



OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 19 August 2020

Session 5



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FINANCE AND CONSTITUTION COMMITTEE

16th Meeting 2020, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Murdo Fraser (Mid Scotland and Fife) (Con)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)

*Tom Arthur (Renfrewshire South) (SNP)

Jackie Baillie (Dumbarton) (Lab)

*Alexander Burnett (Aberdeenshire West) (Con)

*Donald Cameron (Highlands and Islands) (Con)

*Angela Constance (Almond Valley) (SNP)

*Patrick Harvie (Glasgow) (Green)

*John Mason (Glasgow Shettleston) (SNP)

*Alex Rowley (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ewan Cameron-Nielsen (Scottish Government)

Emma Lopinska (Scottish Government)

Ben Macpherson (Minister for Public Finance and Migration)

Francesca Morton (Scottish Government)

Charles Stewart Roper (Scottish Government)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

Virtual Meeting

Scottish Parliament

Finance and Constitution Committee

Wednesday 19 August 2020

[The Convener opened the meeting at 10:03]

Subordinate Legislation

Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Amendment (No 2) (Coronavirus) Order 2020 (SSI 2020/215)

The Convener (Bruce Crawford): Good morning and welcome to the 16th meeting in 2020 of the Finance and Constitution Committee. Jackie Baillie has given her apologies for the meeting.

The first item on our agenda today is to take evidence on the Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Amendment (No 2) (Coronavirus) Order 2020 from Ben Macpherson, who is the Minister for Public Finance and Migration. Mr Macpherson is joined today by Ewan Cameron-Nielsen, who is the team leader in devolved taxes at the Scottish Government. I welcome the minister and his official to the meeting, and I invite the minister to make any opening remarks.

The Minister for Public Finance and Migration (Ben Macpherson): Thank you, convener, and good morning, everybody.

The order provides for the temporary changes to the land and buildings transaction tax rates and bands that were announced by the Cabinet Secretary for Finance on 9 July. It increases the starting rate for residential LBTT from £145,000 to £250,000 for transactions with an effective date of between 15 July 2020 and 31 March 2021.

That is a significant change. It will result in taxpayers saving up to £2,100 in tax on a house purchase and will mean that, excluding the additional dwelling supplement, an estimated eight out of 10 home buyers and an estimated nine out of 10 first-time buyers will pay no tax.

It reflects our assessment of what is needed to support home buyers and the housing market in Scotland at this difficult time, and takes account of house prices in Scotland and the specifics of the Scottish market as a whole.

The committee will be aware that this is the first time that a change to rates and bands has been made outside of the Scottish budget process; it is clearly not usual practice. However, the Scottish

Government's view was that it was necessary to act, and to act quickly, given the immediately destabilising impact on Scotland's housing market of the United Kingdom Chancellor of the Exchequer's 8 July stamp duty land tax announcement.

I note that the UK Government had weeks to prepare for its decision to increase the stamp duty land tax starting thresholds, yet we were given no advance notice, aside from the speculation in the media. That was not helpful and it meant that we had to respond like never before; no change to LBTT has been delivered as quickly as this. All the relevant policy, analytical, legal, operational and other tasks that were required to deliver the change were completed within five working days of the cabinet secretary's initial announcement.

I thank Revenue Scotland staff for the effective and efficient way in which they worked with us to ensure that they were operationally ready to put the revised rates in place on 15 July. I have thanked those staff members personally, but I also want to put my thanks on the record.

The Scottish Fiscal Commission has estimated that the total costs of the measure will be £33 million in the year 2020-21 and £15 million in the year 2021-22, the latter as a result of transactions being brought forward. Those costs are subject to significant uncertainty, as the estimates rely on pre-Covid transaction levels. Post-Covid transaction levels are currently hard to predict with certainty, as I am sure that the committee understands.

I hope that my opening statement is helpful. I look forward to taking any questions on the order from the committee.

Murdo Fraser (Mid Scotland and Fife) (Con): Good morning, minister. I am interested in hearing a bit more about the costings of the policy and how they relate to the potential block grant adjustment. You said in your opening comments that you expect the policy costs to be £33 million in this financial year and £15 million in the next financial year. Do you have an estimate of the impact on the block grant adjustment of the changes that were announced by the UK Government for the equivalent tax in England and Wales?

Ben Macpherson: On whether the policy will have an effect on other spending areas, the answer is no. As a result of changes to the block grant adjustment and consequential implications, no spending reductions will be required, because we will receive the appropriate block grant adjustment to meet the costs of the policy.

Murdo Fraser: Thank you, minister, but that was not my question. My question was this: do you have an assessment of what the level of the

block grant adjustment will be? I am looking at the paperwork from the Scottish Fiscal Commission, which says that the Treasury's initial costing estimate of that policy was £3.8 billion for England and Wales; however, it says that the Office for Budget Responsibility's estimate is the much lower sum of £1.3 billion. When it comes to the block grant adjustment, is there a figure on which the Scottish Government is basing its working?

Ben Macpherson: It is important to clarify that, until the Scottish budget process, we will not have the final block grant adjustment numbers, and a decision will be based on an assessment in that process. I will bring in my official, Ewan Cameron-Nielsen, to add anything further. Perhaps, as we get towards the budget process, we can come back to the committee with further detail on that point.

Ewan Cameron-Nielsen (Scottish Government): Good morning. We will see whether we can write to the committee with further detail on that but, as the minister said, we will not have final BGA numbers until further along in the UK and Scottish budget processes.

One point to note is that, when the chancellor made his announcement on 8 July, the costing of the SDLT impact was in the order of £3.8 billion but, a few days later, the OBR reduced it to £1.3 billion. That was a significant change. However, I understand that the final BGA calculation will need to be done at a point further in the future. If it would be helpful, we could provide further information.

Murdo Fraser: Yes, thank you; it would be helpful if you could do that. The point that I am trying to get to is that, in order to know whether it was an affordable policy with regard to the Barnett consequential, the Scottish Government must have done an estimate of the block grant adjustment before agreeing to make that change. As we know, the UK Government's changes to SDLT for England and Wales increased the nil rate band threshold to £500,000; the Scottish Government took the decision to increase the equivalent to £250,000. Clearly, the higher the figure, the more the economic stimulus would have been created. Given that the block grant adjustment is therefore likely to be much higher than the cost of the policy to the Scottish Government, it looks like there was more headroom to have increased the threshold for LBTT in Scotland, perhaps even to the same level as in England and Wales. Why did the Scottish Government choose the £250,000 level and not a higher figure?

Ben Macpherson: Thank you, Mr Fraser; that is an important question. If the committee is happy for us to do so, we can take a few minutes to answer that in full. Again, we give an undertaking

to Mr Fraser and the convener to write to the committee on Mr Fraser's previous point, when more information becomes available.

The measure that we have taken is based on our view of what is necessary and most beneficial to provide targeted support to the market in Scotland and to taxpayers in Scotland, recognising that the market here is different from that in England and Northern Ireland, where SDLT applies. For example, according to the UK house price index, the average price of a property in Scotland in March 2020 was £152,000, compared to a UK price of £232,000; that is a difference of £80,000, with property prices in Scotland being on average around a third lower than the UK figure. We had to consider that as part of our policy analysis in relation to the measures that we took.

You talked about headroom. It is important to remember that the measure that we have taken will take 80 per cent of residential property buyers in Scotland out of paying tax, and will take out 90 per cent of first-time buyers.

10:15

Over and above that—this goes to the crux of your question—is that, in addition to the change in LBTT, we have announced £50 million of funding this year for the first home fund, which is a shared equity scheme that provides first-time buyers with £25,000 to buy a property. The additional funding will support first-time buyers, a group that we, as a society, particularly want to help. It will support an estimated 2,000 first-time purchases and it increases the total in that fund to £200 million.

Within the spirit and structure of devolution, we have made the policy choices that we think are the most targeted, effective and beneficial for the people of Scotland and for our housing market.

Patrick Harvie (Glasgow) (Green): Minister, you began by saying that the tax change would save a significant number of people money on their tax bills. That is not really the case. They will not be better off as a result of this. They will simply be able to bid up a little higher on the property that they want to buy—the Scottish Fiscal Commission's report makes that clear. This is a classic kind of tax cut that will end up being capitalised into property values and the commission says that it will increase house prices.

Why should we make houses more unaffordable? Why should we further inflate a property market that a great many people are already locked out of?

Ben Macpherson: Support for first-time buyers is important. It helps people in challenging situations to obtain the necessary resources to get on to the housing ladder.

The wider rationale of the policy, both at a UK level and here in Scotland, and in the tight timescale that I spoke about in my opening statement, is not only to give a fiscal stimulus to assist those who are buying; it also has a wider multiplier effect on the economy. It gives people extra resources to undertake work that they may do on their new property, such as putting in a new bathroom or kitchen. The extra resource that people will have creates wider economic activity as they move into their new homes.

As has also been noted, the change has an impact on the building trade and the construction sector, which helps with job creation and wider economic stimulus.

Patrick Harvie: Are you rejecting the Fiscal Commission's view that this will simply lead to people spending the money that they would have spent on tax on a higher property price instead? What is your evidence for rejecting that view?

Ben Macpherson: There will be an effect on house prices. That has been stated. However, the change brings economic stimulus at a time when we are trying to create demand in the economy in order to support both job creation and the recovery process. We want to maintain the productive capacity of the economy. Helping to create demand in the housing market is part of that. It is a measure that is proportionate to current circumstances.

There was also consideration of the wider situation in that the change to SDLT in other parts of the UK created a distortion in the market such that we believed that, to continue to have that demand effect in Scotland as well, it was necessary to act.

Patrick Harvie: Again, I ask what your evidence is for the effect that you say will happen and your answer is simply to say that the effect will happen. It seems to me that actions at both ends—the first-time buyer end and this tax cut for LBTT—is going to increase housing costs rather than create a stimulus, but your response is simply to say that it will create a stimulus. I do not see the evidence for that assumption. Of all the forms of tax cut or spending increase that the Scottish Government might choose to use the consequential for, why is the best effect that you can think of to cut taxation for people who have the wealth to buy a £250,000 home?

Ben Macpherson: Like I said, it was a consideration in a context of distortion in the UK market as a whole, which we are part of in the current constitutional circumstances. I am not doubting the Fiscal Commission's analysis—I do not mean to do that—but in terms of both the analysis that has been made previously and supply and demand economics, providing this

fiscal stimulus is designed to have a multiplier effect in terms of the wider economy through the extra resource that new house buyers will now have to spend on improving their houses.

Patrick Harvie: What taxation policies were considered as an alternative to this one that might have provided a stimulus effect but also benefited people who are in greater need?

Ben Macpherson: Those are questions that we all need to ask ourselves in the run-up to the Scottish budget. However, the measure before us was a change that we made in response to a UK Government decision whereby the market was significantly distorted. I look forward to the discussions on LBTT and wider taxation policy as we go into the budget process.

Patrick Harvie: Okay. It is clear that the measure is just a policy decision to follow in lockstep with UK Government taxation policy. Finally, on timing, at the moment the measure is due to last until the end of March 2021. Is that a fixed and unshakeable position, or will the Scottish Government consider continuing as opposed to ending what is supposed to be a temporary move? What criteria will apply for a decision by the Scottish Government on whether we revert to normal or extend the measure?

Ben Macpherson: As things stand, it is fixed on the timetable in the order. Any new LBTT policy beyond what was agreed in the most recent budget process would be agreed in the forthcoming budget process. The measure is indeed a temporary one.

Patrick Harvie: So the Scottish Government's current intention is clearly to revert to normal, as opposed to having this temporary position, during the next budget process.

Ben Macpherson: Yes, but the normal position will be whatever the Parliament agrees in the next budget process for commencement on 1 April next year.

John Mason (Glasgow Shettleston) (SNP): I will follow up on the previous two lines of questioning, especially Murdo Fraser's. When I read that there would be a £48 million tax cut, I was a bit concerned that that would mean a cut to the national health service or local government. However, if I understand the minister correctly, he is saying that he is fairly sure that enough money will come from Westminster through the block grant adjustment. There seems to be quite a lot of uncertainty, though. Are you very certain that enough money will come in to cover the tax cut?

Ben Macpherson: We are as certain as we can be that the Barnett consequential will be passed on as we expect. As I said earlier, we do not expect changes to other spending, or spending

reductions as a result of changes to the block grant adjustment because of the changes that we propose in the order.

John Mason: I certainly welcome your being able to give that assurance, even though there is quite a lot of uncertainty.

In response to Murdo Fraser's argument, I say that, if there was any headroom, I would not be keen on a further tax cut but would much prefer that the money go into the national health service, which clearly needs it. There would not be any more tax cuts, at least until the budget, would there?

Ben Macpherson: Indeed.

Alexander Burnett (Aberdeenshire West) (Con): I refer members to my entry in the register of members' interests.

Good morning, minister. My recollection is that, when the policy was initially announced, the changes were not to start immediately, unlike in England and Wales. It was only after pressure from organisations in the sector that you did a U-turn and changed the commencement date. At what point did you realise that introducing a tax saving but delaying its commencement would have a negative effect on consumer behaviour?

Ben Macpherson: That is an unfair assessment of the situation, but I am grateful to Mr Burnett for his question. The Scottish Government acted as quickly as it could. As I said in my opening statement—I say this in good faith—we were, unfortunately, not made aware of the SDLT change that the UK Government was making, beyond having seen some media speculation in the days beforehand. The UK Government had weeks and weeks to plan its changes, whereas we in Scotland had to make decisions and then implement the required actions in a very short time.

It is a tribute to my civil service team and to the strength and performance of Revenue Scotland that, within five working days of the cabinet secretary's announcement, they managed to organise the systems to undertake the change. We acted as quickly as possible—within five working days—to put in place the required administrative and systemic response. That was a very quick turnaround, which I say again is a tribute to the strength and performance of Revenue Scotland as an institution.

Alexander Burnett: I appreciate that a lot of administrative detail is required to implement such a change, but my question is one of common sense. Again—at what point did you understand that your introducing a tax saving but delaying its start would have a negative effect on consumer behaviour? Do you understand that now?

Ben Macpherson: We did not delay when it started. We implemented it—

Alexander Burnett: You changed it later.

Ben Macpherson: Pardon?

Alexander Burnett: The start date was due to be later, but you U-turned and brought forward the date when the change would kick in.

Ben Macpherson: No—that was not the case. We sought to implement the change as quickly as possible and, obviously, with consideration having been given to how quickly that could be done systemically and administratively. Revenue Scotland, to its credit, was able to perform that task within five working days.

Tom Arthur (Renfrewshire South) (SNP): Good morning, minister. I have two questions. The first is a follow-up on your exchange with Murdo Fraser regarding the difference between the property markets of Scotland and England. I appreciate that in England there are different thresholds—[*Inaudible.*—]the property market. However, I am interested in understanding how that actually plays out in transactions. I understand that in Scotland, about 80 per cent of transactions would now be exempt. Is that similar to the situation in England, if we are looking to maintain a level of parity?

Ben Macpherson: Yes, the figure is broadly similar. We have taken additional action to take an estimated 90 per cent of first-time buyers out of tax completely.

10:30

Tom Arthur: So, ultimately, the measures are having the same behavioural effect, albeit that property prices vary in the different parts of the UK.

My second question follows on from what Patrick Harvie asked about, which was the risk of inflation of house prices. Surely, as the furlough starts to unwind and unemployment rises, there is also a significant risk of a decrease in house prices, which will potentially leave people with negative equity.

Ben Macpherson: That is something for all of us to consider in all our aspirations as we come out of this situation. Tom Arthur and Mr Harvie have asked important questions. How do we continue to do what we can to make housing more affordable for more people? We also seek to stabilise the market to help people to enter the market as they wish—especially first-time buyers—while giving people capacity and additional resource, in the current difficult circumstances, in order to stimulate demand in the wider economy.

Those are important questions both for avoiding negative equity and for increasing affordability. We all have to think about that in the years ahead.

The Convener: I see Alex Rowley indicating that he wishes to speak. Remember to put that in the chat bar, Alex.

Alex Rowley (Mid Scotland and Fife) (Lab): Are we in danger of overestimating the behavioural effect and impact of the land and buildings transaction tax on the housing market in general? I would not like us to do that. Are we not talking about supply and demand? Is the real problem that there are not enough houses in Scotland? If we want to encourage more people to take the first steps up the housing ladder, house building needs to boom across Scotland. That would drive the economy, too. Is there a joined-up approach to all the issues so that we can get the housing sector moving throughout Scotland?

Ben Macpherson: That is another important question. As we go into the next phase of recovery, and as has been the case during all the years of the Parliament, our housing policy is an extremely important aspect that the Government, along with local authorities and other organisations, must seek to deliver strongly.

As Mr Rowley and the committee will know, and as I certainly know from my constituency experience, there is a need for increased capacity in the affordable housing sector and in the wider housing market. We have a programme for government coming in the weeks ahead; I do not want to make statements prior to that on what will be taken forward, but I urge Mr Rowley to look at that document with interest regarding this area. He is right to emphasise that it is an important area for us all to consider as we go into the next phases of recovery.

The Convener: No other members have indicated that they wish to ask more questions.

We therefore now move to item 2, which is consideration of the motion on the LBTT instrument. I invite the minister to move motion S5M-22290.

Motion moved,

That the Finance and Constitution Committee recommends that the Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Amendment (No. 2) (Coronavirus) Order 2020 (SSI 2020/215) be approved.—
[Ben Macpherson]

The Convener: The question is, that the motion be agreed to.

John Mason: I am sorry, convener, but someone has put an “R” in the chat function.

The Convener: I cannot see an “R”.

John Mason: It is Patrick Harvie.

The Convener: Patrick, I see that your hand is up.

Patrick Harvie: I have put an “R” in the chat function. If you cannot see it, convener, and we are using the chat function to vote, I hope that my vote will be recorded.

I record my opposition to this policy change. The minister has stated clearly that the Scottish Government’s intention is to make housing more affordable, but he has been unable to convince me that I am mistaken in concluding that Government action will increase house prices and housing costs.

There seems to be a desire to be in lockstep with a UK Government whose tax policies should be rejected. That is not a progressive move. LBTT is a very modest improvement on the previous transaction tax in Scotland. It is not a good or progressive tax, and tax cuts of this kind against a regressive tax are not themselves progressive. I will not agree to the motion and I encourage any member who shares the desire to see action to reduce housing costs, rather than tax gimmick giveaways, to consider opposing the motion.

The Convener: Does any other member wish to comment?

Alex Rowley: The point that I tried to make in my question is that the impact of decisions based on the tax can be overstated. Tackling the housing crisis in Scotland is a bigger issue than can be dealt with simply through this tax. That is why I will support the motion.

The Convener: Minister, do you want to conclude before I put the question?

Ben Macpherson: I am content to move to the question.

The Convener: I confirm to Patrick Harvie that I got an indication in my chat function, which had not previously been updated. We should be okay as we go through the next process.

The question is, that motion S5M-22290 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, George (Paisley) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Burnett, Alexander (Aberdeenshire West) (Con)
Cameron, Donald (Highlands and Islands) (Con)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Mason, John (Glasgow Shettleston) (SNP)
Rowley, Alex (Mid Scotland and Fife) (Lab)

Against

Harvie, Patrick (Glasgow) (Green)

The Convener: The result of the division is: For 9, Against 1, Abstentions 0.

Motion agreed to,

That the Finance and Constitution Committee recommends that the Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Amendment (No. 2) (Coronavirus) Order 2020 (SSI 2020/215) be approved.

The Convener: I thank the minister and his officials for their evidence today. The committee will publish a short report to Parliament in the coming days, setting out our decision on the instrument.

I suspend the meeting for around five minutes, to allow a changeover of witnesses.

10:42

Meeting suspended.

10:47

On resuming—

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

The Convener: Our final item today is to take evidence at stage 1 on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill from the Scottish Government bill team. We are the lead committee for consideration of the bill. I note for the record that the Environment, Climate Change and Land Reform Committee is a secondary committee; it will focus on the environmental policy aspects of the bill.

I welcome the bill team to the meeting: Emma Lopinska, constitutional policy manager; Charles Stewart Roper, head of environmental strategy; Lorraine Walkinshaw, solicitor, Scottish Government legal directorate; and Francesca Morton, solicitor, Scottish Government legal directorate.

Before we start taking evidence, I ask members to direct their questions to Emma Lopinska, who I ask to bring in her colleagues to respond as appropriate. Does the bill team want to make an opening statement or go straight to questions?

Emma Lopinska (Scottish Government): I am quite happy to go straight to questions, if that is okay, convener.

The Convener: That is fine by me. I will begin.

The bill's policy memorandum does not define the keeping pace power in part 1. For the purposes of the public record, will you explain to the committee what is meant by "keeping pace" and why the Scottish Government thinks that the principle is necessary?

Emma Lopinska: In terms of defining the provision in section 1(1), the power can perhaps be best summarised as one that makes provision corresponding to European Union law or provision implementing EU law. The power is intended to be both forward and backward facing, so it will enable the Scottish ministers to make provision corresponding to EU law as it develops after the transition period, and to make provision in relation to existing EU laws that have been implemented or already have effect domestically.

When we talk about the keeping pace power, we are really talking about the ability to update domestic devolved Scots law such that it can align with EU laws as appropriate. However, section 1(1) does not contain a duty to implement each and every EU directive or regulation. It is about being able to legislate effectively when EU

developments and refinements could be implemented to benefit Scotland.

On the question why the Scottish Government thinks that the power is necessary, although the power reflects the ministers' desire to remain aligned to the EU where possible and appropriate, in many ways, the power under section 1(1) is largely technical. It provides a time-limited replacement of the power to regulate under the European Communities Act 1972, which will be lost at the end of the transition period. EU law covers a wide range of policy areas, so to aim to create bespoke domestic powers in all relevant areas, or seek to make necessary or desired legislative changes, however small and technical they might be, through primary legislation would, in the Scottish Government's view, be disproportionate and inefficient.

The response of the Faculty of Advocates to the Environment, Climate Change and Land Reform Committee's call for evidence on the bill explained the point well, so I will read it out. The Faculty of Advocates said:

"After the end of the transition period, some areas previously subject to EU regulation will continue to require regulation at the domestic level, in the interests of good government. Within those areas, the subject matter may pertain to an area within devolved competence. A power to adopt EU measures appears to us to offer a vehicle for such necessary regulation of those areas in future."

The Scottish Government is therefore of the view that section 1(1) is a pragmatic and practical power. In recognition that the United Kingdom has now withdrawn from the EU, it is a discretionary, time-limited power, and will be subject to parliamentary scrutiny.

The Convener: On the matter of parliamentary scrutiny, as far as I can see, the policy memorandum is silent on the decision-making process for determining whether to keep pace. In particular, it is silent with regard to the level of accountability, transparency and parliamentary scrutiny—that is the issue that you described—that the Scottish Government believes is appropriate and proportionate, especially if the decision is not to keep pace, for which no formal legislative scrutiny process would exist. What is the Scottish Government's view on that issue, and what does it propose?

Emma Lopinska: There is quite a lot in the question. In assessing whether to align with any given EU measure, the ministers will consider factors such as practical implications, economic and social benefits and costs, resource implications in terms of budget or Government or parliamentary time, and whether an alternative approach would demonstrably deliver the same outcomes as or more ambitious outcomes than the relevant EU measure. Having considered all

relevant factors, and if it is determined that aligning with an EU measure would be in Scotland's best interests, as is the case with normal policy development, the Scottish Government will consult as appropriate. Any such consultation will allow the Government to consider the views of and possible impact on stakeholders.

In addition to the normal policy note, business and regulatory impact assessment and so on, the Scottish Government will lay explanatory statements, as set out in sections 5 and 6, to be scrutinised by the Parliament. Among other things, those statements will set out the reasoning behind the instrument and how retained EU law will be affected. Section 7 requires ministers to lay before Parliament an annual report setting out how the power under section 1(1) has been used in that reporting period.

I am aware that some stakeholders have called for the precise circumstances in which ministers might choose to align or not to be set out more clearly, and to perhaps have that in the bill. I feel that I should say that the Scottish ministers will always take decisions in the best interest of Scotland, taking into account the full impact of any such decision. As I have said, sections 5 and 6 require ministers to set out their reasoning for reaching any decisions to align.

The danger of setting out an explicit decision-making framework in the bill is that that would fail to take into account potentially unforeseen circumstances, and it could become overly prescriptive, potentially rendering the power ineffective.

I return to the views of the Faculty of Advocates. It considers that

"the range of EU law that might be the object of such regulations—both as to subject matter and nature of the instrument—is such that the definition of criteria within the Bill would be an impossible task."

We welcome that view. We do not consider that providing for that in the bill would be helpful or appropriate, given how relevant factors change.

In relation to scrutiny of any regulations made under the power, section 4(2) sets out the type of provision that, if included in regulations, will be subject to the affirmative procedure. It states:

"That provision is provision which—

(a) abolishes a function of an EU entity or a public authority in a member State without providing for an equivalent function to be exercisable by any person,

(b) provides for a function mentioned in section 1(3) or (4) to be exercisable by a Scottish public authority, or by a different Scottish public authority (as the case may be), or by any person whom the Scottish public authority authorises to carry out functions on its behalf,

(c) falls within section 1(5), regarding the charging of fees or other charges in connection with the exercise of a

function by a Scottish public authority, except for provision which relates only to altering the amount of a fee or charge to reflect changes in the value of money,

(d) creates, or widens the scope of, a criminal offence,

(e) creates or amends a power to legislate.”

Anything not listed will be subject to either the affirmative or the negative procedure. In those cases, there is a choice of procedure—the so-called “either way provision”.

I am aware that there have been calls for the enhanced affirmative procedure to apply when provision is made that amounts to substantial policy considerations or something similar. However, I think that that would be difficult to operate in practice, given how unclear that test is and how difficult it would be to define. Applying it would effectively involve a subjective assessment of whether any provision meets the test, and the test could open the door to speculative legal challenges where it could be argued that a different procedure could apply. Therefore, the Scottish Government considers that the scrutiny procedures chosen for the power in section 1(1) represent a good balance between allowing for effective and thorough scrutiny of the power, and ensuring that it is sufficiently flexible to allow the Government, where appropriate, to respond quickly where legislative changes are needed, and—

The Convener: You have gone into a fair bit of detail, and I know that other members want to ask questions in this area, too. Alex Rowley has indicated that he has a supplementary to my question. We will then go to Murdo Fraser.

Alex Rowley: My question is about the timing of the legislation. We do not know what the deal—or no deal, for that matter—will be. Although it might be desirable to keep pace with EU law, it might not be practicable or possible to do so. The briefings that I have read show that there are a lot of ifs and buts depending on the outcome. Why are we legislating now, before we know the outcome and whether we will have any alignment with Europe? That will be a factor, will it not? My question is about timing. Why are we legislating now?

11:00

The Convener: I will give Emma Lopinska a bit of time to think about that. I would rather take first questions that are genuinely supplementary to what I said. I do not think that Alex Rowley’s question was a genuine supplementary, so I will come back to it once we have dealt with questions from Murdo Fraser and John Mason that relate directly to what I was asking about.

Murdo Fraser: I have a couple of questions that flow quite nicely from the convener’s question about parliamentary scrutiny. In the submissions,

there are some concerns that what is proposed will make us a rule taker but not a rule maker. Laws are made elsewhere in the EU by a supranational body that we will not be part of. We will have no input into making such laws, and there will be no consultation or engagement on them, yet they will be introduced by regulation to the Scottish Parliament, so the extent of parliamentary scrutiny and consultation with stakeholders will be limited. There will be no scope for amendment by members of the Scottish Parliament in the usual way. Why has the decision been made to legislate in that way, as opposed to how we normally introduce laws, which is by primary legislation?

Emma Lopinska: Given that the UK was the member state, the Scottish Government has always had to work hard to influence in less formal ways. Scottish Government officials will continue to engage with counterparts in the European Commission, although that engagement might be influenced by any future UK-EU deal. Ministers will continue engagement with their counterparts.

As I said, the power is discretionary. It is not a case of having to bring into domestic law the whole of every EU directive or regulation. We have the discretion to consider what the directive or regulation would mean for Scotland and what the benefits would be. As I said, several factors will be taken into consideration.

We will also think about the most appropriate legislative vehicle to use. There might be areas in which existing domestic powers could be used rather than the one that we are discussing. As I said, we will consult on any draft regulations, so there will be the opportunity for members and committees to take part in the consultation to shape the regulations. Stakeholders and the Parliament will have the opportunity to be consulted. Of course, the Parliament could decide not to approve any regulations if the case that is made by the Scottish Government is not deemed to show how they would be beneficial to Scotland.

However, as I said to Mr Crawford, the bill is not just about looking to the future. A huge body of EU law is being rolled over into domestic legislation. In a lot of cases, we will lose the ability to amend that legislation. We will have to stick with domestic law on the statute book that we cannot tweak or amend in order to take account of current circumstances. For example, when we implemented an EU directive previously, we might have decided that body X was best placed to carry out a certain function, but then, because time had moved on and things had changed, we might have wanted to change that so that body Y carried out the function instead. It would not be appropriate to introduce primary legislation in every case—for example, to make technical changes—because

we know how difficult it can be to find space in the legislative programme.

The bill is really a practical measure and a replacement for the way in which we previously have been able to tweak existing law. It is not always necessary or appropriate to bring forward large numbers of pieces of primary legislation.

Murdo Fraser: Unfortunately, convener, I missed most of that answer, because my screen froze and the sound cut out.

The Convener: I know that this is a bit repetitive, but could you give us a shortened version of the answer, Emma?

Emma Lopinska: It is not just about looking forward; it is about looking backward and being able to amend, where appropriate, existing law on the statute book.

As we have done previously, we will attempt to influence EU policy as it develops.

We will set out clearly why we think that measures are appropriate. The committee, stakeholders and Parliament will have an opportunity to take part in consultation on any regulations that are made and, ultimately, Parliament will be able to decide whether the case has been made and whether implementing a measure is beneficial to Scotland. The Parliament will decide whether to approve the measures.

The Convener: I hope that that shortened version helped, Murdo.

Murdo Fraser: Thank you.

What is your estimate of how many laws a year will be introduced under the bill?

Emma Lopinska: I do not have a definite figure, because many of the EU legal acts relate to functions of the EU and therefore would not be appropriate or operable outwith the EU. Also, some EU laws are made in reserved areas, and it would not be for the Scottish Parliament to legislate in those areas, either.

I do not know the answer. As I said previously—I do not know whether you missed this—we would look to see whether we had existing domestic powers to legislate, so regulations might not all necessarily be made using the power in the bill. I am afraid that I do not have a definite number.

Murdo Fraser: The argument for the approach in the bill is that it would be too burdensome to use primary legislation, as that would clog up the statute book. My difficulty with that is that, if you cannot tell me how many laws you expect, I am not sure how you can credibly sustain that argument.

Emma Lopinska: It is about replacing a power that will be lost. We do not think that it is good or efficient government to have areas where we know that we cannot legislate without bringing forward primary legislation, especially when they are minor and technical areas. It really is a sensible replacement power.

The Convener: I understand that John Mason is having problems with his screen, which may be frozen, so I ask Emma Lopinska to go back to Alex Rowley's question, which was about whether now is the right time for the bill, given the level of uncertainty.

Emma Lopinska: I think that it is. The Scottish ministers called on the UK Government to seek an extension to the transition period. If that had been sought and agreed, we would not have had to introduce the bill right now.

The bill aims to legislate within the law as it currently is. There is no denying that it is being progressed at a time of great uncertainty. The reason for having a replacement is to provide a bit more stability. As I said to Mr Fraser, the bill introduces a replacement power and is about ensuring that we can legislate when we need to do so. Although the EU referendum took place in 2016, there is still no certainty and the Scottish Government thinks that we cannot continue to wait when we are about to lose the power.

As ministers have said on numerous occasions, it is for the Scottish Parliament to determine how we should align with the European Union. The bill would allow the Scottish Parliament to do that, rather than wait to see what further constraints might be placed on the Parliament and its ability to legislate. We are looking at the current situation more than four years on from the referendum and thinking about what we can do to ensure that we can legislate when that is appropriate.

The Convener: Do you want to follow up on that, Alex?

Alex Rowley: The question about creating legislation now is about the implications of doing so. We had a debate about this issue in Parliament yesterday. My biggest fear is about trade and the fact that we have a Government in Westminster that wants to take powers away—not necessarily to have them at Westminster, but to give them away to multinational companies. It will then be those companies, rather than Governments, that will be making decisions about our daily lives. That is my fear, and I do not trust the UK Government that is currently in power to do anything different.

If the UK Government introduced a trade bill—as it seems to be doing—and at some point the national health service could be covered by it, it seems desirable to have this bill. However, will the

bill be effective in protecting Scotland and the regulations and rights that we currently have if the UK Government can bring in new laws, such as trade bills, and override all of it?

Emma Lopinska: We can only do what we can do, and it is not for me to speak about any actions of the UK Government to circumvent legislation that is made in the Scottish Parliament. Hopefully, if the bill is passed and enacted, the way that the Scottish Parliament wants to be able to legislate will be put into the statute book. I cannot speculate on what comes after that.

Francesca Morton (Scottish Government): I want to respond to the point about the impact of potential international agreements that the UK Government enters into. The impact of any deals on this bill will depend on what is specifically decided as an outcome of those agreements. However, the crucial point—and it is one that the Scottish Government has made repeatedly—is about the importance of involving the Scottish Parliament and Government's views, given that there are responsibilities in devolved areas that will be impacted. It is crucial that the Scottish Parliament and Government should be involved in the negotiation of those trade deals. I want to make that clear.

Patrick Harvie: I want to ask about an issue that relates to Alex Rowley's question, so I will begin with my question on that and then ask some other questions.

Yesterday, we were not only debating the potential for international trade agreements but the UK Government's proposals for the internal market. Since the publication of the white paper on that, has the Scottish Government sat down and considered potential conflicts or interactions between this bill and the proposals in the white paper, if they were to be implemented as they stand? What issues do we need to be aware of?

Emma Lopinska: I have had discussions with the team, during which we have looked at the internal market and thought about how things might go. However, we need to see a UK bill and its exact terms to know how it would impact on what this bill seeks to do. Everything is a bit too vague and uncertain for us to be able to say, with any certainty, that it would impact X, Y or Z. That is why we have to wait for a bill that states exactly what the UK Government would introduce.

Patrick Harvie: When and if that bill is published and introduced at Westminster, what would be the process? Would the Scottish Government publish a supplementary policy memorandum or something? What would be the process for informing this Parliament, as part of our scrutiny of the bill, about the issues that are raised in the potential interaction?

11:15

Emma Lopinska: We would need to look at any bill and discuss with ministers what they think it means for part 1 of our bill. Obviously there is also part 2, under which we would still want to advance our standards. As I have said, depending on what would come out in any UK bill, we would need to speak to ministers to see whether they want to take a particular position.

Patrick Harvie: I go back to the process that led to the continuity bill being produced—not the UK bill that is coming.

A lot of aspects of the Brexit process have led to work having to be done in a hurry and to imperfect processes. However, last year there was a consultation on environmental governance. There has been work with all the interested organisations, and it seems that there has been time to take account of that consultation. Has it been the Scottish Government's intention that the bill will fully implement the recommendations of the consultation on environmental governance? Is that its purpose?

Emma Lopinska: I will pass that question to Charles Stewart Roper.

Charles Stewart Roper (Scottish Government): Mr Harvie, you are right that we consulted on environmental principles and governance. As you are probably aware, that was quite early in the development of governance policy, and we consulted on the gap that would emerge on leaving the EU and on principles for filling that gap.

We got some very interesting responses from stakeholders, and we have had further discussions with stakeholders following that consultation. From that, ministers developed their understanding of the gap that needed to be filled by domestic arrangements and of the principles that they would use to make decisions on the nature of the institutions and arrangements that would fill that gap.

Although the consultation did not contain detailed proposals, we feel that we have taken forward the results that we got from it—in particular, the strong feeling of stakeholders and other respondents that there was a significant gap in governance, that it was important to fill it in order to defend environmental standards and that we needed to fill it with a body that would function independently of ministers and seek to maintain a solid system of environmental governance in Scotland.

Patrick Harvie: I am interested in exploring this issue, but I do not want to do it in a way that would be more appropriately directed at the minister;

obviously, ministers are responsible for questions of policy.

Campbell Gemmill's submission on the bill says that the Government's response to the consultation recommendations

"is not wholly clear and the proposals currently set out for Environmental Standards Scotland (ESS) go part of the way toward meeting part of the recommendations made. In scope, in powers, in independence, and in resource the ESS ... falls short."

Is it the Scottish Government's position that those recommendations are intended to be fulfilled only in part and only "part of the way", as Campbell Gemmill has described, or is there an intention to go further than what has been published?

Charles Stewart Roper: Our view is that we are implementing the spirit of what we put in the consultation and the responses that were received. Of course, we are aware of the report that Professor Gemmill did for Scottish Environment LINK and the recommendations in it. Ministers can make decisions that do not follow in full the recommendations of Professor Gemmill's report and the submissions of SE LINK.

Ministers have made their decisions, which are reflected in the proposals in the bill. We think that we have produced a system of governance that will be robust and effective, that will fit in with the other institutions and the existing institutional structures in domestic law, and that will respect the role of the Scottish Parliament in domestic institutions. Ministers took that position in order to have a balanced but robust system of governance.

Patrick Harvie: An issue that will no doubt come up is the exclusion of finance and budgets from the application of the principles. They are currently restricted to policy development, which has been criticised. The Environment, Climate Change and Land Reform Committee will obviously want to look at that, but, as the Finance and Constitution Committee, we have an interest in the reasons why finance and budget issues have been excluded from the application of the principles.

Does the Scottish Government intend to publish anything more by way of illustrating what it seeks to achieve by excluding so much from the application of the principles, a great deal of which is not excluded from the existing application under the EU of EU environmental principles?

Charles Stewart Roper: That exclusion follows the Environmental Assessment (Scotland) Act 2005 and, at EU level, the strategic environmental assessment directive. It is clarified in the guidance for the strategic environmental assessment system that the exclusion is to be things that are purely budgetary and financial measures.

It is not that the new governance arrangements will not be able to make recommendations about the need for more resources in some areas; it is more that the finance and budgeting process itself should not be subject to environmental governance, in the same way that it is not subject to strategic environmental assessment.

That will be made clearer and expanded on in the guidance on the principles and their operation, so there will be more information about it for the operation of the system. It is our intention that we follow the same level of exclusion in the strategic environmental assessment system for things that are purely budgetary or financial measures.

Patrick Harvie: Do we expect to see a draft version of the guidance that you mentioned during scrutiny of the bill? Will it be published before we have to make decisions about what is in the bill?

Charles Stewart Roper: We intend to provide for consideration at least an outline and the key content of the guidance.

Patrick Harvie: Will that be before stage 2?

Charles Stewart Roper: Yes.

George Adam (Paisley) (SNP): How will we maintain our current standards? EU standards for everything are at quite a high level. How will we maintain food and workers' rights standards, and how will we replace EU funding? Those are the questions that my constituents and members of the public are talking about. How will we maintain standards through the current proposals?

Emma Lopinska: I just want to check—do you mean using the power under the bill?

George Adam: Yes.

Emma Lopinska: As I set out, ministers have made clear their ambitions for Scotland. They are obviously attracted by the high standards that have been set by the EU and, therefore, we will keep pace with those standards wherever possible and practical. I cannot talk about specific areas and say that we will definitely align on those areas. We might want to go further in some and we want to consider alternatives that might be more beneficial.

More generally, as I said earlier, with regard to EU measures as they are now and how they might develop in the future, this power is about being able to amend, tweak or refine what is already there. As new measures are introduced, we can consider whether they would be beneficial to Scotland. If they would be beneficial, the power in the bill could be the way to help us maintain high standards, once we have looked at the impacts of any agreed common frameworks or the future EU-UK relationship.

George Adam: Say, for talking's sake, that we had a trade deal that had an impact on workers' rights or food standards in Scotland. How would the bill help the Scottish Government to protect those rights and standards? How would the bill actually do something?

Emma Lopinska: If it was an area where we did not have the ability to keep aligned in another way—if there was no current domestic power in any of the areas that you mentioned—and it was within devolved competence, we could use the power in the bill to say that we wanted to give effect to decisions that had been taken by the EU and state how we planned to do that.

Alexander Burnett: I will follow on from Patrick Harvie's questions about the process to get to this point. We have heard all the reasons for introducing the bill, but in the discussions, what arguments against the bill did you have to counter?

Emma Lopinska: Before I answer that question, would you mind if I clarified what I said to Mr Harvie? I do not think that I was very clear when I answered his question about a UK bill. I said that I would have to have a discussion with ministers because he specifically asked about how we would put views across to Parliament. I should have been clearer in saying that we would need to have discussions with ministers to determine how they wanted to ensure that their views could be put across to Parliament on the back of any UK bill that was introduced. I apologise for not being clear in that answer.

On Mr Burnett's question about countering arguments against the power in section 1(1), the people whom we spoke to were largely supportive. People appreciate the high standards that the EU represents and are conscious that we do not want to see any regression from those standards. People were quite happy to know that we were making sure that, if measures come out of the EU that would be beneficial, we will have the ability to legislate to reflect those measures in our domestic law, if we need to.

As Mr Fraser said earlier, the main concerns tended to be that we might take laws and implement them in their entirety, when we will have had no say in developing them. I would go back to what I said to Mr Fraser. We always had to work in less formal ways to be able to influence those decisions in the first place, because it was the UK that was the member state. We are used to working in those kind of ways and we will carry on doing that.

We will also look at any measure and consider it—we do not have to take it and we do not have to implement it. For measures such as directives, which tend to be in the public domain, we will have

the opportunity to see how they are developing over time. It takes years for some EU measures to be agreed. We can see how such measures develop and think about what impact they might have for Scotland and what benefits there could be, as they go along. We can see how any such measure is developing and we can advance our own thinking at the same time. Once we see a final measure, we will be able to look at it in the wider context, including the common frameworks, any EU-UK agreement and any other future international agreements. We will then be able to think it through for Scotland and decide how it would be beneficial. We can then go out to stakeholders and others to consult on it as well as set out our thinking. That is how we have been countering such concerns.

Alexander Burnett: One argument that was raised at yesterday's Environment, Climate Change and Land Reform Committee by a leading academic was that there was a high risk that the bill would be struck down by the Supreme Court. What consideration have you given to that?

11:30

Emma Lopinska: I became aware of that only through today's newspapers. The *Official Report* of the session is not yet available and I could not find the video so I could not watch it back. The articles that I read were confusing. It was not clear whether the professor was talking about a high probability of the UK Government deciding to refer that to the Supreme Court under section 35 of the Scotland Act 1998, or whether the professor was suggesting that the powers would be redundant once a UK bill was passed. I would need to see the detail of the evidence before I could give an answer.

Alexander Burnett: I have not seen the *Official Report* either. Given what happened with the first continuity bill, was there any consideration or discussion of that possibility before yesterday's committee meeting?

Emma Lopinska: I might ask Francesca Morton to make sure that I do not say anything that is wrong from a legal point of view.

The referral of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill in 2018 demonstrated that the Supreme Court had reached a view that the Scottish Parliament had the competence to prepare domestic laws for after the EU exit. Only one section of the bill, section 17, was found to be outwith competence. The actions of the UK Government, both in the time that it took to consider the referral, and in the provision in the European Union (Withdrawal) Act 2018, which amended the competence of the Scottish Parliament after the 2018 legal continuity

bill had already been passed by the Scottish Parliament, led to large parts of that bill being deemed to be outwith competence when the ruling was made.

That 2018 Supreme Court ruling made the general point that the Scottish Parliament had, at that time, the ability to prepare its own laws. The power to keep pace, as it was in that bill, was found still to be within the competence of the Scottish Parliament. I would say that the Supreme Court has ruled on that.

Francesca Morton: I am happy with what Emma Lopinska has said. My supplementary point would be that the Presiding Officer has given the bill a clean bill of health and has agreed that it is within the legislative competence of the Scottish Parliament.

I have also not seen that comments that were made yesterday. I do not know whether those were about questions connected to the UK internal market and the extent to which the UK proposals might serve to undermine devolved policy making in general. That is not a legislative competence point. We will look at those comments when the *Official Report* is available.

Tom Arthur: I have only one question, because a lot of ground has been covered already. It follows on from an earlier exchange, when Murdo Fraser asked whether one justification for using regulations would be the volume of legislation that might be required. There is uncertainty about the volume of legislation and there is also a discretionary element. I learned from two and a half years on the Delegated Powers and Law Reform Committee that much of what is in regulations is not appropriate for primary legislation.

Could you sketch out the nature of some of the provisions that could be dealt with by regulations, and why regulations and delegated powers would be better vehicles than the full three-stage process of making primary legislation?

Emma Lopinska: One general example would be when the EU is looking at a list of banned substances. If we wanted to add something to an existing list, we might not have the power to do so. Bringing forward a bill for the sole purpose of adding one line to a list of banned substances would not be a great use of parliamentary time and effort.

I gave this general example earlier. When we were implementing a directive, if something had changed, such as its remit or staffing, in the body that we had thought was the most appropriate to carry out certain functions, we might decide that it would be more appropriate for another body to carry out those functions. Again, I would not say that bringing forward a bill for one function of a

body would be an appropriate use of time. For general amendments to regulatory schemes, lists of species at different levels of protection and things like that—sorry, I should have been better prepared for that question. There are so many different things that we currently use the power of section 2(2) of the European Communities Act 1972 for that are very technical and minor. We do not want to have to sit for years with a statute book that does not quite work as efficiently as it should.

Tom Arthur: That helps. I could be completely wrong in what I am about to suggest, but my understanding is that if delegated powers were not to be used and the bill were not to become law, the only solution would be primary legislation. However, primary legislation for each and every regulation would be completely impractical, so the only option would be to have periodic pieces of primary legislation that sought to sweep up all the regulations. However, that then would become an issue as we would not be able to respond quickly to a changing legislative landscape. If I am correct in my understanding, there is no practical alternative but to have that regulation-making power to achieve the bill's aims. Is that a fair understanding?

Emma Lopinska: Yes, absolutely.

Angela Constance (Almond Valley) (SNP): I have a couple of questions that pick up on written submissions that the committee has received. I know that the bill has been built on cross-party talks and on-going engagement with stakeholders, given everything that has unfolded since the Brexit referendum. However, the submission from the Human Rights Consortium Scotland states:

“Section 6 should be amended to include that there must be a statement to the effect that Scottish Ministers have had due regard to their obligations under the Human Rights Act 1998 and under international obligations.”

Whether the bill is amended in that fashion would of course be a political decision but, from a technical point of view, is there anything to prevent the bill being amended as suggested by the Human Rights Consortium?

Emma Lopinska: As you said, the Scottish ministers always have regard to their obligations under the Scotland Act 1998 and the Human Rights Act 1998 to comply with convention rights and international treaties. However, the Scotland Act 1998 and the Human Rights Act 1998 require more than due regard being paid to obligations, so we think that the suggested amendment is unnecessary.

Angela Constance: Thank you. Similarly, the submission from the Convention of Scottish Local Authorities states:

"With respect to consultation to Local Government ... Section 9(2)(g) establishes an obligation by Scottish Ministers that 'must consult' 'such persons appearing to them to be representative of the interests of local government'."

COSLA is suggesting that, in addition to that, there is a more explicit obligation on the Government to consult individual local authorities before laying new guidance in Parliament on how to apply principles. Is there any technical reason why that should not be the case?

Emma Lopinska: We are really grateful to COSLA for its views on the bill. We are committed to ensuring that local government is consulted as appropriate.

We are going to work through COSLA's specific recommendations to see what we can do. From a technical point of view, we would want to be sure that anything that is deemed appropriate or necessary is proportionate. I am certainly happy to look through those suggestions with COSLA, and I know that Mr Russell has spoken to COSLA on the matter.

The Convener: I have no indication from members that they wish to ask any further questions. I therefore thank Emma Lopinska and the bill team for their evidence. In our next few meetings, we expect to take further evidence on the bill from interested parties, including those who have provided written views to the committee. Our final session with the cabinet secretary is expected to take place in early September.

As we have no further items on our agenda, I will now close the meeting. Thank you to everyone involved.

Meeting closed at 11:41.

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