



OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 25 August 2020

Session 5



The Scottish Parliament
Pàrlamaid na h-Alba

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.parliament.scot or by contacting Public Information on 0131 348 5000

Tuesday 25 August 2020

CONTENTS

	Col.
INTERESTS.....	1
UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) BILL: STAGE 1	2

ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
18th 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:

Terry A'Hearn (Scottish Environment Protection Agency)

Robbie Kernahan (NatureScot)

Karen Ramoo (Scottish Land & Estates)

Dr Annalisa Savaresi (University of Stirling)

John Scott (Ayr) (Con) (Committee Substitute)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Virtual Meeting

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 25 August 2020

[The Convener opened the meeting at 09:45]

Interests

The Convener (Gillian Martin): Welcome to the Environment, Climate Change and Land Reform Committee's 18th meeting in 2020. I would especially like to welcome Liz Smith, who joins the committee for her first meeting, and I thank Annie Wells for her contribution to the work of the committee over the past months.

We have apologies from Claudia Beamish and from Finlay Carson. I welcome John Scott, who is Finlay Carson's substitute.

Under our first agenda item, I invite Liz Smith to declare any relevant interests.

Liz Smith (Mid Scotland and Fife) (Con): I have no relevant interests to declare.

The Convener: Thank you.

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

09:46

The Convener: Agenda item 2 is to continue taking evidence on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill. We have three panels. I welcome our first panel: Robbie Kernahan, director of sustainable growth at NatureScot; and Terry A'Hearn, chief executive of the Scottish Environment Protection Agency. Good morning to you both.

I will get stuck in with a direct question about the proposed organisation, environmental standards Scotland. How do you envisage working with ESS? What are your general feelings about what your potential relationship with the new agency will be?

Robbie Kernahan (NatureScot): First and foremost, the creation of a new body with oversight of environmental governance is quite exciting. The bill clarifies the powers that the body will have, which, broadly speaking, we welcome. There are still a few questions about the nature of the relationship that we will have with it. A lot of the interaction between us will be about where ESS's focus will be, how it is set up and the types of cases that it will explore.

The bill's policy memorandum explains that to a certain extent. The model will, I think, be focused on prevention and remedy in a supportive style, working very much in partnership with NatureScot.

Of course, ESS will have quite a lot of discretion over how it investigates cases. Our expectation is that it will investigate only a handful of cases annually, where there is high-profile, significant environmental risk. That will very much replicate the way that cases are referred to the Government now. I am looking forward to establishing that relationship once ESS is up and running.

Terry A'Hearn (Scottish Environment Protection Agency): It is a new organisation. The question is whether, in the way it is set up, the way it works and the way organisations such as SEPA work with it, it will add or detract value. We think that the way it is being set up is promising, because we think that it can play a positive role.

I imagine that the sorts of conversations that I will have with the chair and the chief executive of the new organisation in the early days will cover the fact that we are already overseen by various other bodies and processes. We report to this committee on various issues, for example, people can hold us to account by testing our individual regulatory decisions by court and other review

processes, and the Scottish Public Services Ombudsman reviews other ways in which we administer things.

What particular role can ESS play? The focus on strategic issues and whether we and others are getting it right on particular matters in a strategic sense is promising. I will give a practical example. Probably the two most contentious areas that we regulate, given the comments that have come from a variety of people, are the Exxon-Shell site at Mossmorran and aquaculture. A regulator will always have some areas to regulate about which there are different views in the community and, quite rightly, questions about whether we are discharging our responsibilities properly. What we think is promising about the bill and the policy advice around it is that there will be strategic questioning of whether we are doing the right thing. In both those cases, we are putting a big emphasis on thinking about how we can bring the parties together—we will do that wherever we find a difference of views. As some committee members know, because you have been involved in both issues, that can be very difficult.

Given how the body is to be set up, it seems to be envisaged that there will not be early intervention, as Robbie Kernahan said. That will allow us to do our regulatory-role work with—in the Mossmorran case—residents who are very concerned, businesses and other regulators. It will not help us if the body intervenes early and does not allow us to do our job. However, if at some point it is able to ask, “Are you really regulating major industrial facilities in the right way, strategically?” when it comes to flaring, for example, as seems to be envisaged, we think that it will have a valuable role that will fill a gap—given that individual regulatory decisions can already be questioned and tested through other legal processes.

We envisage that it would add a lot of value if another oversight body were able to say, “This is a big issue for the environment. Are you getting it right or wrong, strategically?” The body could then work with us, and—if we had got it wrong—give us guidance on how we should fix things. That is the nature of the relationship that we envisage, from the discussions that we have had with officials who were involved in drafting the bill and from our reading of the bill.

The Convener: You will not want any overlap in responsibilities or confusion about who does what. A few people have expressed that concern and asked where SEPA and ESS will sit and what gap ESS will fill. You said in your submission that you have concerns that the name “environmental standards Scotland” is potentially misleading.

Terry A’Hearn: I guess that the name is the gift wrapping around the present. Maybe it makes a

difference and maybe it does not. What is important is that people understand the role.

Let me take that practical example again. The people who are concerned about Mossmorran have lives to lead and kids to raise and so on, and we do not want them to spend a lot of time thinking about whether to go to the ombudsman, another oversight body, a parliamentary committee and so on. I would not live and die by the name, but other names might more accurately describe what the body does—that probably was not a great thing to say, because you might now ask me to suggest another name.

The Convener: I will bring in other members.

Mark Ruskell (Mid Scotland and Fife (Green)): Mossmorran is a useful example. Do you envisage ESS having a role in relation to the joint work that you do with the Health and Safety Executive? I am aware that a lot of your regulatory functions are shared with other bodies.

Terry A’Hearn: You have been personally involved in this issue. If we are reviewing a flaring incident and ESS tries to come in too early, that will not be helpful. However, at some point ESS could ask whether the connection between the two organisations is working well, that is, whether health and safety regulation and environmental protection legislation are knitting together well or clashing. Let me use Mossmorran as a case study again: we think that we should be held to account for the individual regulatory decisions and it seems to me that the new body should be saying, “Okay, when we look at one or more regulatory decisions, it seems that something is not quite working here; can we come in and have a look at that and work with you on it?”

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): May I ask about the remit of ESS with respect to the responsibilities of SEPA and NatureScot? There are two elements in that regard. Obviously, it is not just the two bodies that are represented on the panel today that affect the environment; transport agencies and others do, too.

It is important that we understand whether NatureScot and SEPA think that the remit of ESS as it is currently defined sufficiently covers the work of those two bodies, or whether they think that it needs to be extended. You are not speaking for anyone else, but do you think that ESS’s remit as it is currently defined sufficiently covers the wider responsibilities that the Government might have to discharge in other parts of the Government that are also environmental responsibilities?

Terry A’Hearn: As far as our responsibilities are concerned, for a start, what is proposed goes further than what we have in Europe. That makes

sense, because the European system involves a set of nation states, whereas the arrangement that is proposed in the bill is for one jurisdiction. For example, we do not get the direction that we might get through a direction notice from the proposed new body. We understand that, because it is filling a different gap.

It would seem that that ability of ESS would apply to a wide range of things that SEPA does. I am comfortable with that. My concern is more about whether it will act at the right time, with the right focus. If the new system operates well, we will be held to account and held to do our job properly across a wide remit. Because I have been thinking about how the proposed new system would apply to SEPA, I have not thought as hard about how it would apply to other agencies, bodies and parts of Government in the context of their responsibilities.

Let us take the example that Mark Ruskell raised. If ESS was looking at industrial facilities and how the Health and Safety Executive and SEPA worked together, there would be nothing to stop it saying, "If the planning system worked like this, it might be easier to discharge the joint health and safety regulations and environment protection regulations more effectively." Certainly as it relates to SEPA, the scope of ESS seems to be very broad, but I have not turned my mind as much to the scope of ESS as it relates to other bodies. We can come back to the committee on that, but I think that there is some scope there.

Robbie Kernahan: From our point of view, the scope of ESS is really helpful on a number of bases. The new body will provide reassurance to the Scottish Government on the extent to which European legislation, primarily, has been complied with. There are still some questions about whether the scope of ESS will be restricted to providing oversight on European Union-derived legislation or whether it will look at domestic environmental legislation, and it would be helpful to have clarity on that.

With regard to how ESS will operate with not just us but other public authorities, it is interesting to reflect on what Terry A'Hearn said. We want to establish a relationship with ESS on the nature of our functions and ensure that we are operating to the highest possible standards. We are reassured by the fact that ESS will provide a bit of additional independent oversight and will be able to take other public authorities to task and scrutinise what they are doing in relation to land management, housing and transport. For example, it will be able to make sure that local authorities discharge the expectations that are placed on them as public bodies in complying with European legislation. ESS's provision of such oversight will be a welcome addition to the landscape in Scotland. It

will be able to do that in a way that is tailored to the Scottish context.

However, we need to be reassured that we do not end up with a wide-ranging environmental watchdog that is not clear as to what type of cases it will investigate. We are keen to ensure that, when we talk to ESS, it will operate proportionately and will focus on some of the key issues, which we know are systemic, rather than operating on a case-by-case basis. I think that it will take a bit of time for the criteria by which ESS thinks about what types of cases it will look at and how it will work to bed in.

Stewart Stevenson: I have a brief final question, which requires only a short answer. Is the exclusion of finance and budgets from ESS's remit right, particularly in the context of a green recovery?

Robbie Kernahan: There are still questions about the budget and staff complement for ESS. Although there is a modest staff complement and an estimate of limited budgets, because some of the areas that ESS will explore are fairly specific, we have concerns about to what extent it will begin to rely on expertise from our SEPA colleagues and from NatureScot in discharging its functions. However, broadly speaking, we are content with the approach.

10:00

Terry A'Hearn: If I have understood the question, we do not have a particularly strong view on the finance and budget issue.

The Convener: That is fair enough. We will move on to questions from John Scott.

John Scott (Ayr) (Con): Before I turn to my questions, which are on international obligations, I declare an interest as a farmer and landowner.

In written evidence, Scottish Natural Heritage stated that the functions of ESS as currently described in the bill would

"rule out oversight of obligations set out in international conventions, such as the Ramsar Convention and the Bern Convention".

What should ESS's role be in relation to international law and obligations to which the United Kingdom is a signatory?

Robbie Kernahan: That again comes back to clarity on what the bill means by "the environment". There are questions about whether the term even includes the scope of the habitats and birds directives as defined in EU law. We are keen to continue to explore that issue to ensure that we get absolute clarity on the definition of "the environment". Our interpretation is that, currently, the bill would probably rule out oversight of some

of those international obligations. There are questions about whether we want to tidy up the bill to ensure that it includes the Ramsar and Bern conventions. There are other issues that are perhaps worthy of further consideration in a Scottish context, such as whether the definition of “the environment” includes landscape. There is scope to be a little clearer about the term “the environment” and the legal obligations to which it pertains.

Terry A’Hearn: I agree with Robbie Kernahan. There will be a fair bit of international law that is translated into Scottish law that we administer. Most of the environment protection laws are based on EU directives. I know that this is a slightly different point, but a fair bit is translated into Scottish law and, if we are administering that, the new body would have oversight of it. I take the point that there will potentially be some grey areas.

John Scott: SEPA supports replicating the strategic approach taken by the European Commission to enforcement and therefore you “strongly agree” that ESS should not be able to take formal compliance action on individual regulatory decisions by public bodies. However, others do not take that view. What should be the role of ESS when an individual regulatory decision by a public body appears to contravene environmental law?

Terry A’Hearn: I have a couple of points on that. First, if we make a regulatory decision that seems to contravene law, there are existing appeal processes. A system works well if bodies are clear about their particular role. We think that that should be the route. If a business that we regulate or someone else thinks that we have made the wrong decision, they have appeal rights. If ESS looked at the matter and thought that we had got it wrong, even if that was not the case and the issue was not in ESS’s jurisdiction, we would want it to raise the matter with us and chat to us so that it understood where we were coming from and what the court had decided. The issue would then go on to ESS’s radar so that, if it had a strategic review at any point, it would be well informed.

To be clear, we stick to what we said in our written evidence. It sounds as though we disagree with some other evidence, but we think that we should continue with our existing processes for individual regulatory decisions and that it will not help anyone if that line is blurred strongly.

ESS can play the role of saying, “Hang on. There seems to be something strategically not right that might have been given rise to by one or more decisions.” That is the point at which it can come in and add value.

Robbie Kernahan: I agree entirely with what Terry A’Hearn has suggested. In the Scottish context, there are existing appeal mechanisms for individuals or organisations to make representations or challenge individual decisions. Although uncertainty still exists about the exact nature of the cases that ESS will investigate, our hope and expectation is that it will not necessarily consider what we might consider to be run-of-the-mill complaints or individual cases. For the majority of our functions, appeal mechanisms already exist. Our plea is that ESS remains strategic and focuses its energies on the underlying issues that seem to crop up time and again.

The Convener: Angus MacDonald has some specific questions about appeals and compliance.

Angus MacDonald (Falkirk East) (SNP): SEPA’s written evidence implicitly suggests concern that the sheriff courts will not have the expertise to deal with an appeal against a compliance notice that is issued by ESS, and it points to the Scottish Land Court as an alternative. Should appeals and judicial enforcement of compliance notices be heard in a specialist judicial forum, such as the Scottish Land Court, as opposed to the sheriff court?

Terry A’Hearn: A couple of mechanisms could be used. Appeals could be taken to a specialist court or, if they are not taken to a specialist court, members of the judiciary could have particular training and expertise on such issues. We have said in our submission where we would prefer such cases to go. The key point for SEPA, ESS and whoever raised the case is that it is heard by people equipped with the expertise and experience to deal with it. We have a preference for where such cases should go, but there are other mechanisms to achieve that.

Robbie Kernahan: People can appeal decisions that NatureScot or others have made through a range of routes, including through a public local inquiry, the Scottish Land Court, the sheriff court or judicial review. If ESS issued a compliance notice to a public authority in order to correct a failure to comply with environmental law, our expectation is that we would continue to work in partnership with ESS in order to reach a mutually acceptable solution. That is the steer that we have been given. The conversations that we have had with officials have shown that it is very much a case of working in partnership to deal with such situations.

The Convener: Liz Smith has questions on issues that might arise with cross-border working.

Liz Smith: I am particularly interested in the relationships that SEPA and NatureScot have with their counterparts in the rest of the UK. Do they

share the same objectives as you? Can you point to specific challenges relating to divergence from a common purpose?

Terry A'Hearn: We work very closely with our counterparts in the other parts of the UK. We have also maintained very strong relationships with our counterparts in Europe. I apologise if committee members are not football fans, but the analogy that I make is that we are the referees—Parliaments set the laws and we administer them. If there are similar laws, we work very closely to try to take common approaches that suit our jurisdictions.

For example, the chief executive officers of the four UK environmental protection agencies are in regular contact and meet a couple of times a year. There are working groups on nearly every topic that we regulate. I have staff with, for example, farming interests who know how the Environment Agency, the Northern Ireland Environment Agency and Natural Resources Wales regulate farming issues. We try as much as possible to have common approaches. Where our approaches are not common, we try as much as possible to understand where we diverge, so that we can make matters as easy as possible for the people who we regulate.

It is not just about the black and white administration of law. As new issues come up, we keep strong relationships with the other bodies, so that we can try to understand, for example, the best ideas and evidence, we share resources and we do not necessarily all do the same science.

The final piece of the jigsaw is that we work closely with the relevant trade bodies. We have a strong relationship with—to pick just one body—NFU Scotland, which also, obviously, has close relationships with its counterparts in England, Wales and Northern Ireland, so that we can identify divergences and problems, and try to take common approaches as much as possible.

In a sense, whatever the law is, that approach is critical to administering the law well. That is a past theme, it is a big asset and we will continue to maintain it.

Robbie Kernahan: Broadly speaking, our position is similar to that of SEPA. We have good working relationships with nature conservation bodies in England, Wales and Northern Ireland, and we meet regularly to compare and contrast notes. Although there are, obviously, legislative differences in the detail of how our functions are discharged, broadly speaking, we are fully aligned in what we are aspiring to do in raising the awareness of and promoting nature across the UK.

We share similar objectives with the tools that we are provided with in terms of protected areas

and licensing, and we share similar customers and stakeholders, including local government and non-governmental organisations. We work fairly closely together, as far as we can.

As a statutory nature conservation body, the other element from which we benefit is the Joint Nature Conservation Committee, which allows us to have conversations about where we can work more closely together and set common standards in, for example, monitoring protected areas and species. We work as closely together as we can, recognising that there are differences for legitimate reasons, but we try to ensure consistency.

Liz Smith: Will the new body enhance those relationships? I ask for a yes or no answer.

Robbie Kernahan: I am not entirely sure that ESS, because of its geographic remit—it will be solely based in Scotland—will make much difference to our relationship with colleagues at Natural England and Natural Resources Wales, for example. I do not really see it having a significant impact.

Terry A'Hearn: I probably agree with that. All the organisations will have oversight bodies. An obvious point is that whether relationships work well is based on how people operate. For example, if we have a big divergence between the oversight body in England and Scotland on particular issues, that might make it more difficult for us to get common approaches with our counterparts. That might be appropriate, because the laws might be different and they are different jurisdictions making different decisions. That is why, for us—we emphasise this in our submission—the relationship that we need to quickly establish with ESS is key, so that we can raise such issues.

I think that Robbie Kernahan is right that it probably will not make much difference, but we need to ensure that how the relationships are set up means that there is an open door and an understanding of the variety of issues that need to be considered, so that we can avoid that being a problem, where it occasionally might be.

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

Mark Ruskell: I am sure that the panel is aware of the previous evidence we have heard and that there are different views on the adequacy of the principles in the bill. Concerns have been raised with us on two areas that have been omitted from the bill: the principle of the integration of environmental policy, which is reflected in the EU treaties; and the principle of a high level of environmental protection. What are your views on those two principles? I expect that, as regulators, you are instinctively in favour of a high level of

environmental protection, but could you explain the basis for your views?

10:15

Terry A'Hearn: In our act—the Environment Act 1995—there is a principle that economic, social and environmental objectives are integrated. Some people have questioned how that is worded, but it says that there needs to be integration and that if there is any conflict, the environment takes priority in the way that SEPA discharges its responsibilities. Given that most of the laws that we administer come from being based on those principles, we think that there is—I do not think that safeguards is the right word—adequate guidance set through the current processes to ensure that the laws we administer adhere to those sorts of principles. Again, we perhaps have a slightly different view to some of the submissions and views that have been expressed to the committee.

Robbie Kernahan: I followed the discussion last week and the previous week with some interest. Like Terry A'Hearn, I think that the principle of integration is already reasonably well embedded in some aspects of legislation in Scotland. I take on board what officials said about trying to ensure that the key principles in environmental governance—the four principles that are in the bill—are those that we need to see sustained and embedded.

Of course, we want to see a high level of protection in Scotland, but NatureScot does not have a firm view on whether that needs to be embedded as a principle in the bill. As Terry has said, certain aspects of the two principles you mentioned are already embedded in various bits of legislation that we and others regularly use. In summary, although we have noted the discussion, NatureScot does not have any firm views about the need for additional principles. We note that there were opportunities in the consultation to include more, but I can understand the logic of focusing on the four principles that exist in the current provisions.

Mark Ruskell: I take on board your point that the integration principle is embedded in existing laws, but does that ensure that integration will happen in future laws that are being constructed? Is there a danger that over time that principle of integration could start to wither? I am also interested in Terry's view on the principle of a high level of environmental protection—I do not think that you commented on that.

Terry A'Hearn: There are other options for applying the principles, such as through strategic environmental assessments, which mean that the principles can be considered when you are making

key strategic decisions. In relation to a high level of environmental protection, again we do not have a strong view, but the laws that we administer tend to be based on that. Whether or not they will be in future is a matter for speculation and consideration. As an administrator of the EPA, I do not feel constrained by that, but I can understand the other side of the argument.

Mark Ruskell: I have a question about the duty to “have regard to” the environment, as it is articulated in the bill. We have heard evidence that there are other ways to frame that requirement, and it has been framed in other ways in the UK Environment Bill, which uses both “have due regard to” and “take into account”.

Do you have a view on the different legal phrasings of the requirement to “have regard to” the principles? Which one do you prefer? Do you like the one that is in the bill, or do you think that it could be stronger? What is the difference between “have due regard to” and “take into account”?

Terry A'Hearn: The issue will always come down to what interpretation administrators and, in particular, the courts will take. I would probably have to check with my legal advisers to what extent they think that a different form of words would make a difference and come back to the committee with a supplementary answer. Intuitively, I am not sure that which particular form of words is used will have a huge impact. What is important is that a phrase of that sort is included in the bill.

I am sorry—I cannot really comment on the specific phrasing, but I could get back to the committee if it would like us to provide further information on that.

The Convener: Our doors are always open for supplementary information from anyone wants to send it to us.

Do you have anything to add, Robbie?

Robbie Kernahan: I do not think that NatureScot has any strong views on the extent to which different variations of “have regard to” or “have a duty to” make a meaningful difference. We have experience of existing wording in legislation, whereby all public authorities have a duty to take biodiversity into account, and we have seen that manifest itself in a number of ways.

Whatever formulation is chosen—whether it is that authorities should “have to regard to” or “have to comply with” the environmental principles—we must guard against the danger that we merely create a reporting regime for public bodies, or an audit requirement for them to show how they have met that duty in case of challenge. We do not think that there is a need for another reporting duty, particularly as we carry out our role appropriately.

Although we already follow the guiding environmental principles, I get the point that it is important that we ensure that those principles are embedded as strongly as they possibly can be and that all public authorities embed them when it comes to projects and new legislation. It is important that we get it right, but I do not think that NatureScot can help to advise the committee on the specifics of the wording. Environmental lawyers would need to look at that.

The Convener: I have a question about NatureScot's submission to the committee, which drew our attention to a "contrast" between the proposed duty and the existing statutory duty on public bodies in relation to biodiversity. What did you mean?

Robbie Kernahan: I will build on that point. There are already statutory duties on public bodies, one of which is that public bodies must take into account biodiversity in discharging their functions, as far as that is relevant. However, the firm placing of that duty on public bodies by the Nature Conservation (Scotland) Act 2004 has not delivered the recognition of biodiversity that we would have liked to have seen in how that duty has been discharged and, in our submission, we referred to that in relation to the embedding of the environmental principles. Fundamentally, the trick here is to ensure that those principles are transferred into clearer guidance on how public bodies and all relevant public authorities need to take that duty on board and discharge it.

Although the legal basis is important, the issue really manifests itself in how these things are discharged in practice. We have some questions about how successful that has been, even when a formal duty has been placed on public bodies. That is the point that we were trying to make.

The Convener: I have a further question for both of you. If the applicability of the principles was extended beyond strategic environmental assessment to all public sector decision making, would that make it easier for SEPA and NatureScot to meet their environmental protection and natural heritage obligations in responding to the climate and ecological crises that we face?

Robbie Kernahan: Yes. Our reading of the embedding of the principles is that all Scottish ministers will have a duty to have regard to them in relation to a broad range of policy and decision making. That is really important for us. It is not just about the remits of SEPA and NatureScot, it is about the broad sweep of policy making, including the development of much wider legislation.

In summary, we would see it as really helpful for all public bodies to have a duty to have regard to the principles. That would help us to deliver the nature-rich future that we envisage.

Terry A'Hearn: I have reflected a little more on the previous question about the wording "having regard to" or "taking into account". I have worked in different jurisdictions. Sometimes the wording of the law is absolutely essential and sometimes it does not make quite as much difference. Whatever it says, I do not think that the phrasing will really affect decisions.

Often, when duties and responsibilities are placed on a wide variety of public bodies, ministers and so on, an official just has to write a report saying, "This is what we've done to comply". The more important thing—this is the pleasing thing about the way that the body is being set up—is to have the right relationships.

An example is for us to get a strategic relationship with Transport Scotland with regard to how to build an integrated transport system that will reduce environmental impact. That is about not just construction, which is what we have traditionally looked at, but how the system operates to reduce carbon emissions through encouraging the right sort of travel. A duty can play a role in that, but it is more important for key decision makers to be aligned strategically, with the right partnerships, working together in combination with communities and the private sector.

As we come out of the Covid situation, which we all hope that we will eventually, the thing that will reduce transport emissions will be employers, employees, transport bodies and local councils working out how we will do our work differently. A duty might help with that to some degree, but I do not think that it will be the key thing. It is the relationships and the strategic alignment that are critical.

Mark Ruskell: My next question, which partly relates to the question that Stewart Stevenson explored, is about the exclusions. A budget for transport, which is the example that Terry A'Hearn used, would not be included under the provisions in the bill, because budgets are excluded, but plans and programmes would come under that scrutiny.

Do you have any further thoughts on budget processes? For example, is it possible that individual budget lines might not be part of plans and programmes and would therefore not be captured by the provisions in the bill?

Terry A'Hearn: I know that you might sometimes feel frustrated when an official says that something is a little beyond their remit, but I am really thinking about how SEPA will do its job under the proposed legislation. We would not have a strong view on that issue of budgets.

Robbie Kernahan: My answer is much the same. NatureScot cannot offer a strong view on

the rights and wrongs of including budget settlements and how that ties in with the bill.

Mark Ruskell: Okay. I want to ask about another exclusion. Defence is an overriding concern and it is excluded from the provisions on strategic environmental assessment. What are your thoughts on that? I am particularly interested in NatureScot's view. Would it be appropriate, for example, for the Ministry of Defence to be required to have due regard to the impact on whales and dolphins of military activities? How otherwise are we meant to deal with the environmental impacts of defence operations?

10:30

Robbie Kernahan: The bill, like existing legislation, makes exemptions for certain activities. Defence is an interesting example where there is an overriding public interest, or a perceived overriding public interest. We see in both domestic and European legislation a recognition that, although there is a policy intention, certain things can override the legal mechanics of what a piece of legislation is trying to do.

What can I say about defence in this situation? To what extent will a public authority comply with environmental law? We would hope that the Ministry of Defence will be cognisant of the principles, certainly on the land that it manages, as far as it is able to do so in discharging its functions. I return to the comments that I made about the biodiversity duties, which apply to public authorities as far as they impact on those authorities' plans and projects.

That is the aspiration. How the duties will subsequently be meaningfully discharged in what public authorities do, including those in defence, will largely depend on the nature of their actions and the specifics of what they are doing.

The Convener: Part 1 of the bill deals with keeping pace with EU environmental standards. You have both supported that in your submissions and our discussions. Alongside that, there is the white paper on the UK internal market. Are those two things compatible? Are there potential problems between the keeping pace powers and anything that might happen as a result of the UK Government's internal market legislation?

Robbie Kernahan: You have seen our response. We welcome the intention behind the bill, which is to align devolved Scottish legislation as far as possible with EU legislation. We support that policy intent.

You heard last week and a fortnight ago just some of the uncertainty that surrounds governance and the internal market implications. Your witnesses spoke about the complexity of that

and some of the speculation and second guessing about what the white paper on the internal market might mean.

It will be difficult to comment meaningfully until we see some detail and draft provisions emerge from the discussions. The arguments have been rehearsed at previous meetings and I cannot add much more on behalf of NatureScot.

The Convener: What involvement has your organisation had in the establishment of the common frameworks that you hope will give you some clarity?

Robbie Kernahan: NatureScot sits on an EU programme board that is convened by our colleagues in the Scottish Government environment and forestry directorate. We are doing everything that we can to make sure that we keep abreast of things and prepare, and to ensure that we are sited and aligned as well as we can be for exit from the EU. We are not directly involved in any of those discussions, but we are working very closely with officials in the Scottish Government to make sure that all the common frameworks that impact on our remit are adequately dealt with.

As you have heard from previous witnesses, some framework discussions, such as those on fisheries, seem to be making progress, but with others, it is difficult to know exactly where the stumbling blocks are.

I alluded to the fact that we have experience of setting common standards and frameworks through the Joint Nature Conservation Committee for things that directly affect our remit. We know that we can do that. However, that is probably as much as I can say, because NatureScot is not actively involved in negotiating any of the frameworks.

The Convener: Would you have expected the common frameworks to have been nailed down by now?

Robbie Kernahan: Yes. I think that it goes without saying that, the closer we get to the end of the calendar year, the more nervous everybody is, and it—[*Inaudible.*]*—*that we are in this position.

The Convener: Terry, will you answer the questions that I put to Robbie Kernahan, from your perspective at SEPA?

Terry A'Hearn: I support what Robbie Kernahan said. I will not repeat it, but I will emphasise a couple of points from our perspective.

Scottish Government officials have been extremely good about involving us in the technical development of the frameworks and other rules and systems that are needed. Obviously, it is for

parliamentarians to work out the issues around the internal market across the jurisdictions. From a technical point of view, I add that there are some areas, often involving products, in which it is more important to have commonality and ensure that things are easy. Examples include chemicals and the emissions trading system, which needs to apply across the market.

It is beyond my remit to say what the ultimate framework should be at the overall level. However, at a technical level, it is critical to have technical input in order to make sure that things work as clearly as possible so that it is easy for people to work out what to do. We have been providing our input at that level, and the doors have very much been opened by Scottish Government officials to make sure that SEPA's expertise is well harnessed and used.

The Convener: You say in SEPA's submission:

"a mechanism will be needed to assess provisions that come out of the EU in the future and determine whether and how they fit with Scotland's ambitious environmental agenda."

How do you see that working? Are there other models or arrangements around the globe where you have seen that working?

Terry A'Hearn: In a discussion about keeping pace, it is important to consider the current set of EU environmental laws and directives. Originally, environmental protection—as distinct from nature protection and enhancement—was about management of specific issues such as standards for factories and run-off from farms. Later directives have been about the circular economy and trying to get the system to use the environment more sensibly.

A couple of committee members, including the convener, were on the ecological footprint earth overshoot day webinar that we had last night at the parliamentary reception. Earth overshoot day is about the overall economic and social system. For example, we regulate the water environment, and a lot of energy is used in protecting it—for instance, in treatment plants. We need to not reduce water quality outcomes but to find a way for Scottish Water not to use as much energy in the way that it reduces impacts on water bodies.

We could have a situation in which people said that, under the rules of keeping pace and integration, we must reduce greenhouse gases and get to net zero but allow a bit more pollution of rivers and lochs. We do not want that to happen. We want the future of keeping pace to be about changing the whole system so that we can reduce greenhouse gases and find innovative ways of meeting what is currently in the water framework directive. I do not want there to be any sacrifice of

water quality in order to meet another environmental objective.

In keeping pace, the best frameworks will be ones that pick up the later focus in Europe on the circular economy directives and green recovery, which will enable bodies such as SEPA to work with businesses, communities and others on integrated environmental management.

Mark Ruskell: I have a related question about the water industry. Terry, what are your impressions of how the water industry in the UK might change as a result of common frameworks and the internal market proposals? Do you see a shift in the way that we publicly own and regulate water in Scotland?

Terry A'Hearn: Again, I note that some questions are outside my remit. Ownership decisions are for parliamentarians.

We have a publicly owned water monopoly, but the critical point is that, whether it is publicly or privately owned—people will have strong views about that—the Water Industry Commission for Scotland as the economic regulator and SEPA as the environmental regulator sit down with Scottish Water and talk about the broad outcomes that the Parliament and Government have asked us to jointly achieve. That is what I like about working in Scotland.

I refer to the example that I gave a moment ago. Some people will say, "We've got to reduce greenhouse gases and we could put up with a bit more water pollution." I sit at the table and say, "No—that's not going to happen." We will not need to use as much energy building and running water treatment plants if the next housing development is built so that it does not have any waste water. We can stop building in the old style, which wastes water.

I have been quite impressed by Scottish Water. Sometimes we take enforcement action against it, so the relationship is sometimes a difficult one. However, when we had a workshop with Scottish Water recently at senior level, we said, "We're both trying to achieve net zero and we're both trying to protect Scotland's precious water—how can we achieve both objectives?"

I keep coming back to the point—I might sound like a broken record, but that is because I believe this so strongly—that we must have a clear platform of law that sets minimum standards, and then strong partnerships with a variety of people to consider how we can go beyond that and achieve multiple outcomes.

Scotland is abundant in water and we have a lot of expertise and some good relationships, so we can really make our mark. That is the way to keep pace with where the world needs to go. I would

like us to be a pace setter and not just a pace keeper.

The Convener: I have a final question for both of you. The UK Government's Environment Bill is in its early stages. Scotland does not have an environment bill, but we have our green recovery and various iterations of the climate change plan. Do you see it as a potential issue that we do not have an environment bill? Could there be an issue if environmental targets are advanced more effectively by the UK bill? What are your general views on that? It is mentioned as a potential issue in some of the submissions.

Terry A'Hearn: I am not sure that the statutory basis is the key thing. To me, it is more important that targets are set in relation to the economy and society. I refer again to the example that I gave. Scotland has 90 per cent of the UK's fresh water, so we could say that we do not need to try too hard. However, the whole world is going to overuse water and we have to be a great steward of it. I turn that into a strength and ask not just how we can protect water quality in Scotland, but how we can use it to build a better economy and society and one that can take ideas to the world.

I do not think that SEPA has a strong view on whether such targets should be set in statute. For us, the critical thing is that they are set well, are owned by people and are implemented well by bodies such as SEPA.

Robbie Kernahan: NatureScot's view is probably broadly similar. The environment strategy that Scotland produced recently provides us with the vision and ambition. On how that translates into targets, we have a similar view to SEPA. Having targets in statute might not provide the flexibility that we need. We need to have the tools and resources to deliver on the vision, and the collective desire to make it happen. That will require a collaborative, co-produced approach to setting ambitious targets that we can realistically achieve.

I broadly agree with Terry A'Hearn. Having targets in statute could cause problems for us.

The Convener: John Scott has a final question.

John Scott: What needs to be done to move the common frameworks issue forward? I gather that some are better developed than others. You are both practical men, and I am interested to know what you believe needs to be done in order to get some meat on the bones of the frameworks, so to speak.

Terry A'Hearn: As you say, we are practical. It is not complicated. We, and all the people involved, just need to keep on rolling up our sleeves and getting on with it. There is not a lot of

time to do it. That is all that is needed—it is as simple as that.

Robbie Kernahan: There is perhaps not much to add. There is a willingness to make it happen. As Terry A'Hearn said, we need to roll up the sleeves and make the best of the time that we still have available.

The Convener: I thank you both for your time this morning. As always, your evidence was very informative. If there is anything else that you want to add or follow up on, our door is always open and you know where to find us.

I will suspend the meeting until 10.55, when we will hear from our second panel.

10:46

Meeting suspended.

10:55

On resuming—

The Convener: We continue to take evidence on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill. I welcome our next witness: Karen Ramoo is a policy adviser for Scottish Land & Estates.

In its submission, SLE states:

"We are concerned about there being substantial policy divergence throughout the UK and the likelihood that this could impact businesses which currently operate seamlessly throughout the UK".

Will you outline your concerns?

Karen Ramoo (Scottish Land & Estates): Thank you for that question. I should highlight that part 1 of the bill is being dealt with by one of my colleagues, so we might need to provide a bit more supplementary information.

Our concerns relate primarily to the potential negative consequences of significant—[*Inaudible.*] It goes back to the points that people who have given evidence previously have made on the unknowns relating to internal markets and the development of the proposals in the UK white paper into a bill. We accept that, with devolution, we naturally get divergence, but common frameworks will play a critical role in ensuring that any divergence that is likely to happen is not large scale and will not have a negative effect.

The Convener: I know that you said that one of your colleagues deals with part 1 of this bill but, in general, the keeping pace power is to allow us to uphold the EU's environmental standards. As a result of the internal market bill or UK trade arrangements with other countries, is there the potential for a lessening of environmental standards in the rest of the UK while Scotland

continues to keep the same standards? Is that your primary concern?

Karen Ramoo: At the moment, we do not know how the four different jurisdictions will work together and implement the environmental principles. On the environmental and agricultural side, common frameworks are still slow in coming. We do not know enough to know what the impact will be. We have a general concern that, because of the unknowns, there is the potential for significant divergence. That might not be the case but, until we have the full details, it is difficult to comment further.

The Convener: So you are just flagging up the issue.

My colleague John Scott has a question on common frameworks.

John Scott: Scottish Land & Estates has said that it has concerns, but I would like to hear the positive side. Notwithstanding those concerns, are you reassured that the common frameworks relating to food, agriculture and the environment can allow for shared ambition across the four nations of the UK? Tell us about the upside.

Karen Ramoo: The upside is what we have seen from the UK Agriculture Bill, which has progressed through the House of Lords committee stage. That stage has increased the focus on the need to share ambition across the four nations. We are glad that the issue is being raised to ensure that important reserved policy decisions do not disadvantage Scotland. We therefore have some comfort in how that bill and the discussions on common frameworks are progressing.

I think that it is recognised that a four-nations approach is needed, that joint thought processes are needed on how common frameworks work and that the frameworks should not just be implemented by one body but need the buy-in and input of others. We are moving in that direction, so we are feeling fairly comfortable.

11:00

John Scott: I declare an interest as a farmer. The interconnectedness of all agriculture and food production across the UK is intrinsic to supporting our society. There is an absolute need for commonality of purpose and working in that regard, with good will all round. Do you agree with that?

Karen Ramoo: I absolutely agree with that; that is key. I do not have much more to add.

I know that you want me to focus on the reassurances, but I will raise one of our concerns. At the moment, it appears that some conversations on common frameworks are

happening between England and another nation, rather than as all four nations jumping in with their input. As you said, collaboration and co-ordination are extremely important—they are the only way that common frameworks will work.

John Scott: Thank you very much.

Stewart Stevenson: I want to come in briefly on the back of that issue and ask whether concerns are primarily focused on outcomes. Across the four nations, we will mostly share a view about outcomes, but we will have divergences on means. The issue that comes to mind in which there are different policies across the different parts of the UK is genetically modified foods. That does not seem to cause great problems for the internal market of which we are a part at the moment, or for the smaller internal market of which will be a part in the future. Is our focus on outcomes, or is it on something else?

Karen Ramoo: It is the mechanisms that are used to reach the outcomes that are key.

I will stop there rather than dig myself into a big hole. As I have said, that topic lies with another SLE colleague, and I would feel more comfortable if we could provide a bit more detail on our concerns and thinking on that question in writing.

Mark Ruskell: Will you talk us through the additional environmental principles that SLE has proposed and your rationale for doing so?

Karen Ramoo: Like everyone else has said, we very much support the four key principles in the bill—those principles are fundamental to environmental law. We consider that the bill could be strengthened by the inclusion of additional principles—particularly, as highlighted by many others, the principle of integration, which is key.

Given our conversation about a potential divergence in the four nations, I think that the principle of integration would help to bind things together. We do not consider that the current commitment that the European Union offers is honoured in the bill, because it lacks the integration principle. The bill could be much stronger by making that commitment. The integration principle is also key to binding the other principles and how they work together.

We have also suggested that principles relating to sustainable development be included, as that would recognise the socioeconomic factors involved. Particularly in light of the green economic recovery and recovery from the Covid crisis, that is a really important principle. We recognise that it is supported in the proposed purpose of the bill, so we are not too precious about seeing that included as a principle.

With regard to the other principles we have suggested, non-regression is self-explanatory in

the sense that we do not want to see a backwards step in how environment standards are upheld. We want to see Scotland move forward and achieve the gold star of matching the current EU environmental thinking.

The other principle that we suggested is one for appropriate spatial and temporal scales. The thinking behind that is that it is very important that environmental issues are addressed at the appropriate scale.

Key to all of our suggestions is that, once we have the guidance on the principles, we will better understand how they interact with one another, what they mean and how they interlink with other policy. Once that is documented, how to interpret the principles that already exist will become clear.

Mark Ruskell: On the duty to “have regard to” the principles, you will have heard that there are various suggestions on how that can be interpreted. SLE has suggested the wording “act in accordance” with the principles. Can you flesh out that idea a bit more?

Karen Ramoo: The suggestion came on the back of discussions on the UK Environment Bill, which we have been watching carefully as it moves forward. We have picked up on conversations around the wording that is being used there. Like other organisations, we feel that there is an opportunity to strengthen the approach in terms of the wording that says ministers should “have regard to” all the principles.

Whatever the wording is, it is important that there is transparency in the decision-making process in accordance with the principles to allow effective oversight by ESS.

We are not necessarily precious about the wording that we have suggested. We fully take on board suggestions that have been made by others, in particular Scottish Environment LINK when it spoke to the committee last week. Our approach is about ensuring that we live up to the duty and the high environmental expectation. We are not massively precious about the wording, but we feel that it can be strengthened.

Mark Ruskell: Do you have a view on the definition of “environment” in the bill? We heard concerns from NatureScot that it does not necessarily include landscape or birds. I do not know whether your members would have a view on that.

Karen Ramoo: In general, we felt that the definition of environment was adequate, but we accept that concerns have been raised. We would be open to recognising that there have been omissions and that the definition could be strengthened. Also, the definition of environment in the UK Environment Bill has just been amended

to incorporate climate change targets, and in essence we would welcome a joint approach.

Angus MacDonald: I wish to follow up on the guidance on the principles. In your submission, you state:

“we believe the requirement for Scottish Ministers to ‘consult relevant Public Authorities or other appropriate persons who are subject to the principles duty prior to laying’ should be expanded to also include ‘persons appearing to them to be representative of the interests of local government, industry, agriculture, fisheries or small businesses’ and should also include consultation with the OEP”.

Could you explain to us why the list of those who should be consulted on the development of the guidance should be expanded beyond those to whom that guidance applies?

Karen Ramoo: We support the process that is set out in the bill, which places a requirement on the Scottish ministers to consult on the guidance. The environmental principles will affect all of us in our daily lives and, if they are to succeed, it is really important for people to have a clear understanding of what the principles mean and how they can be implemented.

In referring to the list of stakeholders, we were trying to say that, essentially, there should just be a public consultation on the guidance. I do not feel that it should be restricted to a select group of people. It is important that the guidance on the principles is coherent and that everybody should have an opportunity to input, so that we are as clear as possible on what the principles mean and how they can be implemented.

Angus MacDonald: Okay—that is a valid point.

Stewart Stevenson: I want to explore SLE’s views on the structure and staffing of the new environmental standards Scotland body. In particular, what kind of people should be appointed to the board of ESS? Do you think that the board should primarily be led by people with skills and knowledge that are relevant to environmental issues, or should it be representative of different interests? That is not to say that it must be one or the other, but which of those would be the higher priority in the view of SLE?

Karen Ramoo: It is really important that ESS is made up of representatives from a breadth of different areas. It is important to have environmental, land management, business and environmental law expertise in there. The key is to make this independent body as strong as possible, armed with the best expertise that is needed to do the job. There are potential options to seek advice outwith the body on certain issues, but our preference is to have mixed expertise and a balanced organisation.

Stewart Stevenson: I notice that one of things that you have not mentioned is the necessity of having people who understand the law relating to the environment. ESS is not the regulatory body with oversight of the day-to-day operation; it is the body that is holding other parts of the public domain to account on implementing the law. I take it that you would agree that it is important to have people who understand environmental law and how it works.

Karen Ramoo: Yes—apologies: I perhaps went through my previous answer too fast. I did mention environmental law, and I think it is very important to have somebody or some bodies within the organisation with an understanding.

Stewart Stevenson: That is fine—my apologies if I missed hearing you say that. That sometimes happens.

There is another thing related to ESS, and you used this word in the answer that you gave to me: “independent”. It is probably important for it to be independent of ministers and able to act impartially because, in a sense, ESS is holding the bodies that are responsible to ministers to account. How do you in SLE think that that can best be achieved?

11:15

Karen Ramoo: I am probably building on what has already been said by others, but we feel that it is incredibly important that the body is independent of ministers.

Part of ensuring that would be for the recruitment process and suggestions about expertise to come from the Scottish Parliament, not the Scottish ministers. At the moment, the underlying perception seems to be that the Scottish ministers are quite involved in the process, that they would benefit from taking a step back and that the Scottish Parliament should be more involved. One thing that would help is the employment of rapporteurs who could assist in the recruitment process.

The ESS needs teeth to do its job so, alongside independence, it needs to be adequately funded. We would like ring-fenced funding to be put aside for the body. We would also like it if, perhaps at the end of the year, the ESS reported on whether it had sufficient funding to do its job adequately. Those are some of the key issues.

I refer to paragraph 1(1) of schedule 1 to the bill, which states that, on one hand, ESS will be very much independent of the Scottish Government and ministers. On the other hand, the following subparagraph almost contradicts that independence. That has been highlighted by others. We would support the amendment or

removal of that subparagraph. If it is amended, we want some clarity on when the mentioned exemption could be used.

Stewart Stevenson: Are you, in effect, saying that this body should be appointed and paid for by the Scottish Parliament and not the Scottish Government, as one or two others are, and that the Parliament’s committee that looks after public appointments should be involved? I am having a brain fade, but we have a committee that looks after public appointments.

Karen Ramoo: Our key thoughts are that it definitely needs greater Scottish parliamentary input. We would welcome that approach.

John Scott: I will develop on the points that Stewart Stevenson and Ms Ramoo made. Are you saying that the structure should be equivalent to that of an ombudsman, such as we appoint in the Scottish Parliament? If so, who would hold the ultimate position for decision making—would it be ESS, the Scottish ministers or the courts—if there were a disagreement between this new body and the Scottish ministers?

Karen Ramoo: In essence, we are saying that we welcome the independent body that is being set up. We feel that it meets the requirements and is fit for purpose to some extent. Some minor tweaks need to be made, including a step back to ensure that it has sufficient independence. A lot of the issues relate to funding and the recruitment process.

We are not looking for a completely revised and new model. We are fairly content with the proposed suggestion of the ESS, but we would like to see the areas that I previously touched on strengthened slightly.

The Convener: Those are all of our questions. I thank Karen Ramoo for her time this morning.

11:19

Meeting suspended.

11:25

On resuming—

The Convener: We will continue taking evidence on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill. I welcome our final witness this morning, who is Dr Annalisa Savaresi, a lecturer in environmental law at the University of Stirling. Thank you for joining us once again, Dr Savaresi. You have been in front of us quite a few times, and it is nice to see you back.

I am aware that you are working with our colleagues in the Scottish Parliament information

centre on a briefing that explores UK trade agreements and the potential impacts on environmental protection. Will you talk the committee through the background to your work and any emerging themes that you have found?

Dr Annalisa Savaresi (University of Stirling):

Thank you very much for inviting me to talk to you again.

Together with my colleague Filippo Fontanelli from the University of Edinburgh, I have been working with SPICe on a briefing that aims to support members' understanding of how on-going trade negotiations, particularly with the EU and the US, are likely to impact the exercise of regulatory powers over environmental matters within the UK. The briefing consists of a number of parts that deal specifically with examples of how trade agreements affect the exercise of regulatory powers at national level. At the same time, we try to understand the implications for Scottish lawmakers of the internal market rules and the proposals that are being put forward by the UK Government. We do not know a lot about those proposals yet, but the briefing tries to unpack some of the underlying issues for environmental standards and protection in Scotland.

The Convener: One question that we all have is about what will take precedence or primacy in the process—will it be the trade agreements or the internal market? It is almost as though there are three pillars or potential moving parts that could affect environmental standards across the UK. There are many unanswered questions at the moment, but what are your immediate thoughts on that? Am I correct in my assessment that there are three potential divergence issues?

Dr Savaresi: It is important to understand that, with EU exit, a very fluid scenario is materialising before our eyes. On the one hand, we have the external element, which is the constraints that come from the outside that are associated with trade agreements. As a matter of course, trade agreements affect the way in which a country exercises its regulatory powers in general. In particular, in talking about the environment, there are implications that are associated with trade in products. That will happen more as a result of the new situation associated with EU exit. On the internal side, however, the UK is in a very peculiar situation that is associated with the fact that, as you will know, devolution occurred in the context of EU membership. With EU exit, the uniting frame of EU law is being removed, which means that the elements that make the UK—[Inaudible.]—are likely to move further apart. The measures that the UK will take in order to ensure that that does not affect trade internally are yet to be seen, but we can anticipate that things will happen on that.

Therefore, we have that moving landscape in front of us right now.

The Convener: Do you see the continuity bill as a potential solution to what we are talking about?

11:30

Dr Savaresi: I think that the continuity bill is trying to do what the Scottish Government—almost from day 1 after the EU referendum—has said that it wants to do, which is to enable Scotland to keep pace with EU environmental standards after exit. However, the truth is that the capacity of Scotland to keep pace with the EU will be constrained by external trade agreements that the UK might make and is in the process of negotiating with the EU and the US, as well as, internally, by any rules that are developed to ensure the internal market's integrity.

The Convener: Thank you. Mark Ruskell has more specific questions.

Mark Ruskell: I will ask about specific examples of where there is perhaps a lack of clarity about how internal market arrangements will operate and how they might dovetail with trade agreements.

When the committee took evidence from him, Professor Campbell Gemmell talked about the water industry and the market for utilities and whether those will be carved out of internal market arrangements or international trade deals. I am interested in your thoughts on that specific example that has been raised with us. There have been other examples, such as the deposit return scheme operation across the UK, and there might be further examples.

Dr Savaresi: The briefing will go into detail on many of those examples, which are either extant or fabricated, in order to allow members to understand the various scenarios. I will keep to the examples that Mark Ruskell has mentioned.

I was thinking of what Professor Campbell Gemmell suggested in relation to water. I see that as an important area, because, presently, there is clear divergence within the UK on the level of compliance with EU water standards, which could be an issue. However, the areas where we are likely to see more tension are around things that are traded, such as chemicals and agricultural products. For example, if Scotland were ever to adopt a ban on pesticides, that would have a significant impact on the internal UK market and on the external relations of the UK. Therefore, from now on, a measure like that would have to be assessed for its implications. That is where measures adopted by the UK might affect the exercise of regulatory powers in Scotland.

We do not know much about the UK Government's proposals regarding that issue, but it has talked about market access and mutual recognition. The implication of such principles is that Scottish producers might have to abide by a ban on the use of pesticides while producers in other parts of the UK would not and would still be able to sell their products freely within the UK. As you can imagine, that would create tensions and disadvantages for Scottish producers, as well as issues of control and enforcement in Scotland.

Although those are all new issues, they have materialised in the past—for example, in relation to genetically modified organisms, which were mentioned earlier. However, the issues have now become more pressing and more likely to arise.

Mark Ruskell: Where do you see the roles of corporate interests and mediation in the process? A company such as Bayer, which sells pesticides across the UK, will want free access to the Scottish market. Will the route for challenging market rules and regulation be enhanced or weakened by the UK internal market arrangements? How does what Bayer might do now, within the European Union, to challenge a decision or directive on the use of pesticides compare to what might happen in the future, outside the European Union?

Dr Savaresi: As you have mentioned, the EU single market is a good proxy for us to use in anticipating what might happen with the adoption and implementation of the rules for the UK internal market. Over the years, the EU has developed a large body of law concerning measures to protect the single market. Legislation that was adopted in Denmark for recyclable bottles is an old example but it is clearly relevant to the present context—not because the law is still relevant, but because it is an example of how legislation that was adopted in Denmark was challenged by the European Commission on the ground that it had obstructed free trade in the single market. That is an example of the sort of issue that might arise increasingly were there to be policy divergence within the UK. The adoption of some rules for the internal market would be helpful in clarifying which organisation would be in charge of which rules should issues of coherence arise.

As you know, in the EU, the European Commission is the guardian of the integrity of the single market and, if necessary, it has recourse to the courts to adjudicate on matters of compliance. A similar mechanism could be developed in the UK if there was an appetite for that. However, it is important to note that the EU is not the only single market—other countries have developed systems to protect their internal markets. I am aware that the Finance and Constitution Committee has commissioned research on that, and, last week,

Professor Gemmell mentioned Australia as an example. It is important to look at those models carefully to understand how they ensure divergence in environmental standards and how any such issues are tackled.

Stewart Stevenson: I will explore the issues that taking a wrong turn might stop Scotland being able to address.

Different environmental standards in some areas are baked into the law north and south of the border. The targets for greenhouse gas emissions are an obvious example, as the timetables are different north and south of the border. The Scottish Government's aspirations—although they cannot be legally enforced—for propulsion systems for cars also differ from those south of the border.

Those are just two examples to get us into the issue. What areas might Scotland not be able to take a different view on, which would affect our environment?

Dr Savaresi: I will perhaps repeat myself. Chemicals regulation is a large area in which divergence is unlikely or would be ill advised because it is very complex. It is currently addressed by the EU through the registration, evaluation, authorisation and restriction of chemicals—REACH—regulation. A whole-UK approach to such a complex matter would seem advisable. That does not mean that Scotland should not consider going its own way on specific chemicals, but regulating chemicals in Scotland independently and separately from the rest of the UK would not make any sense.

When it comes to specific areas such as the banning of pesticides, it is important that a systemic analysis is done of compliance and logistical costs associated with regulatory divergence within the UK. That matters more now than it has done in the past. If the UK does not align with EU standards and Scotland wants to do so, I imagine that a paramount consideration will be how much it will cost Scotland to enforce different standards. It will also be important to establish how Scotland will ensure compliance.

Stewart Stevenson: Let us discuss a specific example, then. You referred to pesticides. Scotland is further north than the rest of the UK, so our biology—what is in nature, and particularly our insects and so on—is a different mix from that of England. That is just a natural phenomenon related to where we are and the climate.

When you put a pesticide into the environment, you do so because you are looking for some positive benefit, but almost invariably there will also be a negative impact. Will Scotland be able to ban a pesticide that would have a differential impact on our native species—our insects, for

example—or on species that we want to protect? Perhaps those insects are not as present in England, or perhaps they are present in such great numbers that it does not matter. I use that as only one example.

Dr Savaresi: I hate to sound evasive, but the truth is that, given the lack of rules concerning the UK internal market, it is almost impossible to tell. In the EU, the European Court of Justice has developed case law requiring reasonable flexibility on the part of EU member states. There is a rule for divergence, and the principle of proportionality is also important. As you mentioned, there is an issue of divergence in habitats and the different needs of the four nations, which might be paramount considerations.

To go back to the example of Denmark and the bottles, the court was very careful to distinguish the principle of proportionality and the exercise of the protection of legitimate interests vis-à-vis the rights of foreign manufacturers to use containers that were not those that the Danish Government had authorised for trade within Denmark. A balance of that kind will need to be struck, which is why I cannot emphasise enough that having rules on who is in charge of scrutinising what, and according to which criteria, is a good thing, not a bad one.

John Scott: Again, I declare an interest as a farmer.

Before I come to my main question, I pick up on Stewart Stevenson's question about the banning of insecticides. If a ban on insecticides, particularly neonicotinoids, were to be implemented by the Scottish Government, that could—as you referred to earlier—put Scottish farmers at a competitive disadvantage compared to other UK farmers. Would you expect the Scottish Government to compensate Scottish farmers for that?

Dr Savaresi: Again, it is a very hypothetical scenario that we are discussing. It is important to appreciate that all this is speculative, but, as you will see from our briefing when it is published, there have been several examples in practice of how discrimination between producers has been addressed. There are rules in that connection that have been developed internationally and applied to the external dimension that I referred to at the beginning of my presentation, and there are rules that have been developed internally.

11:45

We know next to nothing about the internal dimension now. Adopting mitigating measures could definitely be one way of dealing with that, but we have to consider the impact of subsidies, because they are normally also an issue for the protection of free trade. Rules that pre-empt

subsidies of that kind could be developed at the expense of the Scottish Government, if you see what I mean. Again, that is entirely speculation. I do not know how the UK Government will address the matter in legislation. We will have to wait and see what it proposes.

John Scott: I will come to the question that I was invited to ask, which is about the development of frameworks. How is the slow pace of development of common frameworks compounding the issues that you have raised?

Dr Savaresi: I hear that many of the other expert witnesses have already expressed regret about the slow development of common frameworks. The area was highlighted from day 1 as an urgent concern. We are clearly running against the clock here and I do not want to repeat the obvious, but there is a need for clarity in so many areas. It is of great concern.

John Scott: You are obviously well informed on the subject. What do you see as the pinch points that need, shall we say, political pressure to get the common frameworks to move on?

Dr Savaresi: To be honest, I am an outside observer and I do not know what the dynamics are inside the rooms where these matters are discussed. The pandemic has clearly affected progress at the same time as there being obvious political tensions, which has not helped progress. That is partly because constitutional questions tend to take primacy over technical questions at times, and that is where we are.

The Convener: Stewart Stevenson wants to come back in before I go to Liz Smith.

Stewart Stevenson: This is a matter of principle that I want to put on the record. John Scott thinks that farmers should be compensated if banning neonicotinoids had a negative effect on them. Neonicotinoids are known to affect bees, wasps and other insects that are part of the fertilisation process of many of our plants. If banning neonicotinoids improved things for farmers, would he expect them to return that benefit to the Government for spending in other areas of policy?

I just make that observation—it is not a genuine question, convener. However, John Scott ought to think carefully about the principle behind what he has just said, because I suspect that he would not agree with the proposition that I have just made.

The Convener: Your comments are on the record, and I imagine that the two of you will have a vigorous conversation about the matter when you next see each other in person.

I will now go to Liz Smith.

Liz Smith: I want to ask what might be a bit of a leading question. Irrespective of our party politics, I think that we all agree that the key message is to ensure that we get better economic growth and more jobs and investment, and that Scotland and the UK can feel comfortable with whatever arrangements are put in place from the economic perspective. From your considerable legal expertise, do you feel that the key issue is that the UK Government has not given sufficient information about how that could be progressed? There has been criticism that the Government has not taken on board some of the considerations of the devolved institutions. Alternatively, are there fundamental issues at stake that might create difficulties because of the legal networks that will be set up? Is it a question of not having enough information or detail just now, or are there fundamental problems in the proposed structures?

Dr Savaresi: The committee has previously considered the peculiarities of the UK's constitutional set-up. This is definitely not a good time to enter into a grand design exercise—I appreciate that that would be unwelcome, given the pressures that the Scottish Parliament and the UK Parliament are under. At the same time, it is true that all the technical issues that we have been raising and addressing are affected by great uncertainty concerning a set of constitutional questions that are not clearly answerable. It is not just me saying that, as it has been said at length by several experts before this and other committees.

The lack of clarity in the constitutional set-up means that clear solutions that are the result of existing arrangements will not happen immediately, and that is where the difficulties concerning the development of common frameworks are. At the same time, the UK is not alone in the logjam because of the pandemic. It is a subjective issue, but there has been so much delay everywhere with legislative work across the board because of the pandemic, so we are definitely not in a helpful or auspicious set of circumstances.

Liz Smith: That is helpful. My second question is based on some of the concerns that we have heard already and is about the relationship that Scotland has with some of its key partners, one of which in the UK is Northern Ireland. Can you tell us a bit about the situation there, as I understand that you have some expertise in the area?

Dr Savaresi: You heard last week from a colleague—Professor Gravey from Belfast—who touched very well on some of the key issues there. Northern Ireland has to align with EU standards, which raises internal market questions concerning the position of Northern Ireland vis-à-vis the rest of the UK. However, that also raises issues for

Scotland because there are competition tensions with Northern Ireland and Scotland being in the same markets for certain products. Northern Ireland will have to align with EU standards and might get special treatment within the internal market in the UK. What Scotland's position will be is unclear but, for sure, Scotland will not get that freedom to align all the time with the EU; in all likelihood, it will be aligned with the UK internal market.

The Convener: Members do not seem to have any more questions. Is there anything else that you would like to add, Dr Savaresi, that you think that you should draw to our attention and that we should bear in mind, particularly as we will have the cabinet secretary in front of us next week?

Dr Savaresi: I just suggest that the committee take a look at the briefing that I prepared with Dr Fontanelli and, indeed, consider having an evidence session with him, because he has been advising the Scottish Parliament on the trade implications of EU exit for a long time. A conversation on environmental standards is definitely important in that specific context, which is why we prepared the briefing in the first place. It definitely needs to be taken under control. As I said, there are logistical implications of regulatory divergence within the internal market that are associated with environmental services and products, so it is important to keep a close eye on those issues going forward.

The Convener: Thank you for your time this morning and for your evidence, which as always was very informative.

That ends our session today. Our next meeting is on 1 September, when we will hear from the Cabinet Secretary for the Environment, Climate Change and Land Reform and the Cabinet Secretary for the Constitution, Europe and External Affairs on the UK Withdrawal from the European Union (Continuity) Scotland Bill. We will also consider the Greenhouse Gas Emissions Trading Scheme Order 2020, which is made under the Climate Change Act 2008.

That concludes the public part of our meeting.

11:55

Meeting continued in private until 12:12.

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

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

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000

Textphone: 0800 092 7100

Email: sp.info@parliament.scot



The Scottish Parliament
Pàrlamaid na h-Alba