OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Wednesday 28 October 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 28 October 2020

CONTENTS

ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
28th 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)
Alice Mitchell (Scottish Government)
John Scott (Ayr) (Con) (Committee Substitute)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Virtual Meeting

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Wednesday 28 October 2020

[The Convener opened the meeting at 09:00]

Decision on Taking Business in Private

The Convener (Gillian Martin): Welcome to the Environment, Climate Change and Land Reform Committee's 28th meeting of 2020. We have apologies from Mark Ruskell and Finlay Carson. John Scott joins us as a substitute for Finlay Carson.

Our first agenda item is to decide whether to take item 3, consideration of the evidence heard, in private. I am looking to my colleagues to see whether they agree and I see agreement.

European Union (Withdrawal) Act 2018

Ozone Depleting Substances and Fluorinated Greenhouse Gases (Amendment etc) (EU Exit) Regulations 2020

09:00

The Convener: Our next item of business is consideration of a notification from the Scottish Government in relation to consent to a United Kingdom statutory instrument on ozone depleting substances and fluorinated greenhouse gases.

Members will recall that there is an agreed protocol between the Scottish Government and the Parliament in relation to instruments being made by the UK Government under powers in the European Union (Withdrawal) Act 2018 and which relate to proposals within the legislative competence of the Scottish Parliament.

The Scottish Government and the Parliament have agreed an approach to UK-wide statutory instruments, for example to avoid duplication of effort, or where only technical or minor amendments are required.

The notification, although minor and technical, raised some issues for the committee and I wrote to the cabinet secretary about those issues on 13 October 2020. A copy of that letter is included in the public papers for the meeting. The committee had concerns about the status of the common frameworks before we looked at the SI, and many of our questions will deal with that theme.

I welcome the cabinet secretary and her Scottish Government officials, who are Ross Loveridge, head of the heat demand and carbon markets unit; Alice Mitchell, head of carbon markets; and Euan Page, the UK frameworks policy manager at the constitution and UK relations division.

We will go through the issues and any others that occur to members. Members should signal to me by using the chat function if they want to come in on any topic.

Cabinet Secretary, as I said, our main concern is about our ability to scrutinise what is happening with the common frameworks. We do not have the detail of the common frameworks in front of us, which leads to questions about not only this SI, but others that might come before the committee. Is the Scottish Government consulting the Parliament about this particular framework as a whole, through this notification? How is the negotiation on the common frameworks, such as this one, going?

The Cabinet Secretary for Environment, Climate Change and Land Reform (Roseanna Cunningham): I can speak only about the common frameworks that arise from my portfolio, and negotiations have been going far more slowly than any of us would have wished.

Consultation with the Parliament on this and other frameworks on the whole is, for obvious reasons, mainly through committees. Evidence was provided to this committee in an official-level briefing on 9 June. There would have been a lot of technical discussion at that point. We have also just sent you a response that sets out the approach to the development, scrutiny and implementation of common frameworks. The revised common frameworks delivery plan will not be available for scrutiny by any legislature until 2021.

We are trying as hard as we can to ensure provisional arrangements that will mean that this particular framework is operational from January 2021. A summary and progress update on it will be sent to legislatures before the end of 2020, so this meeting is not the Scottish Parliament's only opportunity to scrutinise this particular common framework.

Obviously, other frameworks are being discussed, but the notification that we are discussing relates only to the SI that fixes deficiencies in retained EU law and that provides a legislative basis for January 2021. There are other aspects to the process, and that is one of the difficulties that arises with common frameworks—the process is not just SI driven .

The common framework that has been most discussed—we tend not to think of it as a common framework, but it is one—is the replacement for the EU emissions trading system. That is the one about which there has been more discussion than perhaps any other—it has been under discussion for years now and a common framework has still not been decided.

All the common frameworks are in a slightly different space and are proceeding. None of them has got far enough for a formal indication of an outline agreement to be given to any legislature.

The Convener: You hit upon our main reason for having you in front of the committee today. Our concern when we got the notification was that this would be our only opportunity to scrutinise this particular common framework, but you said that it will not be.

Liz Smith (Mid Scotland and Fife) (Con): Further to the convener's questions, why is the framework being implemented by secondary, rather than primary legislation?

Roseanna Cunningham: In the main, Governments use secondary legislation because it tends to provide a speedier and more effective way of making necessary changes. The SI programme for all the Governments is pretty heavy at the moment, for that reason. By its very nature, primary legislation takes considerably longer and we do not require it to maintain regulations in this policy area. There are always decisions to be made about whether something needs to go through primary legislation or can be dealt with through secondary legislation.

EU law is already being retained through the European Union (Withdrawal) Act 2018, and the SI before us only fixes technical deficiencies that arise from that. I hesitate to say that the SI is not substantive, but it is about fixing very specific, technical decisions. The legislative approach replicates the EU regime. The framework will be operable by January 2021, which would not—I do not think—have been possible if the procedure for primary legislation had been followed. It ensures the whole of the UK's continued compliance with international obligations, which is also important.

Liz Smith: Is it your expectation that any further legislation that relates to the common framework will also be secondary legislation?

Roseanna Cunningham: No further legislation is anticipated to establish this framework for operation from January 2021. The SI that we are considering will complete the process.

If any changes required to be made in future, that would be through SIs, as far as I am aware, but I would have to get out the crystal ball to try to work out what those changes might be. A lot of that would depend on what is being done at the time, but this particular instrument finishes this framework.

Liz Smith: That is helpful, cabinet secretary. I am asking these questions because, as you know, concerns were raised at the Finance and Constitution Committee about when it is appropriate to use primary legislation and when it is appropriate to use secondary legislation. I am just trying to get a handle on whether, in this case, the approach is to do with the timescale, because, obviously, you have to go through a huge number of complexities. It is vital that there is proper scrutiny in the Parliament, and primary legislation can enhance that scrutiny.

Roseanna Cunningham: In truth, if we—by "we", I mean all the Administrations in the UK—had tried to do all this through primary legislation, we would still have been here in a decade. Obviously, that was not an acceptable way to proceed.

All the Administrations have had to deal with a galloping programme of SIs and I am conscious

that they are being processed in an expedited fashion. That is a challenge for every Parliament in the United Kingdom, and we are all just trying to do the best that we can.

Some of the SIs are more substantial than others. We turned some of them into SSIs, because we wanted to have a slightly more careful look at things; we did not consider that others required that. This SI fixes technical deficiencies; it is not a substantial policy SI that might have to be thought about in terms of an SSI. Believe me, even the decision-making process as to what we would choose to turn into an SSI was one that we had to think about very carefully, far less a situation where we would have to put things into primary legislation, which takes considerably longer.

Liz Smith: Yes; the Finance and Constitution Committee heard that concern. Thank you very much.

John Scott (Ayr) (Con): I will ask about new powers to legislate. Under the heading "Impact on devolved areas", the notification says that the SI

"confers powers returning from the EU Commission",

but it is not clear whether any of those are new powers to legislate. Are they new powers to legislate, or not?

Roseanna Cunningham: In a word, no, they are not—there are no new powers to legislate. The existing powers available to the European Commission have simply been returned to the UK, Scottish and Welsh ministers.

The new powers that we are talking about are, in effect, existing EU powers that are being returned to Westminster, Holyrood and Cardiff. They are legislative powers that relate to implementing the principal EU regulations, but not to changing the fundamental approach. The fundamental approach is the target date for reducing the gases, and none of this affects the target; the legislative powers implement the principal EU regulations. We are adopting what that approach was.

The powers are for making discretionary implementing regulations for limited technical aspects and they are powers that were already there.

As far as we can see, the European Commission has not itself ever exercised those legislative powers. We do not see any policy need for them to be exercised by Westminster, Holyrood or Cardiff. However, in the future, if changes were required to the fundamental approach, through the international requirements of the United Nations Montreal protocol, alternative primary powers to would be needed in order to legislate—that goes back to the issues Liz Smith was asking about—because that would be the kind of substantive issue that the regime does not cover; it covers limited, specific technical stuff.

09:15

John Scott: That is understood. Thank you very much.

I have a further question on powers following from the previous notification. The notification says that the proposed SI

"confers powers returning from the EU to the Scottish Ministers within their devolved competence, and regulatory functions to the appropriate regulator in Scotland".

Are the returning powers being conferred only on the Scottish ministers, or also on the secretary of state? There is a bit of a question mark around that, since both seem to have powers. What are the protocols going to be, and how is it going to work?

Roseanna Cunningham: As I have just said, the powers are pretty limited in their scope, because they do not change the fundamental policy point, which is the reduction target. They are really only for implementing limited aspects. They are unlikely to be exercised by any minister in any of the three Administrations to which I have been referring.

They are concurrent powers. They are conferred on the Scottish ministers concurrently with the secretary of state, but the secretary of state can only exercise them with the consent of the Scottish ministers, which can be withdrawn at any time. Those concurrent powers allow some flexibility for an approach across the three Administrations.

They are concurrent powers and we consider them highly unlikely to be exercised—the EU has never bothered to exercise them and it would be highly unlikely that we will—and the secretary of state can only exercise them with the consent of the Scottish ministers.

John Scott: That is clear. The powers are being returned to the Scottish ministers, and you can give them, as it were, to the secretary of state to exercise, but that is at your discretion.

Thank you very much.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I want to look at the interplay of some of the things that are going on here. Clearly, the Climate Change (Scotland) Act 2009 and relevant secondary legislation describe gases that form part of our climate change targets. I do not think that that is touched by what we are talking about, but the powers provide the regime for regulations on goods.

Given that Scotland aims to be net zero five years ahead of the UK, I foresee that the rules

about goods that use, in particular, fluorinated greenhouse gases—in refrigerators and so on—might be different north and south of the border. How does that interact with the United Kingdom Internal Market Bill? If we are trying to get the F-gases under control a bit faster than would be the case down south—and given that we have more ambitious climate change targets, that is a possibility—how does the whole thing interact with the UK Internal Market Bill? Does it cut across the powers that we might be able to exercise, notwithstanding that you are telling us that you think that they will probably not be exercised?

Roseanna Cunningham: It is for UK ministers to explain the purpose and the application of the UK Internal Market Bill. Our position on that bill is very clear.

The legislative powers in the retained EU law are limited to implementing specific technical aspects. It does not change the fundamental approach, which is the target date. That comes out of the UN Montreal protocol; it is not an EU thing. That protocol has, in effect, been accepted and I find it difficult to envisage any point at which the UK will want to depart from it. A decision to depart from that protocol would require primary legislation. It is a difficult issue. As I said, our view on the UK Internal Market Bill and the complications and uncertainties that arise as a result of it is quite clear. However, in relation to this particular SI, if the UK Government were seriously thinking about departing from an international protocol that it had signed up to, there would be far bigger issues than the UK Internal Market Bill. There would be huge issues.

In theory, I suppose that one could say that the five-year gap between our net zero target dates creates some issues. We are very alive to those and content to explore them with our counterparts at the moment. There will be a series of regular meetings between the four Administrations in respect of the drive to net zero, at which I will be incredibly boring by reminding absolutely everybody that we have the earliest net zero target date. That creates some issues across the whole UK, but, given that the UK needs us to get to net zero by 2045 if it is to get there by 2050, it is a dance that we are both locked into. We are conscious of those issues, but I think it is highly unlikely that they will arise specifically in the context of this SI because it is so limited in nature.

Stewart Stevenson: Thank you, cabinet secretary. I am satisfied by what you have said in relation to the SI that is before us, but it is clear that the potential remains for the UK Internal Market Bill to have an impact on the issue at some future point, in other legislation. That may be a matter for this committee or its successor. On that basis, I will conclude my questioning.

Claudia Beamish (South Scotland) (Lab): Turning our minds to data collection, are you able to provide any update on the progress to date on that and access to EU information in relation to the issues in the SI?

Roseanna Cunningham: The data that was collected previously—in early 2018, if I am correct—for the no-deal scenario is being updated to include subsequent 2018 and 2019 data. The original data is now a little outdated. We also require to remove the Northern Ireland portion of that data, because the Northern Ireland protocol means that it will remain in the EU regime. Therefore, the data has to be overhauled by being updated and also fixed in relation to Northern Ireland.

The data from Great Britain companies—I will use the term Great Britain to cover the three administrations—is used to establish their F-gas quota allocations using the EU method, and that process is near complete. It will ensure that allocations are available for the regime to become operational in January 2021. We will continue to have access to historical data for compliance and enforcement purposes. We—again, across the three administrations—are in the process of getting that data into shape so that we can use it effectively for a January 2021 start.

Claudia Beamish: That is helpful. If I have got it right, I understand that we will continue to be dependent on the EU Commission for disaggregated data for businesses. Is that the case? Do we have any reassurance on that?

Roseanna Cunningham: I am not immediately aware of that. I wonder whether Alice Mitchell—the official who deals with the slightly more technical side of things—is able to give you a straightforward answer.

Alice Mitchell (Scottish Government): The data collection process that is undertaken at the moment will disaggregate the data for us, in place of using EU data.

Claudia Beamish: Excellent, thank you. Finally, is there clarity on the UK F-gas phase out trajectory and on what annual quota available to businesses needs to be in place for F-gas on the UK market, in order to reach the same target as the EU regime in 2030?

I imagine that I would not want to answer that question, but we need to put on the record whether work has been done on the matter.

Roseanna Cunningham: There will not be a change there as our F-gas target for GB is the same as under the EU regime—a 79 per cent reduction by 2030. The division that is envisaged is based on the historical amount that GB companies have placed on the market. Effectively,

all companies are in that situation at the moment and that will continue to be the case.

The quota allocations, which I spoke about earlier, will be in place for January 2021. Thus far, with only two months to go, companies have raised no concerns at all at this point in the data collection exercise, so we hope that there will not be any issues.

From January 2021, everything will effectively continue as it has been and there should not be too much of a difficulty. I always want to caveat that kind of statement by saying "thus far" and "as far as we know", because as we have already learned this year, one can never be 100 per cent certain what is around the corner.

There is no move away from the target or from the format of the quota allocation; the companies that are already involved in this market are well acquainted with how to manage it, so no change will happen from their perspective. Thus far, we do not envisage any difficulty.

Claudia Beamish: That is reassuring. For the record, I happened to recently read F Sherwood Rowland's obituary in the *Financial Times*. Some might know—I did not—that he was the first scientist to discover holes in the ozone layer, in the 1970s. This regime is real success story about the protection of our planet in a positive way. It is reassuring to know that, in the difficult handover from the EU, the issue appears to have been addressed well.

Roseanna Cunningham: Those of us of a certain age clearly remember what a crisis seemed to be developing at that time with the ozone layer and it is remarkable how that has been turned around. The fact that we can almost say that that is not particularly controversial now is astonishing, if we think about where we were decades ago. That is a huge success story. Claudia Beamish is quite right to refer to it and to show off her continued reading of the *Financial Times*.

09:30

John Scott: I am afraid that my question is a little more prosaic. I will ask about the delegation between regulators. In the first instance, I will clear up something that I cannot understand and my colleagues cannot either. The notification says that

"The 2019 SI also assigns administrative functions to the appropriate regulator, but with to delegate amongst them."

I assume that there is a typo, but could you clear up what that means? The sentence should read "the ability to" delegate among them, but I read out what is written in the committee's notes. Apparently the typo has come from elsewhere, not from our committee.

Roseanna Cunningham: I will try my best and we will see how far we get.

As we have already discussed, the statutory instrument is conferring the functions that were previously exercised by the EU Commission on all administrators, administrations and regulators equally. Those regulators are: the Scottish Environment Protection Agency, the Environment Agency in England and Natural Resources Wales, but not the Northern Ireland Environment Agency because, as we have discussed, that is covered by the Northern Ireland protocol. The SI is providing powers for ministers to direct that certain functions are to be exercised administratively by the Environment Agency.

There is only one F-gas quota holder in Scotland and I will consider directing the Environment Agency to exercise certain administrative functions on behalf of SEPA—remember, we have talked about the SI really being about those sorts of technical aspects and not the bigger policy direction.

Those administrative functions would be things like data collection from the F-gas importer to determine its quota allocation and operating the GB-wide F-gas registry to manage that quota. However, SEPA will continue its existing compliance and enforcement role for users of F-gas and the Scottish ministers will have the ability to revoke the direction if alternative arrangements are put in place for SEPA to administer those functions. I go back to my point that there is only one F-gas quota holder in Scotland.

I do not know whether that makes it any clearer how that will work in practice.

John Scott: I think that it does.

My second question was going to be about how functions are delegated between different regulators, however, I suppose in Scotland it is self-evident that it would have to be SEPA.

Roseanna Cunningham: Yes, SEPA is our regulator. We need to think about it, but it does look as though delegating an administrative function to the Environment Agency is not an unreasonable thing to consider in view of the situation in Scotland. However, that direction can be revoked at any time.

John Scott: It may or may not establish a precedent—I say that carefully—but it allows flexibility between different regulators.

Roseanna Cunningham: Yes. Let us remember that all the regulators work together in any case on a number of different issues, not only in the United Kingdom but across the world. Environment agencies, whatever they are called around the world, tend to work together and share information. This is in effect just about an

administrative function; it is not about any policy and it is not about compliance and enforcement, so if there was any particular serious issue that arose in relation to the situation in Scotland, it would continue to be SEPA's responsibility. We would not ask the Environment Agency to presume that role. The kind of thing that we are talking about is just keeping the register, making sure that everything is up to date and all the rest of it.

Liz Smith: I have one technical question, which picks up on an answer that the cabinet secretary gave to Claudia Beamish in relation to the so-called no-deal instrument that was laid way back in December 2018, about which you wrote to the committee in early 2019 and that was replaced with another instrument, which was again replaced. Can you confirm that this statutory instrument is on the same principle and is consistent with what was originally laid?

Roseanna Cunningham: Yes; the no-deal SI is the instrument that contains the provisions that were originally notified to the Scottish Parliament in 2018. That was originally laid, but there were some substantive drafting errors at the time; I dare say that that was not one of the Department for Environment, Food and Rural Affairs's finest hours, but these things do happen in the best regulated of Parliaments. There were some substantive errors, so the instrument was withdrawn, corrected and relaid in 2019. The policy approach has not changed, however, so the original notification was still correct. The problem is that we are all trying to cast our minds back years and, as Liz Smith knows, that means that personnel on committees and historical memory on committees has changed as well.

Liz Smith: Thank you for that clarification.

The Convener: Thank you to the cabinet secretary and her officials for answering all our questions on the issues that we had around the SI.

At our next meeting on 3 November, we will consider draft reports on the committee's green recovery inquiry and on our scrutiny of the draft 2021-22 budget. We will also consider further EU exit instruments.

09:38

Meeting continued in private until 10:08.

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