



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Environment, Climate Change and Land Reform Committee

**Tuesday 1 September 2020**

**Session 5**



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Pàrlamaid na h-Alba

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**Tuesday 1 September 2020**

**CONTENTS**

	<b>Col.</b>
<b>UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) BILL: STAGE 1 .....</b>	<b>1</b>
<b>CLIMATE CHANGE ACT 2008.....</b>	<b>28</b>
Greenhouse Gas Emissions Trading Scheme Order 2020 [Draft] .....	28

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**ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE**  
**19<sup>th</sup> 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)

\*Liz Smith (Mid Scotland and Fife) (Con)

\*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Roseanna Cunningham (Cabinet Secretary for Environment, Climate Change and Land Reform)

Michael Russell (Cabinet Secretary for the Constitution, Europe and External Affairs)

**CLERK TO THE COMMITTEE**

Lynn Tullis

**LOCATION**

Virtual Meeting



## Scottish Parliament

### Environment, Climate Change and Land Reform Committee

*Tuesday 1 September 2020*

*[The Convener opened the meeting at 09:30]*

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

**The Convener (Gillian Martin):** Good morning, and welcome to the 19th meeting in 2020 of the Environment, Climate Change and Land Reform Committee.

Today, we continue to take evidence on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill. With us, we have the Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham, and the Cabinet Secretary for the Constitution, Europe and External Affairs, Michael Russell. The cabinet secretaries are joined by their Scottish Government officials: Emma Lopinska, constitutional policy manager, and Charles Stewart Roper, head of the environment strategy and governance unit.

My first question is probably for Michael Russell. The Scottish Government has not set out the criteria for deciding which measures it would or would not choose to align with. Why is that? Would the principles of agreed common frameworks also apply to keeping pace?

**The Cabinet Secretary for the Constitution, Europe and External Affairs (Michael Russell):** Thank you for the opportunity to be here this morning.

It is a good central question, and the answer lies in two parts. First, I would point to a mix of things that are involved here, as we cope with leaving the European Union—which we did not vote for and which inevitably complicates the legislative and procedural landscape. We are not in a simple mix of possibilities; we need to do lots of things in lots of ways in order not to lose many of the advantages that we have had for the past 47 years. The continuity bill fits into that, but it is not the only part of it. You mentioned the frameworks, and we have a range of arrangements within those, such as the memorandum of understanding and formal and informal arrangements. We also have the unwelcome intervention of the internal market white paper and the problems that it will

create. No doubt, we will come on to those problems later.

The continuity bill goes back to a strategy that we developed early in the seemingly endless process of Brexit, which was to find a way in which we could continue to have the high-quality regulations that we thought were most important for Scotland, primarily in the area of the environment but not exclusively so. The bill is a second attempt to put that into place. The first continuity bill was challenged by the United Kingdom and taken to the Supreme Court. Virtually all of the bill was found to be within the competence of the Scottish Parliament; a very small part was not. Of course, by then, the UK had changed its laws—in what one might call a sneaky way—in order to make the bill impossible to operate. We have come back with an operable bill, which the Presiding Officer has said is within the powers of the Scottish Parliament. That allows us to look at and choose those areas that we think are most important.

One size will not fit all. If we lived in a neat world, one might expect a clear and published list of criteria that would apply, but European legislation is large in scale and varied, so we have to approach each issue on its merits. The committee has heard evidence on the issue, and we have tried to present a matrix of issues, which would allow us to decide which of the regulations we felt it was important to continue and to keep pace with. The matrix would consist of things such as the practical implications of doing that. Would it be too difficult to do that? What about the economic and social benefits and costs? Are they things that would be good for us, just as membership of the EU is good for us? Would taking the regulations on be good for us? We do not have unlimited resources, either financially or in terms of personnel, so could we do that within our means? As the Government has made it clear that its ambition is for Scotland to return to the EU, are there things that we should hold on to because they will be important to us in the process of accession? If any of the factors mitigate against aligning, are there alternatives, such as the frameworks that you mentioned, which are another way to go about it?

We are clear that it will require decision making of a varied nature, depending on the issues that we are considering, and consultation with others. I do not think that the Government has all the answers. The landscape is wide ranging, so we may look at certain issues and not be sure what we should do, but somebody else might say, "That's really important." We hear that in the debate as to whether there should be a duty to align. It will not be neat, but I hope that we will bring our intelligence and our judgment to the matter and that we will be keen—as any

Government should be—to consult on and discuss it with the Parliament. It will involve the sunset of the power, which is an issue to address later. The power may fall out of use because we have re-entered the EU. The best reason for ending the provisions of the bill would be that we no longer need them. We should look at the matter from time to time and ask whether we are still using the right tools.

I am sorry that that was a slightly lengthy answer, but it is a complex area and I wanted to lay out all the issues so that we have a chance to discuss them.

**The Convener:** I am glad that it was a lengthy answer, because there was a lot in there. You mentioned the Parliament's role. As complex decisions are made, including those about common frameworks, what will the Parliament's role be in scrutinising them? Where will the Parliament's committees sit in that regard?

**Michael Russell:** As you know, we are bringing frameworks to the Parliament as they come to their final stage, so that they can be consulted on and looked at closely. We want to finish that task, but one of the threats to our doing so lies in the UK Government's internal market white paper. As long as that threat is withdrawn, as I hope it will be, we will be able to complete the framework process, and in so doing the Parliament will have a clear role at the beginning, middle and end. At the beginning, there will be consultation with the Parliament and others about any decision that we make about keeping pace with powers. The middle part is the secondary legislative process. I am sure that we will have a debate about what that process should look like and whether the procedure should be negative, affirmative or even super-affirmative. That is a debate that we have about every single instrument, and we will, no doubt, have it again.

Section 7 of the bill allows for a reporting process so that we are able to report on what we have done. As you know, I have taken on the reporting process under the coronavirus acts. I have learned quite a lot—and I am grateful to my officials for learning a lot—about the reporting process, including what we should bring to the Parliament, how we should do that and what feedback we should expect. The Parliament will be central to the process. There are functions for each part of the democracy—the Government has some functions and Parliament has others, but the interface is quite clear. I am also open to considering whether we need to publish more on the issue, so that there is an even bigger sense of ownership—[Inaudible.]

**The Convener:** My next question is for both cabinet secretaries. Mr Russell flagged up the potential for the proposed UK internal market to

have an impact on the Scottish Parliament's ability to legislate on high environmental standards, which is a live issue, particularly this week, given some of the comments about animal welfare and food standards that are out there. What is the potential for the internal market to effectively cut off the Scottish Parliament or Scottish Government in that regard?

**Michael Russell:** I am happy to address the point more widely, and Roseanna Cunningham can perhaps follow up on the environmental side.

It is a very serious threat. We have been working in good faith with the UK Government on the issue of frameworks. Out of the whole sorry Brexit process, it is perhaps the one thing on which we—working as equals, which has been important—have been able to come to some conclusions with the other parts of these islands. I think that seven of the frameworks are ready to be decided on, one of which does not relate to Scotland. The rest will come in during the next few months and into next year.

I made a commitment that we will not do anything outwith the process that would damage relationships. Then, suddenly, virtually out of nowhere, came the internal market white paper, which takes two European concepts, misunderstands them—perhaps deliberately—and creates a set of circumstances in which Scottish regulation, in virtually every area and not just the environment, would be undermined. It would not matter what regulations we passed, or decided to pass, because they could be undercut by decisions of the UK Parliament, probably operating without Scottish input and under the English votes for English laws process.

It is difficult to underestimate the damage that the internal market white paper proposals would do to the frameworks process. We have made it clear that we cannot accept the proposals, and the Scottish Parliament made it clear when it voted two weeks ago, 92 to 31, that it is against the proposals.

Even considering the absurdly short consultation period of less than a month that has been dictated by the UK Government, a substantial opinion in Scotland from a wide range of organisations is that they just do not want what is proposed to happen, that they do not consider it appropriate and that they suggest that the frameworks process be concluded.

The internal market white paper forms a significant threat to all that the Scottish Parliament is talking about. It undermines and, indeed, destroys the ability of the Scottish Parliament to make choices for the people of Scotland in the devolved areas of competence. It is as serious as

that. We cannot, and will not, accept the proposals.

**The Convener:** Does Roseanna Cunningham want to address the same question from an environmental point of view?

**The Cabinet Secretary for Environment, Climate Change and Land Reform (Roseanna Cunningham):** I am not sure that I have much to add to Mike Russell's points.

The problem with the level of the conversation around the internal market is that it rather indicates an intention or a desire to override completely those pesky devolved Administrations, which might be coming—quite rightly—to different views on issues.

The internal market idea—the notion that there is an internal market that can override everything—is clearly designed to bring into line the devolved Administrations acting perfectly properly in their competencies. It looks as though it is just a way of coming at the devolved competencies by slightly other means.

It creates uncertainty for us. We could go through all our perfectly proper processes, including all the parliamentary scrutiny in the world, and discover that that does not amount to a hill of beans as far as Westminster is concerned and that what we decide could get overridden completely. That is the real concern about the proposals.

The proposals are likely to impact not only across the environmental scene, but particularly on our friends in the rural economy more widely. The issue of animal health and welfare standards has already been flagged. Those are just some of the policies on which we presume we can make decisions, because the Scotland Act 1998 says that we can make those decisions, but the whole internal market debate is in effect about being able to set those decisions aside.

**Finlay Carson (Galloway and West Dumfries) (Con):** We have heard a lot about the issues with the internal market white paper, but, unfortunately, we have not heard very much about the huge positives of having a smooth internal market with no barriers and how important that is to the rural economy and thousands of businesses across Scotland. It is unfortunate that we are hearing about the division that it might create rather than about how we can benefit from using the size of the United Kingdom to enable everyone to move forward and improve their environmental strategies and so on.

I am very pleased to hear that positive progress has been made with the common frameworks. How hopeful are you that they will be concluded by December 2020—I think that that was the

expected conclusion date—and what role will the Scottish Parliament have in scrutinising them? Also, can you tell me whether there are any potential restrictions on environmental strategy? Given the environment bill that is coming forward and so on, might the continuity bill constrain or restrict the ability to set policies in bills that will come up later?

09:45

**Michael Russell:** I am not sure that I understood that final question. Perhaps Roseanna Cunningham will want to respond if she understood it.

As far as the first question is concerned, I am absolutely committed to freedom of trade within these islands. Unfortunately, however, that cannot and will not be assisted by the internal market white paper, which will create new difficulties and barriers and will impoverish Scottish businesses—particularly smaller ones.

I was impressed by NFU Scotland, which made it very clear that it does not believe that the internal market bill is required and commended the frameworks to the Parliament. The Scottish Council for Development and Industry takes the same view.

Mr Carson's view of the white paper is very rose-tinted and it is not shared by those with whom he would normally agree. Of course, he is entitled to his opinion, but I cannot find within the white paper anything that says that there is a threat to the existing single market. What I can find is a lot of false assertion about, for example, the operation of the European market. That is not the same thing, and it is not operated in the same way.

On how the frameworks will be completed, I think that the committee has had information that the first group will be completed by the end of the year, and work continues on the others. It has been delayed by the Covid pandemic, but that should not concern people, because I have made a clear and binding commitment that we will operate as though the frameworks were in place, as a result of which no insecurity will be created by their not being finished.

Indeed, if they are not proceeded with, it will be because the UK Government has killed them because of the internal market white paper. They could not work in co-operation with the regulations and the law that is anticipated in the internal market—that would simply be an impossibility. It would be foolish to spend all that time and effort and be completely overridden on every occasion by decisions that were made elsewhere.

There is a clear choice, and I have made that clear to Michael Gove. I wrote to him on the matter earlier this week, and I will make the point again at the joint ministerial committee meeting that will be held on Thursday. The ball is in their court. If they wish us to work with them to finish the frameworks, we are very happy to do so, and that will provide what they are looking for, what I am looking for and what Mr Carson is looking for in terms of security.

Of course, the insecurity will continue through the Brexit process. We do not even know what the arrangements will be by the end of the year, because that process is being so badly handled, and it is such a misbegotten adventure in any case. However, if the UK continues with the internal market proposals, the frameworks will essentially be dead.

**Roseanna Cunningham:** In the evidence session that follows this one, we will discuss with the committee the particular common framework around the emissions trading scheme. It is really important that that is in place by the end of December, but there is a question mark over whether it will be. Indeed, there is a plan for an alternative way of managing the situation if that is not in place, and that alternative is not something that we would agree with. We will have a longer conversation about that in the second part of this morning's proceedings.

I think that, at the end of Finlay Carson's question about common frameworks, he asked very generally about the continuity bill and what is legislated for there. In effect, what we are doing in the bill is enabling ourselves to align with high standards. That is what this is all about—it is about using our devolved competence on the environment to choose to align with high standards. Our concern about the internal market is that it might enable the United Kingdom Government to prevent us from doing that.

I do not know whether you want me to move on at this point to your final point, which was, I think, meant to cover a much wider environmental picture, or to come back to it. However, as I have indicated, the power to align will be an important part of fulfilling our commitment to maintaining and enhancing environmental standards and, where possible keeping aligned with developing EU standards—there has been a discussion about that.

In general terms, the objective has been to address in the bill any gaps and risks to standards that are created by EU exit. We also have a strategy document that was published earlier this year, which will give us guidance for the future. That strategy looks beyond purely environmental goals and sets out ambitions to increase the contributions of nature to the wellbeing of people

in Scotland and the strength of our economy. We are developing a monitoring framework for that at the moment, which will provide a means of measuring progress towards its long-term goals.

We think that that strategy, alongside the proposals in the bill, will provide a robust framework for environmental policy outwith the EU. It will ensure that we can keep our standards high and comparable with those of the EU. Although it is not within the portfolio, I flag up work that is continuing in the human rights task force on the proposed right to a healthy environment. A lot of things are going on beyond the part of this bill that we are discussing today, which is perhaps the wider point that Finlay Carson was referring to in the final phrases of his question.

**Mark Ruskell (Mid Scotland and Fife) (Green):** I want to pick up on a point that you made about concerns around environmental standards, food standards and animal welfare. Are there other examples of areas where cabinet secretaries have concerns? Professor Campbell Gemmell raised with the committee the issue of diverging water quality standards. Is that a concern? Is there a wider concern about the ownership of water and whether that could be challenged under the single market proposals?

**Michael Russell:** I must leave the environmental issues to Roseanna Cunningham but, in general terms, I point out that the internal market white paper, given the way that it is drafted and its intentions, would affect all areas of devolved competence including water privatisation and, for example, health service procurement. Interestingly, in responding to a question in the House of Lords just after the internal market white paper was published, Martin Callanan—Lord Callanan—drew attention to the role of the courts in enforcing those matters.

That has opened up the distinct possibility that the Scottish Government could say that it was against certain types of contracts in the public sector—for example, in health service procurement—but that, as a result of a bad trade deal, because the internal market white paper is also being driven by the UK's desperation for trade deals at any price, a company coming in from elsewhere, such as an American private health company, could say, "Sorry, but the regulations in England allow us to do this and we now insist on doing it in Scotland". My reading of the white paper is that it would mean that companies could do that, which would have an impact right across Government. It is difficult to envisage any area where there would not be an impact.

Extraordinarily, the internal market white paper mentions building standards, which have been different in Scotland and England since time immemorial. There is a different climate and there



are different materials. The idea that those should suddenly be drawn into consideration when there has been no difficulty with them since long before devolution and membership of the EU gives a hint as to what is going on. It is partly the most elaborate and desperate power grab and partly because anything and everything must be subordinated to the bad trade deals that the UK needs to do.

**Roseanna Cunningham:** I do not have much to add to that. The potential for problems arising is widespread across many portfolios beyond my own. That includes the neighbouring portfolio, which is the rural economy. Transport will also be heavily impacted, and there could be impacts on other portfolios.

People need to understand that the concept of the internal market runs counter to the ability of the Administrations to do what they are legally obliged and entitled to do. It is an entirely contradictory approach, which can be seen in almost any area. The threat to Scottish Water is one example, but there are many other things that I would question in an internal market, such as whether absolutely everything will be done under the English legal system and the Scots legal system will be cut out. Once we pursue such notions, those things will snowball and we will find that an enormous area of Scottish Government policy in the devolved settlement is effectively being set at nought.

When people ask what the problem is, I liken the issue to the notion that, if you have a happy marriage, there is no problem, but that does not mean that you want to remove the right to divorce. Issues are likely to arise in many areas, and they will be a huge problem for us in the future. There is no doubt about that.

**Mark Ruskell:** I will move on to some of the detail in the bill, and particularly the environmental principles. The committee has heard a lot of support for inclusion of the integration principle and for having an overall principle of achieving a high level of environmental protection. Professor Scotford said that the omission of a high level of environmental protection is a “glaring oversight”. Do you have any reflections on the evidence that has come to the committee and the impact of including or excluding those or, indeed, other principles?

**Roseanna Cunningham:** In answer to the question about calls for an integration principle, I agree that the integration of environmental policy into other policy is critical. However, other policies have important contributions to make to protecting and enhancing the environment and achieving a net-zero economy. We see that throughout what we do in Government. Obviously, a natural environment that is healthy contributes to

individual wellbeing and to the health of communities and the economy.

My view is that the proposals achieve integration through the framing of the duty to have regard to the environment—which applies to ministers’ development of policies, including proposals for legislation—across all areas of Government. The duty is not limited to policy-making in the environmental field; it applies across Government. Similarly, it will apply to other public authorities in their consideration of policies and programmes that will have a significant effect on the environment, and not only policies that have specific environmental goals.

In respect of the principle of high environmental protection, I note that the duty is given context by section 13 of the bill, which sets out that the duty is to be applied with a view to protecting and improving the environment and contributing to sustainable development. We can all agree with those goals. However, being a cabinet secretary has taught me that pursuing such a goal involves a wide range of actions, resources and delivery partners. I am not sure that legislating for that high-level policy goal as a principle would be very meaningful. It would be good if it was as straightforward as that, but the reality is that putting that into practice requires more than simply the statement of a principle.

10:00

**Mark Ruskell:** Is the point not that we have already put it into practice, because we already have that commitment to EU environmental principles, and we just want to retain that for the future? Why does it not work now?

**Roseanna Cunningham:** That is what the bill does: it takes the principles that we operate under with respect to the EU and replicates them in our legislation. Trying to put something higher and overarching over that—it feels like that is the intention—does not improve anything, in my view, because we are taking the four principles that we want to replicate and we are doing for Scottish devolved competence what the EU does overall.

**Mark Ruskell:** The point that I am trying to make is that the commitment to high-level environmental protection is already in EU legislation. I am trying to understand why we would not want to retain that in future. I get the principles that are in the bill, but I am not getting why we would want to drop that commitment.

**Roseanna Cunningham:** The bill is not about dropping anything. That is a ridiculous question. We are not dropping anything; the point is that the principles in the bill will deliver that commitment. The high-level principle that Mark Ruskell is talking about is what Government is doing on a daily

basis, and the four principles that we are legislating for—the ones that the EU operates by—will deliver that.

**Claudia Beamish (South Scotland) (Lab):** I want to pursue that point a little further with Roseanna Cunningham in relation to what the Faculty of Advocates has highlighted regarding the principles, and particularly the principle of environmental equity, as enshrined in the Treaty on the Functioning of the European Union.

In view of how important it is, the faculty has highlighted

“environmental equity (in a redistributive sense)”.

I understand what you are saying about the high-level principles, but I would have a concern if that high-level principle was missed. You will recall, as will Mike Russell, that Mark Ruskell and I were both positive about the four environmental EU principles. Will you comment on that point about environmental equity?

**Roseanna Cunningham:** I am not sure that I have much to add. We needed to produce the bill this year. As I think I have indicated before, there is no reason why other principles could not be considered and added. Beyond the four, there are at least another three or four potential additional principles. Right now, the bill is aimed at closing the gap, and I think that people are losing sight of that. As for other, additional principles, we have no clear consensus on the addition of individual principles to the four that everybody understands. That is why we have stuck pretty firmly to the four that we have.

We need to close the gap. There is nothing to prevent us from adding principles in the future, and I would imagine that there will be an on-going discussion about that. No bill can do everything, and the bill that is before us is trying to ensure that, at the end of December, when the transition period is over, we will be in a place that is as near as possible to where we have been within the EU.

**Claudia Beamish:** I suppose that that is why I highlighted what the Faculty of Advocates said about that high-level environmental principle and how important the human health aspect is in relation to the environment.

If the convener agrees, I will move on to discuss the duty either to “have regard to” the principles or to act in accordance with them. Both cabinet secretaries will be aware that the committee has received quite a lot of evidence on that. Perhaps Roseanna Cunningham could comment first, followed by Michael Russell if that would be appropriate, on the concern that Scottish Environment LINK and others have expressed that that duty is not robust enough. That will open up our next line of discussion.

**Roseanna Cunningham:** I am well aware of the debate on the issue, which goes back to last year’s consultation on the principles. The principles are guides to decision making, but other statutory duties exist and we need to ensure that the duty does not conflict with them.

Ministers and public authorities have a really wide range of statutory duties and other relevant factors to consider in any decision-making process. That is important because, if a minister or a public authority is alleged to have failed in a statutory duty or in relation to the guiding principles—that is to say, they have failed to have them in view—they will be open to legal challenge.

The stronger formulation of the duty could constrain ministers’ ability to take other legitimate considerations into account when they are developing policy. The same concern would apply to public authorities. If the duty was made even tighter, it could lead to perverse effects or even hold up decision making, which we would want to avoid.

There are other issues around defining what the duties are in comparison with others. We use the word “duty”, but in some areas it will mean something slightly different. For example, policy interventions that are aimed at preventative action or rectifying pollution at source have consequences for resources such as money and land use, and they also cause carbon emissions. Therefore, although it is important that environmental principles are taken into account in decision making, our approach on that cannot be so specific that it dominates all other duties and objectives. Using the words “have regard to” therefore strikes the appropriate balance.

**Claudia Beamish:** Can I come back on that, cabinet secretary? I find your answer puzzling. I respect your point on resources, but I find it hard to understand how there could be conflict with the guiding principles, which have been enshrined in the treaty and which we have followed throughout our time as part of the EU. If the principles were robust, they would be a way of protecting our environment in the same way as the EU does.

**Roseanna Cunningham:** I will talk about that using the example of my experience of taking the Flood Risk Management (Scotland) Bill through Parliament in 2009. At the beginning of the process, Michael Russell was the responsible minister and I was convener of the Rural Affairs and Environment Committee, but I became the Minister for Environment during that time and I had to take the bill through stages 2 and 3, which was an interesting experience.

One of the discussions that we had at the time concerned the potentially competing interests of two EU directives—the flood risk management

directive, which we were putting into legislation, and the water quality directive, which also emanated from the EU. There was a vigorous discussion about how we could make those two directives work together in practice. That is the kind of discussion that has to happen at a specific level, and a decision had to be made about how to manage those competing interests.

That is the kind of thing that happens in real life. If we make a particular duty gazump everything else because we cannot make that necessary balancing decision, we will run into difficulties.

**Claudia Beamish:** We must agree to differ, but then I am not a lawyer and I have not been in Government. There we are.

Michael, do you have any comment on the duty issue?

**Michael Russell:** No. I think that Roseanna Cunningham put it very well with regard to everything having to fit together.

In every piece of legislation that I have engaged with over the years—there seem to have been rather a lot of them, unfortunately—balances have had to be struck between the new legislation, the existing legislation and the priorities. In every committee, people have said, “Are you taking this seriously enough? Shouldn’t you make this a duty rather than something that ministers must have regard to?” However, we have to recognise how the bits fit together.

I do not think that there is the slightest weakening of commitment to the principles. To ensure that they are part of the matrix of legislation rather than sticking out and perhaps being difficult to manage is the right thing to do, and I think that Roseanna Cunningham expressed the situation well.

I do not know whether we have to agree to differ. I expect that we find ourselves on the same side. We all agree that this is an important issue and I do not think that it is being diminished in any way by the language that is being used.

**Claudia Beamish:** I thank you both for those comments. The committee will reflect on them.

**The Convener:** On—[*Inaudible.*—the principles and the issue of having regard, does that apply in the same way that you have asked public authorities to take the principles into account only during their strategic environment assessment processes, rather than during all decision making around, for example, planning and budgets? Does what you have said apply to that reasoning, too?

**Roseanna Cunningham:** I lost the sound during the first part of your question. Could you repeat that, please?

**The Convener:** You have just explained why you are taking an approach that involves ministers having regard to something rather than having a duty placed on them. Is that also the reason why public authorities have to apply the principles only in a strategic environmental assessment rather than in all decision making on things such as planning and budgets?

**Roseanna Cunningham:** Perhaps. I would not want to be quite as specific as that—I used a specific example in response to the previous question.

The current direct effect of the EU environmental principles is on policy making in the EU. The purpose of this bill is to close the gap that will otherwise arise at the end of December, when we come out of transition. In the EU, laws are made that reflect the environmental principles, and those laws drive the design of regulatory schemes. Some directives and regulations had a more direct copying of the principles into their provisions and then, obviously, into Scottish regulations. However, I think that I am right in saying that the EU principles at that level had no direct effect on individual regulatory decisions in Scotland. The principles guide the policy making, and then, out of the policy, you design the regulatory system that has to apply.

10:15

I am trying to preserve the effect of the environmental principles, and I have therefore applied the duty to the level of policy making. In that, I have gone beyond the UK Environment Bill provisions, which apply only to ministers, by choosing to apply the duty to strategic decisions that are taken by all public authorities. That decision was made in response to the consultation exercise and the feeling that was expressed that those principles ought to apply much more broadly.

If we were to try to apply those principles to individual decision making, such as individual grant funding decisions and individual regulatory decisions, the process would become wholly impractical and disproportionate. The principles are strategic by definition—the way in which they are framed and written makes them strategic in scope. Trying to apply those strategic-level principles to individual sites, licence applications and grant funding decisions would be difficult. It would create a lot of uncertainty and inconsistency in decision making and would make the process take a lot longer. Information would be required from applicants, and the processing efforts of regulators would be wholly disproportionate to any possible gain arising from any individual decision.

The way in which the EU has done things, and the way in which we have operated—in effect, making the principles guide the policy design—will ensure that the regulatory schemes will reflect those principles and their application. That is why we have chosen to do it that way. That circles back to the question of what we are trying to do in this bill. We are trying to prevent the disruption of our systems at the end of 2020, when the transition period is over. That is what this bill is about.

**The Convener:** Mark Ruskell and Finlay Carson have some final questions on the principles before we move on to talk about environmental standards Scotland.

**Mark Ruskell:** I want to ask about the rationale behind the exclusions to section 10, particularly those relating to finance and budget. It strikes me that there might be some things in the budget that are not part of plans or programmes—the climate challenge fund, for example—and which, therefore, will not be included in that kind of assessment. It has been put to us in evidence that budgets are increasingly becoming preventative, in that they are concerned with the causes of problems, which means that there could be benefits to budgets being captured by the provisions in the bill. What is your response to that?

**Roseanna Cunningham:** The intention of the provision is basically to remove the purely financial and budgetary processes from the scope of the duty. If that is not done, the process will become extremely complex. It is basically reflective of the provisions in the Environmental Assessment (Scotland) Act 2005.

The intent of the exclusion will be explained in guidance, in a similar manner to what was done in relation to the 2005 act. I do not think that those exclusions will have any impact on the achievement of environmental objectives. A lot of significant environmental policies will have some financial consequences, and the intention is not to exclude policies on that basis, in the same way that policies are not exempt from the requirements of the 2005 act.

I think that this debate arises from a lack of clarity around people's understanding of section 10(3).

**Finlay Carson:** I have a brief question on the guidance. You have touched on how new policies can be developed after the legislation is in place, but what options are there for increasing the scope of organisations that should be involved in developing the guidance in relation to these principles?

**Roseanna Cunningham:** At the moment, the provisions require us to consult other persons that

are considered to be appropriate. We intend to consult extremely broadly on the guidance before laying it before Parliament. If the committee strongly feels that particular individuals or organisations should be consulted and might perhaps be overlooked, we would be happy to hear about that.

**The Convener:** We will now move on to a discussion of environmental standards Scotland. We probably received most evidence about that issue.

**Liz Smith (Mid Scotland and Fife) (Con):** The vast majority of witnesses were comfortable with the idea of environmental standards Scotland, but there was quite a range of views about how robust it can be unless its roles and functions are clarified. Roseanna Cunningham, do you accept that criticism, and how might you be able to clarify its roles?

**Roseanna Cunningham:** I am not sure that I accept the criticism. At the risk of sounding boring, I repeat that we are trying as far as is reasonably possible to replicate the current enforcement system that applies via Brussels—doing so is forced on us out of necessity. I know that there is a vigorous debate about what could be put in place, and that there has been for a long time. My intent in the bill is to ensure that there is something in place as of 1 January that will allow us to do in as expansive a way as possible what has been done in terms of oversight via Brussels.

A lot of the proposals that I see and discussions that I am aware of concern some much more expanded ideal version of the body, which might be established down the line. There are two discussions going on. One concerns whether, as much as is humanly possible, the body will do what is already being done; and the other seems to be about what things would look like if we were in an ideal world and had a blank sheet of paper. I am sure that this committee's successor committee in the next session of Parliament will want to come back to some of those issues in the longer term. However, the bill that we are discussing is about what happens in the short term. It is about getting us through the exit from transition and into the new world with a system that, as far as possible, mirrors what we currently have.

**Liz Smith:** I accept that, and it is an interesting perspective but, obviously, there is a long-term view to be taken. Groups such as WWF, the RSPB and—I think—the National Trust for Scotland are flagging up concerns about the possibility that the new body might be a bit too close to the Government, and they point to some aspects of paragraph 1 of schedule 1 to the bill, where they think that there is a bit of a

contradiction. Is the new body too close to Government?

**Roseanna Cunningham:** Obviously, at the end of the day, a view will be taken. It is difficult to see, in our system, another way in which the body could be constructed. We have chosen a way of doing this that distances us in so far as is humanly possible from the workings of the body. We have to create it and set it up and, ultimately, there will be some accountability along the line. However, in so far as is reasonable and possible, the model that we have chosen has been proven to work already in respect of some other things that we have done, and that gives us the confidence that it will be independent.

Believe you me, I have no interest whatsoever in getting involved in the decision making that this body would have to be involved in. I cannot imagine that anybody would, at any Government level.

**Liz Smith:** My last question is about what relationship you feel the body would have with the commissions or whatever other bodies other jurisdictions in the UK choose to set up. How do you foresee that working?

**Roseanna Cunningham:** This is about matters that are within the power of the Parliament in Scotland. The new body will have oversight over those and it will not have oversight over what is not devolved. Nevertheless, if decisions are taken elsewhere that are about devolved matters, it will be able to follow that through. I imagine that there will be times when it will do that. Different bodies will be set up within the UK; the Welsh are in the process of thinking about setting something up and there will be the OEP—office for environmental protection—as well as ESS. When they are set up, I expect that they will have strong working relationships in the same way that the Scottish Environment Protection Agency and the environment protection agency in England do already. That is fairly standard. The body will develop strong working relationships.

We do not want one body sitting over them all. That is what we do not want to see. In terms of relationships, we would want to leave it to the body itself to make that decision about how much and how far it wanted to set up working arrangements with other bodies. My feeling is that it would be in their mutual interests to do that but it would be for the bodies to choose how they would then carry that out.

**Finlay Carson:** My question is about the definition of the environment within the bill. NatureScot—previously Scottish Natural Heritage—has highlighted concerns that the bill's definition of “environment” omits habitats and

species and it raises some concerns that ESS will not be able to ensure compliance with

“the Birds and Habitats Directives and associated domestic Regulations.”

Has that been an oversight or is there another method to ensure that the birds and habitats directives are abided by and complied with?

**Roseanna Cunningham:** In general terms, we are trying to use language in the bill that is understandable so that people—and ultimately, and potentially more importantly, courts—know straight away what it applies to. We do not want people to look at the definition of the environment in the bill and just read it in isolation. There is a danger that that is what is happening here. However, it is part of a much wider set of definitions, which include environmental law, environmental protection and environmental harm. They are comprehensive when one reads them all together. In my view, it is clear that the work of ESS will include consideration of how successful environmental law is with the protection of our species and habitats.

10:30

**Finlay Carson:** You will surely agree that it is concerning that SNH raises that concern. Can you give us some comfort that there will be better guidance or information to ensure that it is clear that the bill as it stands will ensure compliance with the birds and habitats directives? We are talking about the concern not just of someone off the street but of an organisation that we would expect to understand what you have explained. Are you comfortable that the bill will ensure compliance and that that message can get out there?

**Roseanna Cunningham:** Indeed. By answering the member's question in the way that I have, I have put on the record that the definition in the bill encompasses the protection of species and habitats. We can provide a fuller explanation to SNH. I am grateful to NatureScot—we should probably stop calling it SNH—for its serious consideration of the provisions. I am happy to provide that comfort on the record and in any other way that I can, because it is absolutely our intention that the bill covers the protection of species and habitats.

**Mark Ruskell:** I have a question about the bill's definition of environmental law. It excludes

“disclosure of, or access to, information,”

which is relevant to our commitment to the Aarhus convention. Is that intentional? Is the issue covered elsewhere within the suite of definitions that you mentioned? Why is it excluded under the definition in the bill?

**Roseanna Cunningham:** I am not sure which definition is considered relevant here. We were not sure that it was practical to lift the definition from the Environmental Information (Scotland) Regulations 2004 in its entirety and apply it to the purpose in the bill. However, I will ask officials to compare the definitions in those regulations with the set of definitions in the bill and we can come back to the committee with a more detailed view on the matter, if that would make Mr Ruskell content.

**Mark Ruskell:** Yes, it would.

**Angus MacDonald (Falkirk East) (SNP):** I want to follow up on Mark Ruskell's question. We know that the definition of environmental law in section 39(1) of the bill does not include parts 1 to 3 of the Climate Change (Scotland) Act 2009, which means that climate change targets are excluded from ESS's remit.

Given that the role of the UK Committee on Climate Change is advisory rather than regulatory, do you not think that climate change should explicitly be part of ESS's remit and reflected in the definition of environmental law?

**Roseanna Cunningham:** Our decision was not entirely or solely based on the UK Committee on Climate Change's advice. Although that is a relevant consideration, there are other things that we have to consider, including the particular relationship between the Scottish Government and the Parliament in setting and monitoring climate change targets and the nature of strategic emissions target setting across the whole economy.

I am not sure that there is any need for an additional institutional voice in that process, nor do I think that it will be effective or even proportionate for the new body to have to gain expertise in that area of policy. The exclusion would not apply to the regulation of individual measures in environmental law in pursuit of emissions reduction targets. For example, peatland restoration and woodland creation are the kind of things that we would expect ESS to consider. Therefore, there is perhaps not as much of a gap there as people might imagine.

**Angus MacDonald:** Thank you. Another point that I want to explore is the fact that concerns have been raised that there would be a governance gap, as the Scottish ministers exercising executive devolved powers and UK Government ministers exercising powers in devolved competence would not be covered by the office for environmental protection or ESS. What is your view on that gap? How could it be resolved?

**Roseanna Cunningham:** In some of my earlier comments, I began to stray into that area. This

committee of all committees knows that the boundaries between reserved and devolved responsibilities can be extremely complex, not least in instances of executive devolution. I have said repeatedly this morning that the bill can provide only for matters that are within the competence of the Parliament. I am clear that it would be inappropriate for the Scottish ministers to be under the oversight of a UK governance body, as that would cut across the lines of devolved competence and our accountability to this Parliament.

It is clear that, where the Scottish ministers consent to actions or regulations by UK ministers in areas that are within the legislative competence of the Scottish Parliament, those matters nevertheless remain within the scope of ESS's governance role. ESS's function is to monitor the effectiveness of environmental law that is within the legislative competence of the Scottish Parliament and how it is implemented. It can therefore take steps to secure improvements in the effectiveness of that law, including through an improvement report. There might be a need for some additional measures to clarify responsibilities and ensure that there are no governance gaps once the UK and Scottish Government systems are in place, but I think that we need the frameworks to be in place before we can actually take those measures.

We have already had a lengthy discussion about how likely that is in terms of timescale. The management of all that is going to be complex and will require—to go back to one of the previous questions—an equal and honest discussion among the various governance bodies in the UK.

**Angus MacDonald:** Thank you.

**The Convener:** We go now to questions from Stewart Stevenson.

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** Liz Smith covered some of what I wanted to ask about, but there are one or two aspects that I still want to pursue. There is the whole issue of independence and how ESS compares with other bodies that need to be independent of Government, particularly in relation to the powers that ministers have to change functions and control budgets and, of course, appointments. The power to change functions is perhaps the most fundamental one. Is that a proportionate way to deal with things? How do we ensure that ESS remains independent?

**Roseanna Cunningham:** Somebody has to decide what money it gets to run its operations. Ultimately, in truth, there is no way round some of that. What we are trying to do is provide that, when ESS performs its functions, it

“is not subject to the direction or control of any member of the Scottish Government.”

In that regard, I referred previously to the position of the Scottish Fiscal Commission, and I think that Revenue Scotland is in a similar position. The aim is for us to be able to provide that independence in the best way possible. There is a standard provision in the bill about the independence provision being

“subject to any contrary provision in this or any other enactment”,

but that is just a standard provision that goes into a lot of legislation.

We want to ensure that the accounts of the new body are subject to appropriate directions from the Scottish ministers. That is because they have to conform to the “Scottish Public Finance Manual” et cetera. Those are absolutely technicalities, which I am obviously aware of, but I would not want to be intimately involved in them in any way, shape or form. That is all about setting up a body that functions properly and effectively, and has more general accountability.

The powers of the Scottish ministers in that respect are to be subject to parliamentary approval. That is contained in the bill. Changing functions and membership is not just about ministers; it also about Parliament. In that way, independence from the Government will be retained.

All of that is a way of trying to ensure that the body stays independent, in so far as that is possible. We have, in effect, presented a model that provides for a high degree of independence. The body’s constraints are more to do with confirmation by the Parliament and, indeed, the subjection of its strategy to the Parliament.

**Stewart Stevenson:** You have referred to other pieces of legislation that touch on ESS and other bodies that it will interact with. Do you want to draw our attention to any of those in particular, or would you like to write to us to let us know of some of them?

**Roseanna Cunningham:** I have referred to one or two. There is a fairly standard provision in the legislation. If the committee wishes to see a more detailed list, we can certainly write to it and set out that detail. The provision does not really confer a power on ministers to direct or control ESS in itself, but it acknowledges that other legislative provision, which will also have been subject to parliamentary oversight, may do so.

Accounts have to be audited, and there are all sorts of other things that require to be done. Parliament would require them to be done. We can certainly set out that longer list, but my understanding is that there is a set of fairly

standard provisions, which are included in quite a lot of pieces of legislation for a very good reason. It is mostly about accounts and ensuring that the money is dealt with properly.

**Claudia Beamish:** I want to explore the issue of appointments to the interim body. Will the Parliament be involved in those? Do you have any concerns that people who are already in place could affect in any way who is on the body when it comes to fruition as a full one?

**Roseanna Cunningham:** We intend to seek parliamentary approval for appointments to the shadow body through a motion. I will ask my officials to consider with the committee’s clerks the best options for the involvement of the committee prior to that motion. We will come to the committee on that.

On the shadow body looking as though it will simply roll over into the longer-term body, decisions on individual appointments will be made at the time. There might be people who will not necessarily want to stay on for the longer-term body, but there might be others who do. All sorts of matters will require to be considered. Some people will not necessarily want to put their name forward until they see what the body will look like, what its work will be and so on. I cannot second-guess all that. All I can say is that our intention is that the committee and Parliament will be involved in the process.

10:45

**Claudia Beamish:** That is useful information, for which I thank you on the committee’s behalf.

I want to push you a little further on the final body. My understanding is that there will be an open appointment system. Is that correct? I appreciate what you say about whether people might or might not wish to stand, but there will be a fresh start with open appointments. If people who are already on the interim body wish to apply, they can do so. Is that how the process will work?

**Roseanna Cunningham:** That is certainly my understanding. As you will appreciate, following my decision, it might not be me who makes the subsequent decisions, but it is certainly my understanding that we will reopen the process. Those who wish to apply can do so; I anticipate that some—if not all—of those who are on the existing body will want to apply, but I cannot say for sure whether that will be the case.

**The Convener:** I am conscious of time—*[Inaudible.]*—go back to my colleagues. My question is on complying with international obligations, and whether there will be any movement on environmental obligations that come from the European Union. In effect, will ESS have

the role of monitoring what goes on with regard to environmental law internationally and in the EU, or will that be for individual bodies such as NatureScot and SEPA? What is your view on that?

**Roseanna Cunningham:** The sound cut out at the start of your question, convener. Which cabinet secretary is your question directed at?

**The Convener:** It is directed at you, Ms Cunningham. It is about keeping track of international obligations and the direction of travel in the EU. Will ESS be tasked with that, or will it be down to individual bodies such as SEPA and NatureScot?

**Roseanna Cunningham:** My colleague Michael Russell will probably want to come in on that. My understanding is that the Government as a whole will monitor developments in EU law. We do not anticipate that ESS will have to do that—it would put a burden on the body, which would find it difficult to monitor developments routinely. Members will know from their own experience that the development of EU law can be a fairly lengthy and time-consuming process.

ESS will be able to consider examples of EU law and look at implementation in member states to inform a judgment on how effective Scottish environmental law is. I anticipate that that is what it will be interested in doing. However, more generally, it is the Government as a whole that will monitor developments in EU law.

I anticipate that NatureScot, SEPA and other bodies would probably be fairly relieved not to have that specific burden placed on them. Apart from anything else, effort would be duplicated across a whole set of institutions, and the burden would be difficult for them to manage. It would, in effect, mean that many different groups would be doing exactly the same thing.

As I said, my colleague Michael Russell might have some comments on how we will approach the issue more generally.

**Michael Russell:** I will make two points. First, we should remember that this is about continuity. It is Government policy that counts here, and the Government's policy will be to keep pace with EU law in those circumstances in which we believe that it is reasonable, and in Scotland's interests, to do so. At the beginning, I laid out some possible criteria that the Government might bring to the process. However, I do not expect that those matters will be considered without suggestions from others, if I may put it that way. A range of third sector bodies and others will want to keep pace with a variety of European regulations.

Although the responsibility should and will lie with Government, because this is about continuity of policy and regulation, there will be plenty of

scope for input from others, and I am sure that there will be such input, including from the new body.

**The Convener:** We will move on to questions from Liz Smith about the role of ESS in individual cases.

**Liz Smith:** I want to go back to the question of the oversight responsibility that the Scottish Government's body, ESS, will have. Obviously, it will have to engage with other bodies across the UK on specific cases related to reserved environmental policy. Several of the committee's witnesses have said, rightly, that the environment does not respect geographical boundaries. I am still not entirely clear about the relationship that ESS will have with other bodies in specific cases where there is a reserved issue. Can you say a bit more about that, Ms Cunningham?

**Roseanna Cunningham:** We are back to the issue of reserved versus devolved. In my view, if the UK Government enacts something that is properly within the competence of the Scottish Parliament, that will bring it into the scope of ESS. However, ESS cannot follow an issue across the border and have a view about the same activity south of the border, because that would be the responsibility of the UK Government body properly carrying out its reserved function. If that body carries out a function in Scotland that is objectively a devolved function, I believe that ESS will have the duty to include that in its consideration. I do not know whether that is what you are trying to get at.

**Liz Smith:** I am trying to drill down into issues of reserved policy. Obviously, all parts of the UK want to do their best by policy making, and therefore co-operation and engagement are vital. It is the process by which that happens that I am interested in. I am clear about the cases that would be the Scottish Government's responsibility under devolved policy. I would like to hear how the co-operation would happen.

**Roseanna Cunningham:** That is where the joint working will be involved, including through conversations and, sometimes, the common frameworks. I remind Liz Smith that the vast majority of environmental law is devolved, so there should not be many such issues. ESS cannot follow UK ministers, but it can consider how decisions accord with the devolved competence and responsibility of the Scottish Parliament. That has to be considered. The only alternative to that would be the OEP coming to Scotland to look at something that was in the devolved competence of the Scottish Parliament, because the devolved competence had been overwritten by Westminster.



That is why we need the common frameworks, but it is also why we need the different bodies—ESS, the OEP and the Welsh body—to work together. They need to set out their working arrangements and how they will manage what I hope will be only occasional instances when there might be a slightly tricky interplay—let us put it that way.

The vast majority of ESS's work will be about devolved competence, as directed by Government, Parliament and all the rest of it, and looking at whether things are happening the way that they should be.

**Liz Smith:** I think that the cabinet secretary is right to say that; obviously, the vast majority—

**The Convener:** I will bring in Michael Russell, because he wanted to come in on the back of what Roseanna Cunningham said.

**Michael Russell:** I did not want to interrupt Liz Smith; I wanted to add a point about the template for making decisions and resolving difficulties. The intergovernmental review is at the heart of this. If there was a working dispute resolution procedure within the IGR, at the very least one would expect other bodies to take a lesson from that and to be able to operate it. There is no such dispute resolution procedure in place, and I am not holding my breath for there to be one very soon.

I want the intergovernmental review to come to a conclusion and to provide a means by which people can operate. We thought that the successful template for that might be in the frameworks because, until now, for almost the past three years, the frameworks, which have been voluntarily negotiated, have had within them a variety of dispute resolution procedures. If the frameworks are to be assassinated, essentially, by the UK Government as a result of the internal market bill, that rather puts us back to square 1.

**The Convener:** Liz, do you have a follow-up question?

**Liz Smith:** I do not accept that last point, as you would expect. However, both cabinet secretaries are absolutely right that the vast majority of the policy making that we are talking about is in a devolved area. That is very clear. That said, there are important issues on the environment that are reserved. Because they are so important, I am anxious that we have clarity on how policy making would engage with the new set-ups. That is what I was asking for, and I think that it is what a lot of the witnesses were asking for, too.

**Angus MacDonald:** I would be interested to hear Ms Cunningham's view on whether, if an ordinary court is to be the mechanism for appeals against a compliance notice, a sheriff court is the appropriate level, or whether she thinks that a

specialist forum such as the Scottish Land Court, which would have more knowledge and expertise, should be used.

**Roseanna Cunningham:** I am slightly taken aback by that question. That is not within the confines of what we are proposing; we are not proposing to interfere with the current process at that level. That would be a different matter, and we would have to be very careful about doing that.

Given that the continuity bill is about fixing a problem that we face imminently—that of Brexit—that level of decision about what court might be involved need not be a big concern here. We are replicating what we currently do. Decisions about what might or might not happen in the future will be for further down the line.

**Angus MacDonald:** That is a fair comment.

**The Convener:** Michael Russell mentioned the internal market bill and its potential effect on the common frameworks. The issue of the progress of the common frameworks has come up a great deal in our work in the past four years. Bodies want the common frameworks to be sorted out; they want the difficulties to be ironed out.

You talked about the common frameworks being “assassinated” and I think that, earlier, you talked about them being “killed”. What effect could that have on the Brexit process?

**Michael Russell:** Who knows? Who knows what the Brexit process is or where it will end up? At present, as far as we know, it is heading nowhere—it is heading for an exit with no deal or with the worst of low deals because, in the end, that is all that the UK Government is asking for.

11:00

As far as the relationships between the various parts of these islands are concerned, one could say only that they have gone from bad to worse. The internal market white paper is a totally unnecessary intervention. The situation is byzantine in its complexity, but we should remember that the frameworks arose out of the first withdrawal bill—the European Union (Withdrawal) Bill. They were agreed as a means by which to manage the shared competences—that mythical list of powers that are coming back to the Scottish Parliament. It was about how to manage those areas of shared competence in the absence of one part of that shared competence.

The frameworks were a way to resolve that. We went from identifying 150-something areas—of course, they were identified by the UK, and that was not entirely agreed—to a much smaller list of areas that required something to be done, which ranged from full legislation, in the context of aspects of agriculture and fisheries, right down to

a general ability to work together without having even a formal memorandum of understanding.

The question then was about how to formalise that, and painstaking work was done. Eventually, two years ago, we agreed a set of principles on which the frameworks would be based, which included full respect for devolution and the devolved settlement. Our officials have been working painstakingly to build the arrangements, working with outside bodies and consulting as required. They will form a new network of voluntary arrangements—their being voluntary is well known to the UK Government, because Michael Gove, in his present position, signs off, every three months, the work that has been done in a report that says, “This has been done without enforcement.” Enforcement is possible under the withdrawal bill, but we have said that, if anything is enforced, we will not take part.

That is something of a success. We have made a commitment to the common frameworks. We have said that they will operate and they are designed to do exactly what the UK Government says its objective is, in the internal market paper. We knew that stuff was going on in the background, but then suddenly that paper appeared—we did not see it until hours before it was published. It is a product of people who do not want to come to a voluntary agreement, and now we have to say, “No, I’m sorry—we have the frameworks working and we have made guarantees about them, and that is the way forward.” Wales is saying that, too.

It would really be for the best if the UK Government decided that it has made a bit of a gaffe with its internal market paper and promised not to talk about it too much. What it really needs to do now is to agree the frameworks with us, to get them working.

**The Convener:** I thank both cabinet secretaries—one of whom is remaining with us for the next item. This has been a lengthy session, so we will have a brief break. I thank Michael Russell for his time.

11:02

*Meeting suspended.*

11:06

*On resuming—*

## **Climate Change Act 2008**

### **Greenhouse Gas Emissions Trading Scheme Order 2020 [Draft]**

**The Convener:** I welcome everyone back, and I thank Roseanna Cunningham, the Cabinet Secretary for Environment, Climate Change and Land Reform, for staying with us. She is joined by officials from the Scottish Government consumers and low carbon division: Ross Loveridge, head of heat demand and carbon markets unit, and Alice Mitchell, head of carbon markets.

In your correspondence with us, cabinet secretary, you mentioned your reservations about the proposed UK carbon emissions tax and its impact on an emissions trading scheme. Will you bring us up to date on your discussions with the UK Government about your concerns? Have they been resolved? What impact do you worry that a carbon emissions tax would have on emissions trading?

**Roseanna Cunningham:** Emissions trading is a devolved function—what is in effect covered by the ETS is devolved. A carbon emissions tax would be Treasury led, which would immediately remove from us any real engagement in that regard.

What is being proposed, on the face of it, is a reserved carbon emissions tax as a fall-back to a UK ETS in the event that an agreement to link to the European Union ETS is not reached. Committee members will know how incredibly technical this whole area is.

A Treasury consultation on a carbon emissions tax has been going on and will finish at the end of September. We are in the middle of a consultation on a carbon emissions tax at the same time as we are developing a UK ETS.

I have to say that, at UK Government level, there has been resistance to clarifying the Government’s preference for either a stand-alone UK ETS or a carbon emissions tax. Two Whitehall departments are involved: the Department for Business, Energy and Industrial Strategy is responsible for climate change policy and, therefore, ETS; Her Majesty’s Treasury is also involved.

As recently as 4 August, I wrote to the Treasury to repeat my strong objection to a tax, on the basis that all accountability to the Scottish Parliament would be lost. Frankly, that would contravene the higher-level principles that were agreed at the joint ministerial committee that Mike Russell attends and is involved in.

A number of things are going on. The Government and officials have spent a vast amount of time working on the proposal. We spent quite a bit of the previous session talking about common frameworks, and what we are discussing is one of the very important ones. Members need to be aware that, at the last minute, that work could, in effect, be put at naught by a decision to have the Treasury step in and impose a carbon emissions tax. All the work that we have done, all the negotiation that has taken place backwards and forwards, all the meetings and so on will have been put at nothing.

At the moment, the UK Government is running almost a twin-track approach. On the one hand, one department is processing the common framework but, on the other hand, the Treasury is consulting on and proposing something that runs absolutely counter to that framework. All that I can do in that position is to do my job in respect of Scottish interests, in good faith, with the Whitehall department that is processing the development of the policy. However, I know that, running counter to that, there is an entirely different approach. That is discourteous, and we have been put in an invidious position.

Let us not forget that it is not just about my time or the officials' time; it is also about the amount of time that the Parliament, through the committee, has spent looking at the issue. I would be curious to know whether the committee has had any contact from the Treasury about its proposal for a carbon emissions tax—I bet that it has not.

**The Convener:** We scrutinise the ETS, but we have not scrutinised any proposed carbon tax.

**Stewart Stevenson:** I want to move away from matters of process, which is what we have been talking about, to how the two alternatives compare against each other. If a tax approach is taken, there will be no carbon credits that can be traded off in a emissions trading scheme. Therefore, there will be no economic benefit to a company that has been making substantial progress in reducing its carbon footprint and has been able to sell off its carbon credits to others that have not been making the same progress. Is that not a concerning practical downside of taking a tax approach rather than a trading approach?

**Roseanna Cunningham:** The tax proposal removes all flexibility, because a single way of managing the issue would be applied across the board. An ETS works on a much more flexible basis. Fundamentally, the tax proposal creates a big problem.

The level of emissions reduction is less certain with the tax. It is totally dependent on the right rate being set, and we do not have any proposals so far on what that rate would be. The ETS has an

overall emissions cap, so it provides certainty on emissions reductions. It allows the market to discover the best way of doing that, and it encourages decarbonisation, whereas, as I have said, a static carbon tax, with rates set in legislation, would not ensure cost-effective decarbonisation.

11:15

It also would not link to the EU ETS market, which has been a big part of the discussion about the setting up of a UK ETS. In the EU ETS market, the carbon price changes daily in response to supply and demand, so the tax could lead to carbon leakage between the UK and the EU, which would be an extremely unfortunate outcome. As Stewart Stevenson indicated, participants can trade excess emission allowances in the ETS, creating a stronger financial incentive to decarbonise.

There are a lot of areas in which the ETS is a far better mechanism, and it is the mechanism that BEIS is pursuing. However, we appear to have a UK Government that is pursuing two separate policy lines at the moment.

In addition to the point that Stewart Stevenson made, there are other big differences between the two processes. I can be asked questions in the Parliament chamber about the operation of an ETS, but decisions about a carbon tax taken by the Treasury will remove that from us. It is an example of the removal of power from the Scottish Parliament.

**Finlay Carson:** Given that there is a four-Administrations policy set out in the Government response on a UK ETS, I must admit that I am a bit disappointed that we are still talking about division and grabbing powers. Can we just concentrate on the papers in front of us, which we should celebrate as a good example of how the common frameworks might work?

I suggest that it is good practice to ensure that, if the UK ETS cannot, for whatever reason, be put in place when we leave Europe, something is developed in parallel. As the cabinet secretary said, there is an opportunity to feed into the consultation, which, quite rightly, you have done, saying that you would not welcome a carbon emission tax.

I would rather dwell on the positives: we have a four-nations response and, potentially, a UK ETS. That is what my questions are focused on. How confident are you that the UK ETS will link to the EU ETS at some point in the future? Will the draft order allow that to happen seamlessly?

**Roseanna Cunningham:** I can well understand why Finlay Carson wants to put a rosy glow on

what is in front of him, but, unfortunately, he has not been the one involved in all our attempts to negotiate sensibly through this.

The linkage question is absolutely on point with my concerns. A linking agreement is dependent on the outcome of negotiations between the UK and the EU, and we are not party to those negotiations. We are outside the room when those conversations take place. In those circumstances, I suggest that members of Finlay Carson's party consider making representations to their party members who are in Government at Westminster if they want to have a say or if they want the Scottish Government or the Scottish Parliament to have the slightest involvement.

The UK and the EU's negotiating positions suggest a willingness to link our respective ETSS, and I am pretty clear that that is what BEIS wants to do. Unfortunately, I have had an experience where terminology that had been agreed between all four Administrations was later unilaterally changed. That kind of thing has bedevilled a lot of what we are doing. There is a precedent for the EU linking to other countries, with the Swiss ETS link, and the UK ETS order will establish a link-ready ETS that can be linked as soon as an agreement is reached. However, in my view, there is a considerable concern about that kind of thing falling foul of an overwhelming ideology that appears to be developing about the end of December.

I have not received any update from the UK Government about the status of its negotiations with the EU on linking our respective ETSS, despite the fact that I have repeatedly pressed the UK Government to prioritise reaching an agreement on linking, given that both sides share an apparent willingness to co-operate. I am sorry that we do not have a clearer statement on that from the UK Government; the statement from the Scottish Government could not be clearer.

**Finlay Carson:** Let me get this right. You played your part in putting together the order for the UK ETS to align as closely as possible to the EU ETS. That should be welcomed; as cabinet secretary, you have done everything to ensure that that will be as seamless as possible. Are you confident that your contribution to that order will allow the UK carbon market to function successfully in the absence of that link to wider carbon markets?

**Roseanna Cunningham:** I am confident that it will allow the UK carbon market to function as successfully as it can, but we can all agree that the wider the carbon market, the more successful any such scheme will be.

**Mark Ruskell:** I will move the questioning on from the constitution to the climate. At the

moment, there is a big gap between the emissions that were produced by large industrial plants last year and the proposed cap in the ETS. That gap was evident from last year's emissions; it will be bigger this year because of Covid and, because a lot of industrial decarbonisation around heat and power is happening, the gap will probably be even larger going forward. I struggle to see how the cap that is proposed in the ETS will drive investment decisions by those bigger operators. Are you comfortable that the current caps will ensure the reduction in emissions that you need in order to meet Scotland's 2030 and 2045 net-zero targets?

**Roseanna Cunningham:** I am as comfortable as I can be. The proposed 5 per cent cap is tighter than it would have been in the EU ETS—I remind everyone that it is an interim cap. I argued for that tightening of the emissions cap. I am happy that I have, at least, managed to secure that over a long period.

I have continued to impress on the UK Government that, because of Scotland's much tighter and more ambitious statutory targets, the UK ETS needs to be more ambitious. I have pressed the UK Government for a timetable on setting a net zero cap as soon as possible after we get the Committee on Climate Change net zero advice, which, unfortunately, we will not get until after the process that we are discussing has been completed. I managed to secure agreement that we would commit to reviewing the cap as rapidly as possible—within nine months of that advice being received—and that we would implement any changes to take effect in January 2024 at the latest.

Mark Ruskell probably does not think that the situation that we are in is ideal, but we are where we are now partly because of the arguments that I made to tighten everything up, make the cap interim, keep it at 5 per cent and have it reviewed it at a particular time. I believe that we are probably in the right place. We are coming out of a massive pandemic emergency—or, at least, I hope that we are coming out of it—and I hope that we are able to effect some kind of recovery. That has to be taken into account with—[Inaudible.]

**Claudia Beamish:** I would like to pursue that a little bit further with you, in relation to the revised climate change plan. Will there be challenges in relation to Scotland's UK ETS caps over the period up to 2030? How will they be taken into account?

**Roseanna Cunningham:** We will obviously have to look at it all very carefully. The UK ETS works on the basis of a UK-wide cap for a UK-wide market, and the UK targets are somewhat different. As we have discussed, an emissions trading scheme allows the market to determine where to cost-effectively reduce emissions, and

emissions will reduce across the whole system in line with the cap.

The bigger the trading scheme—or the bigger the market, if you like—the better and more functional it will be. We need it to work, but it is the not the only thing that we have to address industrial and power emissions. It is incredibly important, but we do not want it to be seen as if it is the only thing. There is, for example, an incentivisation of emissions reduction through reductions in the reserved climate change levy tax, and other mechanisms, approaches and policies will also have a bearing. Managing this is about managing it as best we can.

The Committee on Climate Change has been clear that there are aspects of emissions reduction that are only for the UK Government to set in place, and I frequently refer to the fact that many reserved aspects require to be dealt with if we are going to achieve emissions reductions. I fall back on the phrase that I use: the UK Government needs the Scottish Government to achieve its 2045 target if the UK is going to achieve its 2050 target, but equally, we need the UK to do what it needs to do to get to its 2050 target if we are going to achieve our 2045 target. We have to work in tandem on this.

**Mark Ruskell:** In all honesty, will it not set us back if we wait until 2024 to adjust the cap and get the right level in place? In effect, will it not mean that the rest of us, who are not covered by the ETS industrial emissions scheme, will have to work harder to reduce emissions?

11:30

**Roseanna Cunningham:** If Mark Ruskell can come up with a solution that involves getting the UK Government to do what we want it to do, and to do it now, I will be pleased to hear it. The reality is that we are trying to do the very best that we can do given what we are currently having to deal with.

With respect, the review of the 5 per cent cap within nine months of receiving the CCC's advice and implementing the changes was something that I had to press hard to get to. If I had not been able to achieve that, we would not have had anything in that regard.

I find it difficult to envisage how it would have looked if we had not pressed in the way that we did. Arguably, at a bigger-issue level, there will be constant management of competing ambition. There are some issues, but if we do not get the ETS up and running, the situation will be even worse.

**The Convener:** I have one final question before we move on to the next item on the agenda. It is

about the public-facing concordat among ministers from all four Administrations that would accompany the framework outline agreement, which you mentioned in your letter of 2 June to the committee. When will it be made available, and will it be shared with the committee?

**Roseanna Cunningham:** Are you talking about the framework outline agreement?

**The Convener:** Yes.

**Roseanna Cunningham:** I think that you may have already been sent a letter on that. I suspect that it is sitting in your inbox, because something was shared yesterday in that regard. It has now been cleared by ministers, but perhaps the committee will want to come back to the matter, once it has looked at it. I am sorry that the timing did not work for the committee meeting.

I think that you have got it—it certainly left us, so you should have had it by now. It sets out the principles for joint governance of the framework. It is there or thereabouts, so you may wish to come back to it, in writing or otherwise.

Perhaps I ought to be clearer: the summary note has been shared. The full FOA has to be signed off by all ministers, but you will get that as soon as possible. What you have in your inbox is a summary of what is coming, if that makes sense.

**The Convener:** It does. Thank you.

We move to the next agenda item. I invite the cabinet secretary to move motion S5M-22351.

*Motion moved,*

That the Environment, Climate Change and Land Reform Committee recommends that the Greenhouse Gas Emissions Trading Scheme Order 2020 [draft] be approved.—[*Roseanna Cunningham*]

**The Convener:** If members have no comments, I will put the question, which is that motion S5M-22351 be agreed. If anyone does not agree, please type “No” in the chat box.

I see that the committee agrees to the motion.

I thank the cabinet secretary for her time this morning, and I thank her officials who accompanied her. At our next meeting, on 8 September, the committee will take evidence on our green recovery inquiry.

11:34

*Meeting continued in private until 11:59.*



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