a bill in order to understand how it would impact on what we can do, and how the Scottish Parliament might be constrained by UK legislation. I could not say that if the continuity bill is approved by the Scottish Parliament and enacted, that would force other parts of the UK to act; at the moment, I genuinely cannot answer that question. I do not know what would happen. We would have to wait and see.

However, I will say that the Scottish Government's view is that a bill on the UK's internal market proposals is not necessary. We think that properly functioning intergovernmental relations need to be established—relations that recognise that European Union exit has happened, and address the weaknesses of the current IGR frameworks. We would say that we should have agreed frameworks across the UK, where necessary, and that they should have recognised working IGR frameworks as part of that.

Mr Russell has made clear the Scottish Government's view that the Government would oppose a UK internal market bill. If a UK bill was tabled that would legislate for the proposals as they are in the white paper, the Scottish Government would oppose that and would recommend to the Scottish Parliament that the bill not be consented to. Obviously, I would not like to speculate on what Parliament might decide to do, or on what the UK Government's response to any decision on consent might be.

I do not know whether that has properly answered Mr Stevenson's question on the UK internal market, but I am afraid that it is just a bit too early to say with any more certainty what would happen.

Stewart Stevenson: I did not expect much more from someone who is, of course, an official, so I am perfectly content with that response. In framing my question, I was not seriously suggesting that we would wish to get ourselves in a position whereby what we did would bind what other Administrations should do. However, it is interesting to turn the question on its head and to see how others might feel about it.

The Convener: Francesca Morton has asked to come in—I imagine that it is on the point about legality. We will get her microphone on; she might have muted herself, and broadcasting might be having difficulty unmuting. It looks like the microphone is on now.

10:15

Francesca Morton (Scottish Government): I asked to come in in the middle of Emma Lopinska's contribution, but she has covered the point that I would have made. Her main point was that it is too early to make a proper assessment: the UK Government has not yet published a draft bill. Although the white paper sets out its proposals, it does not make clear the legal effects of its proposed principles. That was the only point that I was going to add.

The Convener: Before we go ahead, I point out that witnesses should not mute their microphones; broadcasting will do everything for you. We get into difficulty if we start pressing buttons. I think that we have all guessed that by now.

Mark Ruskell wants to come back in on his previous question. Do so briefly, as we have a lot to cover.

Mark Ruskell: I am not sure whether Emma Lopinska will be able to answer my question, but Charles Stewart Roper mentioned that he has, in effect, had substantial reassurance from the European Commission that the bill will ensure alignment. Is it possible to share that with the committee? I would be very interested to see what reassurance and evidence you have had from the Commission that the bill will enable a smooth path to re-accession.

Emma Lopinska: I have not had any such reassurance because, from my perspective, that is not to do with part 1. The power to align is obviously a discretionary power, so it is not about maintaining absolute alignment with the EU on every subject. We could not do that, because some EU law that comes in is in reserved areas, so the Scottish Parliament could not legislate to align with it.

Also, we have to recognise that a lot of EU legislation makes sense only for member states, so it would not make sense for us to legislate to align with it. There will always be that gap.

In considering EU measures that we might want to align with, several things would have to be considered, including the practical implications—the economic and social benefits, and the costs on resources, whether financial or parliamentary. We would also have to look at whether an alternative approach could deliver the same or better outcomes than the EU measure.

At the moment, there is no agreement between the UK and the EU, but should agreement be reached, we would have to look at what it would mean for areas on which we could align. Mr Stevenson brought up the UK internal market; we must wait to see whether the bill would face any further constraints in that respect. Areas for

common frameworks might in the future be negotiated and agreed, so we would have to look at those, as well.

The bill is not about Scottish ministers having to align absolutely everywhere; many subjects in the bill's competence are legislated for by the powers in section 2(2) of the European Communities Act 1972. When that legislation is lost at the end of the transition period, there will, in lots of areas, be no other existing power to regulate. The bill is replacing that power to regulate; it is not saying that we must use it. I could not, however, say that the bill will enable us to remain entirely aligned with the EU so that we could become a member state.

The Convener: We need to pick up the pace, because we have an awful lot to cover. Finlay Carson has a question on common frameworks.

Finlay Carson (Galloway and West Dumfries) (Con): In the feedback from our consultation, organisations such as Scottish Land & Estates say that they are concerned about there being substantial policy divergence within the UK, and about how that will impact on businesses and so on.

I am pleased that Francesca Morton cleared up the idea of the internal market. We do not have a bill yet. We have a white paper, the overriding purpose of which is to protect the really important internal market. We all know that it is worth more than any of our external markets. We need to be clear that it is just a white paper. There is no bill on the table at the moment.

The Law Society of Scotland also suggests that strong collaboration between the UK Government and the devolved Administrations is of considerable importance.

My question is about the common frameworks. The Law Society said that

"The development of common frameworks"

and

"future trade deals ... will have de facto impacts on how these powers can be exercised."

Have we put the cart before the horse with the bill given that we are not clear what common frameworks we will be working within? When are we are likely to see them?

Emma Lopinska: The Scottish Government remains committed to the frameworks process, which has shown that substantive progress can be made where the four Governments come together as equals and proceed on the basis of agreement, not imposition. We remain committed to that, but we have to wait to see what implications the internal market proposals could have for that process.

You asked about putting the cart before the horse. The Scottish Government has always been clear that it is for the Scottish Parliament, and not the UK Government, to determine how far we align with the EU. It is more than four years since the 2016 referendum and we still do not have clarity on so many things. As you have mentioned, we do not have frameworks and we do not have an agreement between the EU and the UK.

I do not think that our ministers would feel that it is for us to wait to see what other parts of the UK decide. The Scottish Government is looking at the powers that the Parliament has within the constraints of the current devolution settlement, and this is the Scottish ministers' way forward to replace the regulation-making powers that will be lost and look at what will happen with environmental principles and governance.

We are putting forward a bill that we think is right for the circumstances that we are in. We cannot start to second guess what other constraints might be imposed on the Scottish Parliament or the Scottish ministers. We cannot keep waiting. I think that the Scottish Parliament has to legislate in the way that it sees as right.

The Convener: Finlay, will you make your follow-up question very quick, please? We have to move on.

Finlay Carson: I will. It was back in October 2017 that the UK and the devolved Governments agreed that a set of common frameworks would be established. Why have we not moved forward? I presume that it is an issue between all the devolved Administrations and the UK. Where is the hold-up? We have discussed the matter in committee before and it appears that there is reluctance from all corners to move this forward, or that something is preventing it, even though there was an agreement back in October 2017 that the matter would be looked at.

Emma Lopinska: This is not my area of expertise, so I hope that you will forgive me if I read out what I have been told about common frameworks.

The current public health emergency has meant that it will not be possible to achieve the original timetable for delivering all frameworks by the end of the transition period. The Scottish Government is working with its counterparts in the UK Government and the other devolved Administrations to prioritise key framework areas.

I am advised that a revised delivery plan has been agreed by all four Governments and that seven frameworks are expected to be finalised and implemented by the end of 2020. Provisional frameworks consisting of effective interim measures are expected to be in place for the remaining estimated 25 areas where final

framework arrangements are not feasible by the end of the year. All four Governments consider the relevant delivery plan to be sufficient and the provisional frameworks to be robust and fit for purpose.

The Convener: We will move on to talk about the environmental principles.

Claudia Beamish (South Scotland) (Lab): Charles Stewart Roper has already highlighted the importance of international credibility and keeping the principles in place. For the record, I highlight that the core EU guiding principles are the precautionary principle, prevention, rectification at source and the polluter pays principle. Those are significant and important.

A number of stakeholders have argued for a widening of those principles. The Faculty of Advocates has highlighted the possibility of including principles that take into account

"environmental equity (in a redistributive sense)",

and NFU Scotland has highlighted "proportionality" and "innovation" principles. There are also other principles, such as those relating to sustainable development.

I will not ask the witnesses in the time that we have today to go into why all those principles were ruled out. However, in order to reassure us as we go forward with the important issue of the guiding principles in the bill, perhaps you could say why only the four principles were chosen and whether they are enough.

Charles Stewart Roper: We consulted on the four principles, which replace the four EU principles, and there was broad support for them. There were not a great deal of responses about additional principles beyond the four, so ministers settled on bringing those four guiding principles into domestic law at this point.

Flexibility is built into the provisions to allow additional principles to be introduced by regulation in future if a consensus emerges that they are legitimate and wanted. However, the provisions that ministers decided to introduce included the four EU principles that we are losing on exit.

Claudia Beamish: Thank you for that response. The committee would also like to know the rationale for including in the bill a duty to "have regard to" the principles rather than a requirement to act. Some stakeholders, including Scottish Environment LINK, have highlighted concerns about that. Client Earth has highlighted concerns about issues being

"siloed or split out from general decision-making."

What conflict could there be? Given that the environmental principles must be upheld, why does the bill say only "have regard to"? Perhaps you could help us to understand that.

Charles Stewart Roper: We feel that the use of "have regard to" is proportionate because of the nature of the principles as guides to decision making. The principles do not represent outcomes or objectives for environmental policy; they relate to essential practice in the making of policy. We think that the "have regard to" formulation of the duty is proportionate and will put it alongside other important duties and considerations that regulators and other public authorities have. The four guiding principles are very important, but they should not dominate other factors in decision making, which is why we have gone for that formulation.

10:30

You also talked about integration. We feel that integration is achieved in the way in which we have formulated the duty. It is clear that the principles affect all decision making where relevant, rather than just decision making for environmental policy. That is how integration is achieved—it is in the structure of how we have put into effect the duty to have regard to the principles.

The Convener: Mark Ruskell has a question on the definition of the environment.

Mark Ruskell: I will ask that question, but perhaps Charles Stewart Roper could reflect in his answer on why the integration principle is not in the bill.

My question is about environmental definitions. We have had quite a bit of evidence from Scottish Natural Heritage in relation to the birds and habitats directive and evidence from other commentators about the lack of an explicit link to climate and climate targets. Client Earth says that the environment definition should be based on the Environmental Information (Scotland) Regulations 2004.

Will you give us some background on why you have seemingly chosen quite a narrow definition of the environment, given those stakeholders' concerns about whether it captures the full range of what we would recognise as environmental laws in Scotland?

Charles Stewart Roper: If I may, I would like to make sure that I did not create confusion earlier when Mr Ruskell asked about the reassurance that we had from the European Commission. We had an official-to-official reassurance that the Commission was quite content that our governance proposals would be robust. The question to Emma Lopinska about future standards and the nature of the keep pace powers concerned a different and more complex issue about future decisions as well as the proposals in

the bill. I wanted to make sure that I had not created confusion there.

On the question about the integration principle not being in the bill, we think that it is there, but it is there in the construction rather than standing as a principle on its own. We achieve integration through the way in which we apply the duty to all decision making and not only a narrow range of decision making.

We will carefully think through the points that have been raised about the definition of environment that we are using. There is no intention to exclude issues such as birds and habitats or the creatures that live there. That is clear from the provision on how we define environmental harm. However, we need to think through whether that is clear and ensure that we do not create a problem regarding nature.

There is a deliberate intent to remove the strategic level of policy making on climate change emissions reduction, mainly because it already has a complex and well-developed governance and policy development issue of its own. It seemed that to overspecify it and bring it, as well as all the existing arrangements and the relationship with the Committee on Climate Change, under the purview of the new body would just create confusion.

The Convener: Mark, do you want to follow up on that response before we move on to talk about the governance models around environmental standards Scotland?

Mark Ruskell: I am aware that time is marching on, but I would like to hear a brief reflection from the bill team on the role of finance and budgets. I am aware that some of your thinking here goes back to the Environmental Assessment (Scotland) Act 2005, from which those aspects are excluded. We are now 15 years on. Has there not been fresh thinking about green recovery and the financial support for it that would perhaps put environmental thinking at the heart of budget processes?

Charles Stewart Roper: Mr Ruskell is clearly right. What we have in the bill reflects the Environmental Assessment (Scotland) Act 2005 and also the strategic environmental assessment directive. The guidance for the environmental assessments is more clear cut—it says that it excludes measures that are purely financial or budgetary. The proposal is essentially to follow that and ensure that, as with an application for environmental assessment, there is an application of the principles to the actual budget-making process, which has its own procedures, processes and relationship with the Parliament.

I take the point that you make. It is not to exclude from consideration the wider issues of how much resource should be applied to environmental issues or goals; it is about the specific processes for budgets and finance, which we see as not being within the purview of the new duty to have regard to the principles.

Mark Ruskell: I will move on to some questions about ESS, and I know that other colleagues will want to come in.

I am trying to get my head around how ESS will work. I will use as an example the current complaint that has gone to the European Commission about the unlicensed use of acoustic deterrent devices—a matter that has come to the committee previously. That complaint might go so far, but be dropped in December.

How do you see ESS dealing with things such as complaints about Marine Scotland issuing or not issuing licences, and concerns about compliance with the EU habitats directive? What might be the outcomes in relation to compliance notices or improvements? Will you take us through an example to show how ESS might work, in theory, under the structure that you set up in the bill?

Charles Stewart Roper: That is an interesting example. I am not an expert on that issue, so although I will take it as an example, you should not take what I say as an expert view on acoustic deterrent devices.

It is clearly a matter of concern to many stakeholders that such issues will be brought to ESS when it comes into being, even in its initial shadow form. They may be about particular sites or the issue in general. We would expect, in line with the bill, that ESS would request information from Marine Scotland on its decision-making processes, the background to that, the way that it conducts its business and issues licences, and the criteria that it uses. We would then expect ESS to come to a view on whether there was a problem.

There are clearly two broad possibilities. The first is that the way that Marine Scotland was acting was somehow in conflict with the law as stated. This is where my expertise falls down, but I understand that there was not a decision to put in an amendment to explicitly ban such devices, so there would be a question of judgment as to whether the body was not acting in accordance with the law. In that case, ESS could start to move towards a compliance notice. We would expect it to discuss its concerns and issues with Marine Scotland and try to resolve them first, but that would be the route.

On the other hand, if the concern was more that the law was not properly taking account of the issue or that the balance between nature conservation objectives and regulation of the activity was somehow not in the optimal place,

ESS could start to move towards discussions about whether the law should be improved. That would take it to the improvement report end of the process. It would discuss with Parliament, Marine Scotland and the Government whether there should be improvements to the law. It could then bring a report to Parliament with its recommendations on whether the law should be improved in the area, and ministers would have to respond to that.

The compliance notice is for narrower circumstances where the public authority is not working in accordance with the law. The improvement report route is for situations in which the law or the broader strategy is somehow not working to the overall advantage of the environment, or the correct balance between the environment and the activities.

Mark Ruskell: Thanks. That is useful.

The Convener: I will bring in Claudia Beamish, who wants to raise some issues on non-compliance.

Claudia Beamish: I want to consider enforcement and non-compliance and my question is for whoever thinks it appropriate to answer on that subject. What will the endgame be in the unlikely circumstance that there are difficulties that cannot be resolved by ESS through the steps that it can take? In her letter of 31 July, the cabinet secretary said:

"The Scottish Government expects that the majority of matters that come to the attention of ESS will be resolved without any resort to its formal enforcement powers."

That is positive. However, under the EU arrangements, where there are concerns about infractions there is also the threat of possible fines. What would be the endgame for the new body if it is established in the way that is currently envisaged? Will there be fines? What will its final powers be?

Charles Stewart Roper: I will pick that up. If we think of the example that we were discussing, if it is a narrower case, where the public authority is not applying the law correctly and no agreement can be reached, the new body would be able to issue a compliance notice. A compliance notice is appealable but would otherwise be binding and could force the public authority to change its practice. For example, the notice might say something like, "licences issued under these regulations must no longer have this condition applied." Although the public authority could appeal that decision, it would otherwise be enforceable and it would have to change its practice in relation to the regulatory activity.

Where the new body felt that there were unresolved issues of strategic policy—that the law or policy was wrong and there could be improvements to make it more effective—and if it could not agree with the Government and public authorities, the end route would be for it to submit a report to Parliament. The system is set up so that ESS would submit an improvement report to Parliament and ministers would have to respond either with an improvement plan, stating how they were going to fix the problem, or by arguing that they did not see the problem in the same way. That could be voted down by Parliament. In a domestic setting, ministers do not think that issuing fines in relation to bigger issues is a useful approach. It is not clear where such fines would go. Ultimately, such issues are for Parliament to resolve. The most tricky issues in environmental policy always come down to some sort of conflict between different human activities and the natural environment. That means there are big societal choices and those issues are for the Parliament to resolve rather than the courts.

Claudia Beamish: Thanks for that helpful clarification.

Angus MacDonald (Falkirk East) (SNP): I am fairly content with the answers that we have had on governance issues but I have some questions about the interim body. I am keen to get more information on how the interim body is being established. I refer members to the submission from RSPB Scotland, which says:

"It is critical that the appointments process for the interim body is transparent and robust, as this Interim Board will form the first Board of the statutory ESS. Ministers should also indicate whether the interim body will be able to accept and investigate representations from members of the public, even if enforcement action, for all but the most serious cases, cannot be taken until the statutory ESS is operational."

Can the officials expand on that and advise us whether appointments to the interim body are already being made?

10:45

Charles Stewart Roper: We have advertised the positions for the first board appointments to the shadow body. We cannot begin a regulated appointment process because of the stage that we are at in the development of the legislation, but we are going through as robust and as close to a full public appointments process as we can in the circumstances. We are doing that in a robust way and, when ministers make those choices, they will be well aware of the need for a credible panel and for high quality appointments so that the new shadow body can start off in a positive way.

From 1 January 2021, we will have a facility in place for people to bring concerns and information to the shadow body, which will start to investigate those in its shadow form before it passes into statutory form sometime next year.

Angus MacDonald: Can you be more specific on the timeline. By "sometime next year", do you mean spring or sometime later?

Charles Stewart Roper: At the moment, we are optimistic that we will be able to establish the body on a statutory basis in the summer, but that obviously depends on the progress of the bill and on the Parliament's consideration of it. Ultimately, sir, it is in your hands, not mine.

The Convener: Stewart Stevenson has some questions about the independence of the new body.

Stewart Stevenson: A lot of feedback has been gathered in the committee's consultation. I will pick up on only a couple of points, as I know that other colleagues will further develop them.

RSPB Scotland focuses on schedule 1 paragraph 1(1), which sets out that ESS is

"not subject to the direction or control of any member of the Scottish Government",

and notes that paragraph 1(2) goes on to state that that clause is

"subject to any contrary provision in this or any other enactment".

Professor Gemmell picked up on the issue of climate change policy and targets.

Where does the Government think that paragraph 1(2) comes in? From my point of view, it seems that Parliament and Government set things such as climate change targets and policies, but I wonder whether some of the respondents are suggesting that setting environmental targets of that kind should be transferred to ESS, although it seems that it should be a supervisory body, rather than one that initiates policy changes. Could we have some explanation as to the meaning of

"subject to any contrary provision"

in practice?

An example of a prior provision might be the legislation on targets for climate change. Are there other examples that we should be thinking about? In the minds of the officials or the ministers, what could cause that secondary provision to kick in?

Charles Stewart Roper: There are two parts to the paragraph in the schedule that you refer to. First, there are things in the continuity bill, and ministers obviously have some role in that bill with respect to the new body, and secondly, there are other possible enactments. That part is there more for tidiness and legal efficiency, rather than because ministers have any other particular functions in mind. It is meant to give us flexibility, so that a piece of legislation passed by Parliament could give additional functions to the new body, without us having to go in and messily amend the act. Once the bill becomes an act, that ability for the body to take on an additional function would already be built in.

There are no specific additions in mind. If one arises down the line, it is more likely to be in the field of the thinking that is being done on the enjoyment of the human right to the benefits of the natural environment, rather than anything on climate change. The climate change institutional structure is already complicated enough, and we do not see that ESS will have a particularly strong role with respect to emissions.

Stewart Stevenson: Let me come back to make sure that I fully understand what I am being told. Clearly, there are existing bits of legislation, of which those relating to climate change would be but one example, are over which ESS will have oversight. Equally, however, paragraph 1(2) of schedule 1 leaves open that Government can bring forward, and Parliament can pass, legislation that will affect what ESS is responsible for, and, therefore, ESS is not master of its own destiny to the extent that some people seem to want. Is that a fair expression of what I have heard?

Charles Stewart Roper: In a sense. However, to say that something is fixed until Parliament passes legislation that changes it is an obvious fact—Parliament can always pass new legislation to change something. All the provision means is that if Government proposes and Parliament passes a change to it, they can do so in a more tidy way because there is already provision in the establishment of ESS for that to happen. The provision does not open up any new prospects for change; it only makes doing so more legislatively tidy.

Stewart Stevenson: I will close this discussion in a moment and allow others to come in.

Are you saying that such changes could be made solely by secondary legislation, or are you simply saying that secondary legislation can be exercised as a power under this proposal that gives effect to what is being brought forward in primary legislation in another bill that is laid? Is that the tidy legislative approach that you are talking about?

Charles Stewart Roper: On that detail of what enactment means, I have to ask my legal colleague to step in, because that is a technical question.

Lorraine Walkinshaw (Scottish Government): Paragraph 1(2) is not a regulation-making power of itself. It would not enable ministers to make regulations to change ESS's remit. Does that answer the question?

Stewart Stevenson: It does, thank you.

Claudia Beamish: I want to further explore issues that Stewart Stevenson has raised. Some stakeholders have raised the issue of the independence of ESS. I will quote from Professor Campbell Gemmell's submission to give a sense of their concerns. He said:

"The direct involvement of the government of the day in recruitment, reporting and operation as well as setting budgets and priorities, however, is inappropriate and weakens the body and its likely value and impact."

There are one or two other comments in that vein but, because of time limitations, I will not quote them.

What is the view, of whoever feels that it is appropriate to answer, on that very important issue of independence? I appreciate that ESS would not be a ministerial body, but exploring that issue would be helpful.

Charles Stewart Roper: The minister's belief is that the proposals will set up the body with a high degree of independence. The non-ministerial department is a strong model of independence, and the bill guarantees the independence of the new body. I think—[*Inaudible*.]

The Convener: We appear to have lost the connection to Charles Stewart Roper and will just have to come back to him later. Mark Ruskell wants to come in on the precautionary principle, but that is probably a question for Charles. I do not know whether I can suspend the meeting to try to restore his connection, because we have only five minutes left. I have some questions around the budget as well, and the funding allocation and its impact. We will wait to see whether we can get Charles back, because more or less all the questions that we have are for him.

I see that Charles has rejoined us. Charles, can you hear me?

Charles Stewart Roper: Yes, I can. Apologies for dropping out again.

The Convener: I imagine that that is not your fault. Did you hear the question?

Charles Stewart Roper: Yes, but I do not know how far I got into the answer before you lost me. The proposals will create a body with a high degree of independence, which is certainly ministers' intention. We think that there are important guarantees in the bill on the key steps for that, particularly that the appointments and the strategy developed by the body will be approved by Parliament. There is no intention to set the body up as a creature of Government and ministers. We think that the proposed structure will give the body a high degree of independence and set it up as a non-ministerial organisation separate from ministers and Parliament. It will therefore have a status of its own, although it will obviously be accountable to Parliament, as it should be.

The Convener: I am going to have to move things along very quickly. I will come back to Stewart Stevenson's topic of gaps in governance for the last question. First, though, a couple of bodies have flagged up issues about potential additional costs to them from interaction with the new body and the resourcing around that, and whether the resourcing of the new body will be sufficient. You will have seen those points made in the written submissions from Scottish Natural Heritage, Scottish Environment LINK and the Faculty of Advocates.

Charles Stewart Roper: Yes. Ultimately, a judgment has to be made about how much funding there should be for the body. Our hope is that, like the European Commission in recent years, it will work effectively on a small number of cases and will therefore not incur large costs of its own or impose large costs on public authorities. The great effectiveness of the Commission governance system was due to its deterrent effect, as people did not want to get into trouble for non-compliance. If the system here is set up effectively, ESS should be able to work on a smaller number of exceptional issues with quite a light touch and not impose huge resource costs. We want to spend money on improving the environment and not on running institutions and casework.

The Convener: Finally, I ask Stewart Stevenson to pick up on the potential that has been flagged up for gaps in competence between the OEP and ESS.

Stewart Stevenson: I am particularly focusing on the issue of where there are powers that might be exercised by either a UK minister or a Scottish minister, because it sounds like the first one to move gets the chance to exercise the powers. However, with regard to UK ministers exercising powers that would affect Scottish law, are officials satisfied that what is before us will give us the ability to have proper oversight of that effect, particularly via ESS?

Charles Stewart Roper: In general, such co-decision powers or powers that could be exercised by either Administration will be exercised with the consent of Scottish ministers when exercised by UK ministers, and we could inquire into that. That is obviously not a complete and full answer to your question, but we do not foresee there being significant gaps, particularly where there are regulatory schemes that work across the UK and Great Britain. The key thing will be for the new governance bodies to work closely together in order to provide effective oversight of schemes that work at the UK and GB level.

Stewart Stevenson: Right. I am not unduly bothered about the issue of consent, although I am not sure that it is co-decision making; rather, it is alternate decision making. I will let that one pass, though. The real issue is where a UK minister does something that affects a Scottish institution. I want to be clear that that would not deprive ESS of the ability to intervene in the operation of the Scottish activity that the UK minister had legislated for, even though the Scottish minister could have done so. It is not a question of consent but a question of how we would get a grip of what happened.

Charles Stewart Roper: The competence of ESS is defined by the law that could be made by the Scottish Parliament. If a law was made by convenience for a UK regulation, that would not affect ESS's oversight of that law's operation, because it would still be within the Scottish Parliament's competence.

The Convener: I am afraid that we are going to have to leave it there. Thank you for your time this morning. I suspend the meeting for five minutes to allow for a change of witnesses.

11:01

Meeting suspended.

11:07

On resuming—

Climate Change Act 2008

Greenhouse Gas Emissions Trading Scheme Order 2020

The Convener: Under agenda item 3, the committee will take evidence on the Greenhouse Gas Emissions Trading Scheme Order 2020. I welcome the Scottish Government officials who are joining us, and I thank them for their work in briefing the committee over the summer and for their flexibility in meeting us today. Ross Loveridge is the head of the heat demand and carbon markets unit in the consumers and low carbon division, Alice Mitchell is the head of carbon markets and Euan Page is the UK frameworks policy manager in the constitution and UK relations division.

My first question is to Euan Page. How has the Scottish Government been involved in the process of developing the UK ETS?

There is no need for you to turn your microphone on and off; broadcasting staff will do that for you.

Euan Page (Scottish Government): Good morning. I apologise to committee members who heard some of this at the informal briefing session earlier in the summer, but I will quickly recap the main points so that we are clear about how the ETS framework fits within the overall frameworks development process.

The approach to UK frameworks is agreed between the UK Government and the devolved Administrations. It is underpinned by a set of principles, which were agreed at the joint ministerial committee on European Union negotiations in October 2017, in order to develop common approaches to manage areas of policy in which devolved competence intersects with EU law. From an initial list of well over 100 potential frameworks areas, we are now down to a total of roughly 30 frameworks areas, of which a replacement for the EU ETS is one.

Frameworks have been developed through an agreed phased approach of policy development, and there has been a very strong focus on ensuring adequate parliamentary scrutiny as part of the finalisation of the frameworks. It is important to emphasise the JMC(EN) principles and the weight that those place on respect for devolution, the democratic accountability of the devolved institutions and the guarantees therein that frameworks will offer at least the equivalent flexibility to tailor devolved policy choices as is currently afforded by EU rules.

The frameworks process has been hindered by a range of factors. Twice in 2019, we had to shift to no-deal planning. We are currently working to the deadline of the transition period ending at the end of 2020, which was set by the UK Government against the wishes of Scottish and Welsh ministers. That places significant challenges on delivering a full frameworks programme before the end of the transition period, so the focus now is on ensuring that we have in place at least provisional arrangements across the board for all areas in which frameworks will still be required.

The EU ETS is one of seven frameworks—six of them apply to Scotland—that we envisage being agreed, finalised and fully operational by the end of the year. That framework is perhaps distinct, in as much as it is not affected by some of the concerns that have beset other frameworks areas in which, with the change of UK Government, there has been an increased appetite for diverging from EU rules. On that framework, we have a shared ambition across the UK Administrations for a UK ETS to slot into the EU ETS system. For that reason, we are not seeing the same challenges in relation to managing divergence across the UK as we are perhaps seeing in other frameworks areas. There is also the imperative of having a new system in operation from a second past midnight on 1 January 2021, because we need to have continuity, as my policy colleagues will explain in more detail.

That is where we are. As I said, the process has been beset by a number of setbacks outwith the Scottish Government's control. Of course, Covid has had a significant impact on capacity across the Administrations. However, the ETS framework is very much on track. It is distinctive for the reasons that I have set out. As Ross Loveridge and Alice Mitchell will doubtless elaborate on at greater length, the policy detail that will inform the operation of the framework is very much tied up in the statutory instrument that the committee is scrutinising. Some frameworks do not require bespoke legislative underpinning, but this arrangement does. The policy detail will be in the SI. The framework outline agreement and concordat, the administrative arrangements and the statements of commitment to working together across the UK Administrations will underpin the legislative undertakings.

The Convener: I want to bring in Alice Mitchell and Ross Loveridge. We have received a series of letters from the Cabinet Secretary for Environment, Climate Change and Land Reform, and we will be asking her about her views on all those matters.

It appears from her correspondence to us that there is one sticking point, and I would like some technical information on why it is an issue. The devolved Administrations want to be part of the UK ETS and have that link to the EU ETS, but there seems to be an issue with the proposed carbon tax, which the Scottish Government does not want. What are the technical issues with having the two proposed schemes? Who wants to answer that?

11:15

Ross Loveridge (Scottish Government): Alice Mitchell and I will be a bit of a double act for this answer, if members are happy with that. In her letters on the negotiations about what would happen when we leave the EU ETS that the committee has received over the past couple of years, the cabinet secretary has been very clear about her concerns about the carbon emissions tax as an alternative to the UK emissions trading system. Both those approaches can set a carbon price; the UK Government has been very clear about the need to set a carbon price, as has the Scottish Government. As the cabinet secretary has said in her letters to the committee, the challenge lies in the extent to which those approaches fall within reserved or devolved competence. The order that the committee is considering is clearly within the scope of devolved competence, which is why the committee is scrutinising it as the main legislation makes its passage through the four legislatures. In contrast, a carbon emissions tax would be reserved to Westminster, using powers under the Finance Act 2020, which the UK Government introduced in 2019, which could be further amended if the UK Government chose to implement that approach.

There is a choice between the UK emissions trading system, of which the devolved elements would be largely accountable to the Scottish Parliament, and a carbon emissions tax that would not be accountable to the Scottish Parliament because it would be reserved. I cannot comment on the merits of either of those options, but the cabinet secretary's concern is that both those options remain on the table, which means that while she, in good faith, is recommending that the Scottish Parliament approve the legislation for a UK emissions trading system, there remains a parallel proposal for a carbon emissions tax. The UK Government says that that proposal is there to cover eventualities and in case there is a need to establish a carbon price by an alternative route, but it is not clear to us why that would be needed, given that the UK emissions trading system could operate as a standalone system even if it was not linked to the EU system. Do you want to add anything to that, Alice?

Alice Mitchell (Scottish Government): I do not have much to add except to say that the two

schemes are mutually exclusive—we would have one scheme or the other and we would not have both schemes running in parallel.

The Convener: What interaction and consultation has there been with sectoral bodies and stakeholders in Scotland, such as the Scottish Environment Protection Agency, to inform the Government's thoughts in this process?

Alice Mitchell: SEPA has been working with the Scottish Government, the UK Government, the other devolved Administrations and the regulators throughout the development of the UK ETS policy. SEPA has been invaluable in providing technical expertise on the ins and outs of emissions trading systems, given that it has working knowledge of all the current technical rules that are being replicated closely in the UK emissions trading system. SEPA has been involved in working groups to establish the design for the UK ETS.

In May 2019, and over the summer, we ran a joint consultation with the three other Administrations for stakeholders on the policy options and design of a UK ETS. That concluded in August 2019. We held events throughout the UK to take stakeholders through the design of the UK ETS, including an event on 12 June in Glasgow, which was attended by 26 organisations, which is about a quarter of all Scottish ETS participants. That was quite a good turnout.

There were further events, and there was bilateral engagement across the UK with trade association groups and other fora.

The consultation was quite niche and technical, so the responses to it were predominantly from current EU ETS participants who have a vested interest in expressing views on the design of a replacement for that scheme. There were about 130 responses from across the UK. About half of those responded on a UK-wide basis, as current operators in the EU ETS. Only eight respondents gave a specific location and said that they were Scotland based, and among those the views were consistent with the general UK-wide view of the design elements of the UK ETS.

Overall, the responses were very supportive of the design of a UK ETS. There were a mixture of views on particular design elements; for example, the level of free allocation and how that is calculated. Those views were on subsets of the overall policy design.

Finlay Carson: This is one of the less contentious frameworks—as we have already been told—and there appears to be good working between the devolved nations and the Westminster Government.

There is a suggestion that carbon tax is still on the table and that it has been worked on in parallel. Is that the case, or is it there simply as a backstop—if I can use that word—or a fallback, given the very short timescale that there is to implement this potential new scheme? Considering that on 1 January we absolutely need some sort of continuity, is the carbon tax being worked on to the same extent as the scheme that we have in front of us at the moment?

Ross Loveridge: Yes. The UK Government is at present consulting on the design of the carbon emissions tax. That consultation launched during July. Legislation is before the committee at present as far as the UK ETS is concerned. All four Governments are confident that the UK ETS can be established and operational by 1 January. The Government response makes that clear, and that is why ministers have laid the legislation in Parliament at this stage. An additional statutory instrument will follow on from that in the autumn.

The timetable that we shared with the committee when we briefed it back in June made clear that the legislation can be in place and the UK ETS established by 1 January 2021. Therefore, the question whether a carbon emission tax is a fallback in the event that the UK ETS cannot be established would have to be referred to the UK Government. That is because Scottish ministers are confident that the UK ETS scheme can come into force on time. That is why they have laid the legislation.

Stewart Stevenson: I have a few quite tightly focused questions on the mechanics of how all of this is going to work.

Do forgive me, I want to ask one very simple question to which there might not be an answer available: how many transactions do we expect to go through the UK ETS in a year?

Alice Mitchell: When you say transactions, do you mean buying allowances?

Stewart Stevenson: There are two parts to the thing. There is the issuing of coupons to people in the market and there is trading. I am interested in the trading. I am trying to get a sense of whether we need computer systems or whether the trading level is such that we could have a ledger for someone to write the transactions in because there are only six a day. I have no sense of the scale.

Alice Mitchell: I can answer on the information technology. We are developing a new IT system to manage the transaction business. It needs more than pen and paper. I do not know the exact number of transactions that currently occur in the EU emissions trading system, or how many occur in the UK portion of that, but we need what is called a registry to manage the transactions.

Some transactions come from operators and are for the allowances that they buy and need to meet their obligations to cover their emissions. Other transactions come from traders, which could be financial institutions wanting to hedge and buy or sell allowances. I can come back to the committee with more information about the breakdown of the proportions of transactions that are from financial institutions and from operators.

Stewart Stevenson: That would be useful. I am not asking for an exact number, but the order of magnitude would be useful as I have no sense of the territory.

I will move to more substantive matters. The UK market is significantly smaller than the EU market. Do you have a sense of how much that will increase the spread between bid and buy, and therefore what the friction will be in what will inevitably be a smaller market? Do we have any understanding of that?

I will ask the other part of my question so that we can deal with it all at once. To what extent will we get to a position where we can trade across the boundaries between the UK and EU emissions trading systems? It strikes me that it is like two countries exchanging currencies. In some cases—as with Nepal and India—the exchange rate is fixed. In other cases, the rate is set by international markets. How will trading work and what will it do to the bid and buy ratio?

Ross Loveridge: Those are good questions: they go into the dynamics of the market. It is important to say that the market has not started yet. As you will have read in the Government response and in the impact assessment, one of the greatest concerns of the four Governments is to ensure liquidity in the market from day 1 and to enable the market to go through its own process of price discovery so that it can understand the most cost-effective price for reducing emissions.

The UK piloted the world's first emissions trading system in 2002 and has been a leading player in the EU ETS since then. We have learned that it takes time for markets to get on their feet and this ETS is being designed with that in mind. One key thing is to ensure that there is liquidity in the market from day 1, so that it can run as a standalone system, so, to respond to your question about linking and what that would mean, new rules are being put in place for auctioning. Learning from the experience of the EU system, there will be market stability mechanisms to provide market certainty and protect against persistently low or high prices. Reserve prices will be put in place for some of the reserved aspects that will be taken forward by the UK Government through the Finance Act 2020. That will ensure that minimum prices are set for emissions and that they do not fall so low that they do not incentivise emissions reduction.

It is important to say that all that is also subject to review. The proposal in the legislation makes it clear that there will be two reviews of the whole scheme, in 2023 and in 2028, which will look at all aspects of the design of the system in order to ensure not only that it is running correctly and fluidly, but that it is incentivising emissions reduction in line with our wider targets.

11:30

With regard to the question of the link and what that will mean, as we have said before, the scheme has been designed to mirror the rules in the EU system that we are leaving. It is a good starting position, because we are already close to the EU scheme; we will have the same scope, sectors and rules around the share of allowances that are allocated for free or auctioned and the same thresholds for smaller emitters. The intention regarding the link with the EU system—again, a reserved matter for the UK Government, which is carrying that negotiation forward—is that we would have fungibility of allowances, so that they could be traded and mutually recognised between both markets. As the markets were linked, the ambition is that we would see a convergence between the two markets: the prices would converge and the allowances would be shared between both. I hope that that covers the points that you raised.

Stewart Stevenson: It probably does so from officials, but when we hear from the Cabinet Secretary for Environment, Climate Change and Land Reform at the beginning of September, she might expect to hear more questions; you might take note of my statement to that effect.

The Convener: Finlay Carson, you were going to ask about the carbon pricing mechanism, but could you continue your questions on the next theme that you wanted to ask about?

Finlay Carson: One of my questions—about the implications of the UK scheme not linking to the EU scheme—has been mostly answered.

Given the different ambitions that the UK and Scotland have for emissions reductions, what would be the implications of a UK-wide cap?

Ross Loveridge: That is a good question. The cabinet secretary was very clear in her consideration of a UK-wide cap in the discussions with the other Governments that, on leaving the EU, it was important to ensure market stability. That is a big share of our emissions, as we set out in June. Around a quarter of all Scotland's emissions are covered by that. The shares vary between the different parts of the UK. We must make sure that we are able to create a mechanism

that ensures emissions reduction in line with the cap and that that cap continues to decline year on year, so that the absolute amount that can be emitted overall across the whole phase of the scheme, out to 2030, falls in line with our emissions targets that we set for the ETS and that it is able to maintain industrial competitiveness and address the risk of carbon leakage. We have spoken before about the risk of carbon leakage from outside the EU, which has clear measures in place to protect against it, and also the risk of carbon leakage from the UK to other countries, and indeed within the UK, which has different industrial compositions. In Scotland, now that our large fossil-fuel power stations have closed, there is more of an emphasis on the energy intensive industrial sector being the main sector that is covered by the emissions trading system, whereas in other parts of the country there is as much of an emphasis on power generation.

Trying to get that balance right across the UK is challenging, but we believe that balancing the ambition for climate with competitiveness is consistent in part with the just transition principles in the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019, as well as balancing the range of considerations of the target-setting provisions of the act. Clearly, those provisions are for a different purpose, but we see in them the importance of looking at the impacts on industry and the economy, as well as on emissions.

It is important to say that our climate targets are set across the economy as a whole—they are based on actual emissions levels from all sectors. We have never expected all sectors of the economy to decarbonise at exactly the same time as each other. In a conversation with the UK and Welsh Governments and the Northern Ireland Executive, it is about making sure that we have a balance that works across the UK and is consistent with our net zero ambitions and those of the UK, which will ultimately reflect the fact that there are different compositions of the traded sector in each of our countries. The proposals that we have put forward reflect that need for compromise between the four Administrations in terms of our policy objectives.

Finlay Carson: Is there a level of confidence in the Scottish Government that the initial cap, which is set at 5 per cent less than what the UK share would have been if it was in the EU ETS, will still be adequate to align with our emissions targets? If not, what mechanisms are there in the legislation to allow that to happen? One of my colleagues will touch on exemptions and potential thresholds for smaller emitters, but is there capacity or flexibility in the legislation to allow that alignment to happen?

Ross Loveridge: In the response, we have been very clear that the cap that has been set in the order is an interim cap until we receive further advice from the Committee on Climate Change, which, unfortunately, will not come until the end of this year. As the cabinet secretary set out in her correspondence, the challenge with setting a cap that is consistent with net zero has been that the four Administrations have not yet received the advice from the Committee on Climate Change on what a net zero-consistent trajectory should be.

As we have set out in the Government response, the first approach is to set a cap that is tighter than what the EU cap was, and then make a clear commitment to review the cap within nine months of receipt of the advice from the Committee on Climate Change—which we expect will be at the end of December this year—and legislate for the change to the cap to bring it into line with net zero no later than 2024, but with an ambition to do so by 2023. It will take time to consult with participants on what the adjustment should be and then legislate. The quickest that we could make changes to the legislation after receiving the CCC advice at the end of December this year would be during the 2023 calendar year.

Claudia Beamish: I have only a brief question, which is supplementary to Finlay Carson's point about the fact that, in Scotland, we have a robust 2030 emissions reduction target and our net zero emissions target is 2045, rather than 2050. Can any light be shed on how comfortable the Scottish Government is with those divergences, in particular with regard to the 2030 target, given how quickly it will come upon us?

Ross Loveridge: To go back to what Euan Page said at the start, it is important to have a legislative mechanism. The legislation is there and is within the competence of the Scottish ministers. We have to work by agreement across the four Governments, but we are accountable as a Government to the Scottish Parliament for the setting of the cap and any amendments to the legislation.

That commitment to the review will have to take into account the fact that we have our own 2030 target in Scotland. We expect that when the Committee on Climate Change gives its advice on that, the advice will be consistent with the fact that there are different targets in place for climate change in the four nations of the UK. We expect that to be reflected in the CCC's advice. Given that the period to which this phase of the ETS applies takes us to 2030, the advice of the CCC and our response to that will have to be mindful of the target.

Mark Ruskell: I want to ask about derogations and exemptions. I am talking about not the ultra-small emitters—those that emit less than 2,500

tonnes of carbon a year—but the space between 2,500 tonnes and 25,000 tonnes a year, where individual emitters can apply for a derogation. There might be some encouragement for them to reduce emissions in that space, but they are not part of the trading mechanism.

I have a particular concern about waste incinerators, which are automatically exempted, as there are a lot of development applications for waste incinerators around Scotland at the moment.

There are also quite a few applications in my region and around Scotland for smaller gas peaking plants in the electricity system. I am interested to know whether those will be captured by the ETS or whether they fall within the derogated threshold of carbon emitters of under 25,000 tonnes. If a number of applications for gas peaking plants go through, that could collectively add up to quite a large amount of carbon being emitted into the atmosphere, and if the plants are not captured by the trading scheme, what will be the impact?

It would be interesting to hear your reflections on how you have drawn that line and on the number and type of derogations that will come through.

The Convener: We have hit a problem, because Euan Page has lost connection. Perhaps Alice Mitchell will step in.

Alice Mitchell: May I ask for clarification of the meaning of "gas peaking plants"? Do you mean stand-by generators that produce electricity in case of a shutdown of the grid?

Mark Ruskell: That is another way of describing them. I think that many of the applications that are coming through would provide that function in the electricity system, but they would also provide regular production of electricity outside of that back-up facility. They definitely emit carbon.

Alice Mitchell: The design of the small emitter scheme is based on the current small emitter opt-out scheme that is available under the EU ETS. Such plants can opt out of the trading portion of the scheme, but they still have an obligation to reduce their emissions. To opt out of the trading, they have to agree instead to meet a target to reduce their emissions, and that target is set on the same trajectory as the ETS cap. It will be the same principle in the UK system.

The companies in the small emitter opt-out will still have to reduce their emissions. If they do not manage to reach their annual target, enforcement action is available to regulators, which will ensure that they are subject to equivalent measures that incentivise them to reduce their emissions.

I do not know any instances at the moment of gas peaking plants in the current EU ETS small emitter opt-out scheme. Participation in the EU ETS is based on a threshold of a 20 megawatt hour capacity. That will be the same for the UK ETS. If those plants are combustion sites with capacity smaller than 20 megawatt hours, they will not even be captured by that threshold.

At the moment, waste incineration is not included in the scope of the EU ETS. We seek to maintain that approach to ensure a smooth transition to the new market for now, but we can reassess once the market is established.

Does that answer your question?

Mark Ruskell: Yes. I presume that you will take guidance from the UK Committee on Climate Change on any future revision of the scope of the scheme.

Alice Mitchell: Yes.

11:45

Mark Ruskell: I have a few more questions, although you have perhaps answered some of them. I have heard a lot of positivity around 1 January being the date when the scheme will be operational. If there are concerns—for example, about the potential for delay—this is your opportunity to voice them before a parliamentary committee. I will take your silence as complete assurance that the scheme can and will be delivered on 1 January.

Alice Mitchell: The SI that we are considering today is the cornerstone of the UK ETS and the timing of laying it is designed to ensure that the structure is in place for January next year.

As you might be aware, this SI is one element; there are others. A second SI will be made under the powers in the Climate Change Act 2008, which will be subject to the negative procedure. There will also be a couple of SIs under the Finance Act 2020, to add in the reserved fiscal elements of the UK ETS, which relate to the power to auction allowances and the Financial Conduct Authority being given a role in overseeing the financial transactions. The two Finance Act SIs are due to be laid in Westminster later this year. All four bits of legislation should—I hope—be in place and the UK ETS should be operational in January.

On the IT infrastructure, we are building a new registry, as I said, which in effect is like a banking system to keep track of allowances and transactions. That is being built as we speak.

The system for use in relation to matters such as stakeholders' annual compliance with the scheme will predominantly be needed from 2022, because people will report emissions on a

calendar-year basis and then have three or four months to undertake activities—there will be a bit of a time lag. There is therefore a bit more time to get that system fully operational, but the UK ETS structure will be there from January.

Mark Ruskell: Will there be an additional resource requirement for SEPA in rolling out the system? Is SEPA adopting a full-cost-recovery model?

Alice Mitchell: As I said, we are working closely with SEPA, which has been helpful in providing technical expertise—the Scottish Government has supported SEPA to provide that expertise over the past couple of years. The complication is that, if we remained in the EU ETS, changes that that scheme is undergoing would come into place in 2021. Because we are replicating those changes in the UK ETS, we have to take on the new activities. Therefore, regardless of the current situation, there would have been new activities for SEPA in 2021.

We are still discussing with SEPA what it will require in that regard. Given that no member state has experience of the new EU ETS activities, it is difficult to predict the level of additional resource that will be required, but it is not thought to be significant.

Mark Ruskell: Is SEPA adopting full cost recovery?

Alice Mitchell: Sorry—yes. As you might be aware, SEPA is currently consulting on its charging scheme for a UK ETS, to replace its existing charging scheme for the EU ETS. The new scheme will be on the same principle, in that it will recover the costs of SEPA's activities in regulating the scheme as well as the maintenance costs of the IT scheme that SEPA uses to keep track of permits and annual reporting. The consultation sets out a proposal on charges that involves covering the costs for SEPA.

The Convener: I will bring in Claudia Beamish for a quick question before I go to Angus MacDonald.

Claudia Beamish: I will build on what has already been discussed. Could the current economic conditions result in an oversupply of allowances and a weak carbon permit price in the UK ETS? You touched on what might happen because of that, but do you have any specific comment on the current economic conditions?

Alice Mitchell: The level of the cap is set not only to reflect the need for compliance in relation to people who are in the scheme having enough allowances to meet their emissions but to recognise that it is a new market. In particular, electricity generators tend to exhibit certain behaviours in markets because they need to manage their on-going long-term contracts—for example, they offer energy contracts a few years in advance at a certain price. Therefore, they tend to hedge, as it is called, and buy their carbon emission allowances for several years, so that they can offer certainty on their carbon price as part of their contract. The cap is set to allow those companies to re-establish that hedging position, and that will likely mean that demand for allowances is not necessarily reflective of the actual level of emissions in the initial few years.

Claudia Beamish: So the current economic conditions are not something that we should be concerned about in relation to hedging?

Alice Mitchell: I am afraid that I do not really know the answer to that. It is difficult to predict the behaviour of the market and how significant that is, which is the reason for setting a cap that gives a bit of leeway to accommodate that. The auction reserve price is one of the in-built mechanisms to manage a surplus. If the price is particularly low, obviously that would not incentivise reduction, so an auction reserve price of £15 has been set as the minimum price at which allowances can be sold.

The rules for auctioning are being adjusted compared to those under the EU ETS. Under the EU ETS, allowances are auctioned every fortnight but, if 100 per cent are not sold, the whole auction does not succeed and all allowances are put back into the pot for auctioning next time round. In the UK system, we will limit the ability to roll them over to only four successive auctions, at which point, if they remain unsold, they will be taken out and put into a reserve. That will reduce the surplus allowances that are continually added to the remaining amount being auctioned.

Angus MacDonald: I turn to the public-facing concordat. The cabinet secretary's letter to the committee on 2 June refers to the development of the

"public facing concordat between the Ministers from all four administrations"

that would accompany the framework outline agreement. Has the public-facing concordat been completed? If not, when does the Scottish Government expect those documents to be available and shareable with the committee?

Ross Loveridge: Euan Page would ordinarily have answered that but, as he has disappeared, I am happy to do so.

That is a good question about the public-facing concordat. It is still being developed alongside the framework outline agreement as part of the process agreed between the four Administrations under the wider JMC(EN) rules. As Euan said at the start, the order in council that is before the

committee provides clarity on ministers' role and accountability to the Scottish Parliament. Any changes to the ETS would require legislation and there would be accountability to the Parliament.

The framework outline agreement and the concordat will describe how the Administration will oversee the ETS in operation. As Euan said, that includes things such as governance, dispute resolution, the practicalities of managing the legislation once it comes into operation and how we will develop the policy for any future change that might require changes to legislation. There is also the review period, which I mentioned earlier.

The plan is for the public-facing concordat to be made available alongside the framework outline agreement once we move into phase 4 of the JMC(EN) agreed processes for common frameworks. My understanding is that it will be made available so that the Parliament can consider it but, because of that wider process, I cannot say when.

Angus MacDonald: Okay. We look forward to receiving it in due course.

Ross Loveridge: Thank you for your patience.

The Convener: As we have no more questions, I thank the Government officials for their time. At a future meeting, we will hear from the cabinet secretary to discuss the issues and we will formally consider the order.

That concludes the public part of our meeting. At our next meeting, on 18 August, we will take further evidence on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill.

11:56

Meeting continued in private until 12:26.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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