OFFICIAL REPORT
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Finance and Constitution Committee

Wednesday 2 September 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

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FINANCE AND CONSTITUTION COMMITTEE
18th 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)
*Angela Constance (Almond Valley) (SNP)
*Patrick Harvie (Glasgow) (Green)
*Dean Lockhart (Mid Scotland and Fife) (Con)
*John Mason (Glasgow Shettleston) (SNP)
Alex Rowley (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Lloyd Austin (Scottish Environment LINK)
Jonathan Hall (NFU Scotland)
Councillor Steven Heddle (Convention of Scottish Local Authorities)
Mhairi Snowden (Human Rights Consortium Scotland)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

Virtual Meeting

Scottish Parliament

Finance and Constitution Committee

Wednesday 2 September 2020

[The Convener opened the meeting at 09:30]

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

The Convener (Bruce Crawford): Good morning and welcome to the 18th meeting in 2020 of the Finance and Constitution Committee. I begin by offering apologies on behalf of Jackie Baillie and Alex Rowley.

Our only agenda item is to take evidence from two panels of witnesses on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill at stage 1. I warmly welcome our first panel: Jonathan Hall, who is the director of policy and member services at NFU Scotland; and Lloyd Austin, who is the convener of Scottish Environment LINK's governance group.

Both your organisations have emphasised that common frameworks are essential in delivering regulatory alignment across the United Kingdom, while recognising that there might also be areas in which policy divergence is appropriate. I want to explore with you how the keeping pace power will interact with the common frameworks to deliver that objective. What are your expectations for the substantive content of the common frameworks? For example, should they include minimum standards?

Lloyd Austin (Scottish Environment LINK): We are very keen for there to be minimum environmental standards. The primary concern of Scottish Environment LINK members is, of course, the protection, conservation and enhancement of our environment for the benefit of not just the environment but, equally, the people of Scotland. Everything that we have done in approaching the policy developments in relation to leaving the European Union has been related to seeking to enable Governments in all parts of the United Kingdom to maintain and, we hope, improve environmental standards.

With so much of the environmental legislation having derived from Europe, and that legislation essentially providing a degree of commonality across the UK, we understand the need for common frameworks. We have been engaging with the Scottish and UK Governments on the frameworks, a number of which are in the environmental sphere.

We are slightly disappointed that engagement with external stakeholders has been considerably delayed and is not now expected until some time in autumn, even though the frameworks are to be completed by the end of the year. Obviously, the delays this year are understandable; nevertheless, it still seems rather last minute.

On the keeping pace power, if that is agreed to in the bill, that will simply be a difference of policy approach that the common frameworks will need to recognise. We have always argued that common frameworks need to be voluntarily agreed and consistent with the policy approaches that are taken by the different Governments in these islands.

Jonathan Hall (NFU Scotland): I echo a number of Lloyd Austin's points in that NFU Scotland, along with the other farming unions across the United Kingdom, has always maintained that, in order to safeguard and enhance the environment and deal with environmental concerns, we need to put in place commonly agreed frameworks. I stress the word "agreed", because that takes us into the governance of how common frameworks might operate.

However, we are not talking only about environmental protection and enhancement. Given that environmental regulation fundamentally impacts on the ways and means by which agricultural production is undertaken, it is clear that if we do not have those common frameworks across the UK, there is a distinct possibility that the integrity of the UK internal market will start to be affected. That will happen if there is a significant divergence in approach and regulation across the UK. That is of significant concern to us in a number of areas, such as plant protection products and the application of water or air quality measures, and that is before we get to biodiversity and other aspects that we are interested in.

One of the biggest challenges for all of us—not just people with environmental concerns, those with agricultural interests or those in the political sphere—is that we are faced with a perpetual triangle. We have the European Union regulations and law that are being transferred to the UK; we have the UK Government's Environment Bill and other pieces of legislation that suggest that, at some point, it wants to depart from that EU legislation in some way; and now we have the Scottish Government's proposals—such as the continuity bill, which we are considering today—which say that it would like to keep pace with the EU regulations. I am at risk of confusing too many aspects of geometry here, but I am still struggling to square that triangle. We have an EU, a UK and

a Scottish dynamic. At the same time, we want to ensure that we respect the devolution settlement and that, where flexibility and differentiation are appropriate, they are allowed to continue. Those are the key fundamentals that we are wrestling with.

The Convener: The NFUS has expressed concern that, in the absence of common frameworks, the mutual recognition proposals in the UK Government's internal market white paper could have adverse effects on the competitiveness of our agricultural producers. Yesterday, the Cabinet Secretary for the Constitution, Europe and External Affairs told the Environment, Climate Change and Land Reform Committee that if the UK proceeds with the proposals in the white paper, the common frameworks would be "dead". Those are obviously still proposals, and we are yet to see an internal market bill. However, if the UK Government proceeds with the mutual recognition proposals in the white paper without common frameworks being agreed, what could the impact of that scenario be for Scottish farmers?

Jonathan Hall: The impact could potentially be extremely significant. I will start by saying that the UK internal market is vitally important to the interests of not only Scottish agriculture but, I would argue, the Scottish economy as a whole. Therefore, we would always argue that we want a regulatory framework that operates to basic standards across the UK so that there is no competitive advantage or disadvantage in the UK's single market.

However, what was suggested by the UK Government in July—which it consulted on in a very short, four-week period—on mutual recognition and non-discrimination would, in effect, drive a coach and horses through the concept of commonly agreed frameworks, because, in essence, the two principles that are proposed in the white paper would mean that something that could be produced to a significantly different environmental standard in one part of the UK would have to be accepted as a legitimate product to be sold or used in another part of the UK. We have many and varied examples that relate not only to the environment but to food safety, food labelling and all sorts of other things.

I will give a very glib example. Let us imagine the situation in which a cereal grower in Northumberland was allowed to use the product glyphosate to desiccate his crop in order to harvest it in a more timely fashion, while that product was not available on the other side of the Tweed in Berwickshire, because of a divergence of regulation in that respect. That would cause a significant disadvantage to producers in Berwickshire, but the grain from Northumberland would have to be accepted for use in a Scottish marketing context.

That is why we say that, rather than accept the proposals that have been made by the UK Government, we must return to the concept of commonly agreed frameworks, whereby all the devolved Administrations have a significant input into their development and no single Administration has the power of veto over the rest. In some ways, we are trying to replicate and build structures around what already exists in the EU, where there is a Commission, a Council of Ministers and the European Parliament. With the UK's withdrawal from the EU, we are losing that governance, and that is a major concern.

The Convener: Thank you. I know that colleagues will want to come back to those matters later in the session.

Are there any amendments to the continuity bill that the NFUS or Scottish Environment LINK would support in seeking to address the potential implications of the internal market proposals?

Lloyd Austin: I agree with much of what Jonathan Hall said in relation to the internal market. We responded to the UK Government's white paper—we can send the committee our response if that would be of interest. We had no difficulty in principle with the concept of an internal market, which has economic benefits, or even with the principles of non-discrimination and mutual recognition. However, we were very concerned that the white paper was confusing and contradictory in relation to the application of those principles to environmental regulation, devolution and a number of other matters.

We have obviously not seen the detail of any bill, but the white paper was both confusing and worrying in its emphasis on deregulation and uniformity of approach. I would not necessarily go as far as Michael Russell in saying that common frameworks would be "dead", but we particularly stressed that we felt that the work on the common frameworks—including on their impact and application—should be completed before any internal market legislation was proceeded with. We said that the jointly agreed approach of common frameworks was preferable and that the case had not been made for internal market regulation.

The keeping pace power in the continuity bill is very welcome; we will undoubtedly come on to discuss how it could be improved. The extent to which the bill interacts with the internal market white paper depends on the detail of whatever internal market legislation comes forward. No one has seen that yet, so I am afraid that the answer to your first question is that we do not know yet.

The Convener: That is understandable. Jonathan, do you have anything to add at this stage?

Jonathan Hall: No, thank you. I am sure that we will come back to the issue.

Murdo Fraser (Mid Scotland and Fife) (Con): My questions will focus on the issue of parliamentary scrutiny. I will start with one for Jonnie Hall from the NFUS, in whose submission there are some comments on the level of parliamentary scrutiny. The committee has taken evidence from other groups, including—last week—the Law Society of Scotland and the Faculty of Advocates, which expressed concern that the bill could put Scottish producers in the position of being rule takers, not rule makers. Potentially, laws that have been made elsewhere that we have had no input into will be introduced in Scotland without going through the process of primary legislation and all the consultation and scrutiny that that would involve.

I would like to get Jonnie Hall's take on that particular aspect. Is bringing in substantial policy changes by means of secondary legislation an appropriate way to proceed?

09:45

Jonathan Hall: I certainly agree with your comments or, at least, what you have reflected from others whom you have heard from. There is a danger that if we aligned ourselves with what happened in environmental legislation at the European level and bound ourselves to that, we would have less flexibility in future to make things more appropriate in a Scottish context, which would then tie our hands on the policy objectives that we might want to achieve.

I take some comfort from the fact that existing EU regulation to do with, for example, the nitrates directive, the water framework directive and even the common agricultural policy has a degree of flexibility in it that allows member states or regions such as Scotland to apply measures through secondary legislation, as long as they adhere to the principles of the directives et cetera and the basic fundamental rules. There is an absolute requirement that Scotland, through the Scottish Parliament, retains an ability to adapt things for Scottish circumstances. We all know that Scotland is unique in many respects in its environment and its agricultural profile. If we are going to keep pace and remain aligned with EU regulation, we need to have the ability to adapt that to Scottish circumstances, rather than it being fixed.

Murdo Fraser: Thank you. I want to be clear about your use of "adapt". If we introduced new laws by means of secondary legislation, there would be no scope for the Parliament to amend those. Do you mean that that should be done through primary legislation?

Jonathan Hall: Yes—it should be done by whatever the most appropriate route would be. If we look at the water framework directive, which I think is a reasonable example, it was transposed into Scots law through the Water Environment and Water Services (Scotland) Act 2003 and various bits of subsequent secondary legislation. That enabled the Scottish Government, the Scottish Parliament and stakeholders to have a significant input into how the process of Scotland meeting its obligations under the directive would work in practice on the ground. We can apply that to the birds directive, the habitats directive and various other things. Having that ability is paramount.

Murdo Fraser: Thank you. I have a final question on this area. For previous witness panels, we have tried to draw a distinction between what might be minor and technical changes to existing EU laws that might be dealt with appropriately by secondary legislation—involving tweaks to existing legislation and changes to dates and lists of products, for example—as opposed to entirely new policy areas. On your mention of environment policy, for example, if a new EU directive brought in environmental policies to Scotland, we would not have any input into the formation of that and there would be no consultation around it. Do you think that there is a distinction to be drawn between minor technical changes that might be dealt with by regulation and major policy changes?

Jonathan Hall: Yes, I do. I say that because I have just gone through the process of the Agriculture (Retained EU Law and Data) (Scotland) Bill, which has just passed stage 3 in the Scottish Parliament, and elements of that are clearly technical in nature and can be tweaked by the Scottish Government through secondary legislation and regulation in order to, as you said, bring about minor changes. Equally, though, if there was a significant departure in terms of how we would support agriculture in the future and what the objectives and purpose of that would be, that would require much more open scrutiny and consultation.

A significant amount of the debate around the bill concerned the issue of the level of consultation and indeed whether there should be affirmative or negative procedures around different aspects of that bill. That is one area that might set a precedent for how we handle environmental changes in the future.

The Convener: Before we go on to Dean Lockhart, we should hear SE LINK's view on that recent exchange.

Lloyd Austin: In our view, scrutiny is a good thing because, as non-governmental organisations and as stakeholders, we are interested in improving the engagement and consultation between policy makers and decision takers and those interested parties.

We are probably relatively neutral on what parliamentary procedures are used for which types of regulation. However, we would generally favour more engagement and consultation where possible so that all relevant stakeholders are included. In that regard, one way of dealing with whether the different instruments should be subject to different procedures might be for the Government to involve a sifting committee, which has been discussed at Westminster, so that, rather than trying to define the difference between minor and technical or significant in advance, each is decided on its merits as different proposals are made.

I agree with Jonathan Hall about the need to link the use of those powers to a purpose. We very much welcome the Scottish Government's commitment to maintain and exceed EU environmental standards and, while EU environmental standards are good, that is a good ambition to have. Of course, we cannot see into the future, so I am slightly concerned; we should define our environmental ambition by environmental standards rather than by someone else's standards. There is great potential in developing the Scottish Government's environmental strategy to give that some statutory underpinning and link the purpose of keeping pace to the better delivery of that environmental strategy.

The Convener: There is a slight contradiction between what you have said and what I am reading in SE LINK's submission. I recognise that the submission states:

"it is vital that Parliament has the time and resources to adequately scrutinise secondary legislation".

That is quite clear in your submission. However, it also states:

"LINK members are content with the proposals to maintain alignment through secondary rather than primary legislation",

recognising that

"This allows already limited parliamentary time to be saved and for keeping pace powers to be used effectively to match developments at the EU level."

That is why I asked you to come in to make the LINK position clear for the record. Is that the position of LINK or is it not?

Lloyd Austin: Yes, we are content, in as much as I do not think that it is necessarily for us to decide which parliamentary procedure should be used for what, but we would like to see as much consultation and engagement as possible either before the parliamentary process begins or during the parliamentary process.

The Convener: Thank you. That is helpful.

Dean Lockhart (Mid Scotland and Fife) (Con): I would like to follow up on the previous discussion with the NFUS in relation to keeping pace with the EU directives or regulations. If we keep pace with EU regulations without having the ability to influence or change those regulations at an EU level, would there be concerns that those regulations might very well be more suitable for the EU market and EU farmers rather than being adapted to be more appropriate for the Scottish agricultural sector?

Jonathan Hall: There is that risk. As with any regulation or environmental condition that might be applied to Scottish agricultural production, there may absolutely be a need for certain regulations, but they have to reflect the circumstances in Scotland.

I have already referred to the fact that we need a degree of flexibility. The idea of keeping pace can be applied to the principles established by the EU on environmental regulation, but their applicability in Scotland has to be adaptable to Scottish circumstances. As I said, we have already seen aspects of that in practice with various directives. Equally, we have seen it under the auspices of the common agricultural policy; some of the cross-compliance conditions and so on have been tweaked, if I can put it in that way, to better suit Scottish circumstances.

However, the ability to tweak is, and always has been, somewhat constrained. That has proved to be a frustration not only for Scottish agriculture, but arguably for some of the administrators of schemes and the enforcers of some of the EU regulations. It is not necessarily always in Scotland's best interests, in terms of achieving the objectives that we want to pursue, if we are essentially being asked to adhere to a regulation that is applicable across 27 member states. Would Scotland have the ability to tailor regulations to meet its needs?

There are definitely risks, which is why we need the ability to make appropriate adjustments. Rather than harmonising our regulations absolutely, we need to think about reflecting and adhering to the basic principles of those regulations in a way that would enable us to adapt them to Scottish circumstances.

Dean Lockhart: Thank you for that. In your submission, you say:

"keeping pace with the EU has the clear potential to lead to substantial regulatory, and therefore economic, divergence with the rest of the UK",

which you identify as

"a major concern".

Can you give us some practical examples or specific scenarios in which regulatory divergence from the rest of the UK might give rise to problems in the agricultural sector?

Jonathan Hall: I have already alluded to some instances of that—as I said, they are potentially numerous. If Scotland remains essentially aligned with the EU, and the EU takes a particular approach to setting organic standards or the use of gene editing or other technologies while the rest of the UK does not, where does that leave Scottish agriculture vis-à-vis its competitive position in the internal UK market?

We have raised those questions in our submission on the bill, and we are raising exactly the same questions with the UK Government vis-à-vis the proposals in its white paper on the UK internal market. At the end of the day, the UK internal market is far more important to the interests of Scottish agriculture than the EU market or other export markets, given that 60 per cent of the agriculture and food products that leave Scotland do not go much further than England. We need to be mindful of ensuring that we are not in any way disadvantaged as a result of our alignment with a regulatory system that no longer applies in the UK market.

Another dimension that we have not yet mentioned is that we still have to see what the future relationship between the UK and the EU will be in respect of these matters. If that diverges significantly from where we are today, and the UK starts to veer away from the EU in that respect, but Scotland, through the continuity bill, retains alignment with it, that will start to put extreme stresses on the operation of the internal UK market. We clearly want to avoid that, which is why we have been very critical of the UK Government's proposals, why we are still concerned about aspects of the continuity bill and why we still believe that the commonly agreed frameworks are the right approach.

10:00

Dean Lockhart: I have a final question on the interaction between common frameworks and the internal market proposals. Once the common frameworks are agreed, I presume that the expectation is that they would sit outside the internal market proposals, and the internal market proposals would not necessarily override them.

Jonathan Hall: Anything that would essentially render the common frameworks redundant because they could be ridden roughshod over is something we need to avoid. The purpose of the common frameworks is absolutely clear to everybody. Where we are still very much in the dark is on how they would operate and be covered in practice so that they are effective.

I go back to the parallel with where we are with the EU at the moment. We have this huge institution called the European Commission and, like it or loathe it, it performs a function. I am not suggesting that we should have something like the European Commission sitting in the UK but we need that third party outwith the UK Government and the devolved Administrations that will enable the governance of common frameworks to be overseen properly and effectively.

Dean Lockhart: Thank you.

The Convener: I know that we are going to get deeper into this because John Mason wants to cover some of these issues. However, the reality is that, if the proposed internal market bill becomes legislation, it is legislation and common frameworks are not on a legislative basis at this stage. Whatever happens, the legislative process would trump all. I am sure that John Mason will get into that area and the other questions that he wants to ask.

John Mason (Glasgow Shettleston) (SNP): Thank you, convener—and thank you for asking my questions for me.

Mr Hall, you said that, if there was divergence with England or the rest of the UK, that would put a strain on the internal market. Could you expand on that a little bit? As I understand it, at the moment, a range of Scottish products such as beef, salmon and butter, I think, command a premium price. If we have higher standards, does it not just mean that we will get a higher price when we sell those products in England?

Jonathan Hall: You are absolutely right to suggest that Scottish products generally command a premium, but that premium is not huge. We need to work hard to protect and maintain it, which is why the way in which we produce food in Scotland, its provenance, having environmental standards that underpin that premium and so on are important to us. However, we do not make a margin just on the price of our products. A lot of it relates to the costs of production. Regulations in environmental standards influence the costs of production rather than the price at which we sell products.

If we had significant divergence in regulations across the United Kingdom, producers in Scotland would face higher costs of production because of our adherence to a certain set of standards that were not having to be met by other producers in the rest of the United Kingdom. That would diminish the margin that we have on the products

that we sell in the UK market. That could put us at a serious disadvantage.

I illustrated that earlier with the glib example of the use of a product called glyphosate. If glyphosate was to be banned for use in Scotland but it was available for use in the rest of the UK, that would put a severe strain on the productivity and profitability of cereal production in Scotland. You can apply that to other regulations. There is a sensitive area around gene editing. If those tools were available to producers in other parts of the United Kingdom, that would afford them an advantage that would lower their production costs and which might not be available to Scottish producers.

John Mason: You are not arguing that we all go down to the lowest common level, are you?

Jonathan Hall: Absolutely not. As I said, it is in Scotland's interests to maintain the highest standards because that is one of the elements that our premium is built on. We could have a premium product selling at a premium price. However, if regulatory standards mean that it costs us more to produce a kilo of beef in Scotland than it would in other parts of the United Kingdom, that would disadvantage Scottish producers.

It is not about a race to the bottom; it is about maintaining high standards and ensuring that those are not undercut. Undercutting standards cuts costs in many situations. We want to avoid that. We want to apply the same rules.

John Mason: To go back to the idea of structures, your evidence says:

"NFUS remains concerned that departure from the EU has created a legislative void which the UK Government seeks to fill but without introducing equivalent structures."

You touched on that in your answers to Bruce Crawford's questions. What kind of structures do you think that we need? You said that you do not want to replicate the European Commission. Would you suggest some sort of third-party body?

Jonathan Hall: You are absolutely right. I would have used the expression "third-party". I do not want to create an institution as big as the European Commission but, like it or loathe it, the Commission performs a function, which it does largely well. We are all accountable, whether we are administrators, farmers or member states. We adhere to the word and the will of the Commission in carrying out our responsibilities.

The kind of commonly agreed framework that we need in the UK is some sort of third-party structure. I have no clear vision of what that might look like, but I know that others have thought about it. Academics have thought about how that might evolve and develop. It comes down to service-level agreements and memorandums of understanding between the devolved Administrations, with some sort of third-party body to oversee the arrangements.

We already have that with the Food Standards Agency in the rest of the UK and Food Standards Scotland. Obviously, those bodies do no apply across the UK, but they are at arm's length from Government—that is the most important thing.

John Mason: What is the risk if we do not have such bodies in place?

Jonathan Hall: I am not a constitutional expert, but there is the risk that a UK Government that argues that it has to adhere to international obligations and that is negotiating trade deals on behalf of the UK could have an excessive influence over the devolved Administrations. That could even affect areas that are already devolved. We must safeguard against that. Although we want to adhere to the basic principles of regulation, we also want flexibility on how we do things across the United Kingdom.

John Mason: I have one question for Lloyd Austin, although he is welcome to comment on any of the issues that I have raised.

In your evidence, you say that you would prefer the bill to be amended to require Scottish ministers to keep pace with environmental outcomes, rather than enabling them to do so. Can you expand on why you think that is the case and whether you think it is possible?

Lloyd Austin: I will come to your specific question in a moment, but I have a comment on the previous exchange, on whether regulatory approaches should be uniform or whether there should be flexibility between jurisdictions or local areas. That is a long-running debate; you can always argue for more uniformity and you can always argue for more flexibility. That is one reason why it is important to define what you are trying to achieve in relation to environmental outcomes, which comes back to my argument for an overall strategy. Although the Scottish Government has that in a non-statutory sense, we would like to see it given a statutory underpinning and many of the Government's environmental duties being linked to the achievements and outcomes of that strategy.

Another way in which to deal with the uniformity-flexibility dilemma is through common frameworks. I underline everything that Jonnie Hall and I said earlier about the benefit of common frameworks. In an environmental and regulatory sense, I would like the common frameworks to include clear minimum standards that each Administration seeks to achieve but which give it the flexibility to go further if it wishes. To use a phrase from before, I would prefer to see a race to the top than a race to the bottom. We raised concern about

that issue in relation to the UK paper on the internal market in as much as it appeared to underline a deregulatory race-to-the-bottom approach.

In relation to structures, we have commented that the intergovernmental processes have been dysfunctional for a while. We have seen academic work on that and we have commissioned academic work on it from bodies such as the Institute for Government. We note that an intergovernmental relations review is under way in which the UK Government and the devolved Administrations are involved; however, it appears to have stalled. It was referred to in the UK white paper on the internal market, but nobody knows what proposals it is likely to come up with. Those kind of structural issues are important to resolve.

I will now come on to the specific question of a keeping pace power versus a keeping pace duty. We very much want the power to be firmed up. We recognise the difficulty of making it a simplistic duty, because there will be circumstances in which, through no fault of the Government, keeping pace may not be possible or in which a means of keeping pace in a more sophisticated manner is required. For example, that might be due to international circumstances, changes in the EU, changes in the UK or unknown events because of EU-UK negotiations. Therefore, the power should be linked to the question of purpose that I talked about earlier such that it is preceded by the purpose of achieving our environmental ambitions. We should make it a duty to use the power where it is necessary to achieve those environmental ambitions.

You could also broaden that purpose to include other public interest concerns. I know that the committee will later take evidence from the Human Rights Consortium Scotland. The purpose could include environmental standards and ambitions, but it could also include social and employment protections and other things such as that. The purpose would therefore become a duty, but not a blanket simplistic duty that must happen in all circumstances; rather, the Scottish ministers would have to exercise the power in whatever way possible to achieve the purposes stated, such as environmental standards.

The Convener: Before we have questions from Tom Arthur, I just comment that it will be interesting to see what the relevant amendment looks like: it sounds pretty complicated, judging from that last answer.

10:15

Tom Arthur (Renfrewshire South) (SNP): Mr Hall, you alluded to the relationship between regulatory standards and the cost of production, noting the implications for profitability and inter-UK competitiveness. Could you explain to me, as a layperson, what the relationship is between regulatory standards and quality of product?

Jonathan Hall: As I alluded to in responding to the previous question, it is a matter of environmental standards and, I must add, animal health and welfare standards. They absolutely underpin the quality of a product, and no more so than with Scottish agriculture. The premium price that I talked about is safeguarded by the fact that we adhere to some of the highest environmental and animal health and welfare standards that we know.

Significantly, that is a product of EU regulation and legislation. We have said that we do not want a race to the bottom, and any erosion of the standards risks undermining the quality and provenance of Scottish agricultural product. It is important that we retain the ability to maintain the highest of standards, not only for the sake of the standards themselves—to safeguard environmental interests and so on—but to promote and market the product of Scotland.

Tom Arthur: The NFUS position is to have mutually agreed common frameworks. However, I ask you to indulge me for a moment and to speculate on a scenario in which there was regulatory divergence—if, for instance, Scotland was to maintain and expand on its existing standards, but standards were relaxed somewhat in England, perhaps prioritising quantity over quality. What would be the implications for the agriculture sector in Scotland as a consequence? Where would the balance be in that hypothetical scenario if the quality and premium of Scottish produce was competing against a more profitable English sector?

Jonathan Hall: You identify a clear risk. Neither the UK nor Scotland within the UK is significantly big enough to cut it on a stack it high, sell it low basis in any market, whether that is the domestic UK market or an international market in any commodity—beef, lamb, cereals, dairy products or whatever. We are just not a big player. Therefore, quantity is not a game that we want to play.

We need to focus on quality, which is why it is essential that we retain the highest of standards across the United Kingdom. If we are in a trade agreement with another country and we are selling a UK product—not necessarily a Scottish product, although we would obviously want to market Scottish products as such—we should do so on the basis of standards and quality, rather than on a quantity basis.

That goes back to the discussion about how to ensure that standards are upheld, which comes back to the issue of commonly agreed frameworks

and how they are governed. The last thing that a commonly agreed framework should be is something that is top down and imposed centrally and that the devolved Administrations just have to run with. No devolved Administration or no one Administration should be able to veto the others. That is where we get into the aspect of how commonly agreed frameworks could and should work, so that they are commonly agreed, as it says on the tin: not just common frameworks, but commonly agreed, with the input of all Administrations so that, although there could be a degree of divergence, we operate within a standard that is upheld. In some senses, that is where we need to get to.

Tom Arthur: You have mentioned the potential implications of a trade deal with other countries. There has been much commentary on the potential for a trade deal with the United States and the implications of that for food standards and animal welfare standards across the UK as a consequence. Clearly, that would have implications for common frameworks.

I do not want to put you on the spot but, as much as I appreciate, agree with and am sympathetic to the position that you have articulated as to the need for mutually agreed common frameworks—that is the position of the Scottish Government and of other devolved Administrations—ultimately, we have a system of constitutional arrangements in the UK in which Westminster is the sovereign Parliament. Where does the buck stop?

Sometimes, attempts at agreement will not ultimately result in agreement being reached. Who should be the ultimate arbiter? Who should make the decision on matters such as what should be a common framework, even if it is not commonly shared?

Jonathan Hall: That needs to be taken out of the gift of Governments, which is why I suggest that a third party should be the ultimate arbiter in such instances.

I go back to the fact that the Commission operates in a way that oversees the development and delivery of regulation across the EU. We need a third party to do likewise in the UK, whereby each of the devolved Administrations is like a member state or a member of the Council of Ministers—it can agree to what has been proposed, and accept the governance around that, once it has been placed into law.

The UK Government certainly should not have the ultimate ability to impose on the rest of the UK. That would have a constitutional impact, in terms of respecting the devolution settlement, and would not be in Scotland's interests in relation to retaining the standards to which we currently operate and the markets in which we want to work.

Tom Arthur: To make sure that I have understood your position, I will summarise: we should agree through negotiation and we should never have to use any backstop measures. Ultimately, it should be a relationship of equality and parity, with no Administration being able to cast a veto, but equally no Administration being able to impose on another.

Jonathan Hall: Absolutely. Everything that we have said about commonly agreed frameworks is couched in terms of no one Administration imposing on the others, and none being able to veto. That will coerce the point at which a common agreement is reached, because ultimately no single party has a final say over the others.

Tom Arthur: I have a question for Lloyd Austin. LINK's written submission, near the bottom of the second paragraph on page 5, refers to a desire for

"a 'race to the top' for strong environmental standards."

It goes on to say that the thrust of the UK Government's white paper on the UK internal market

"suggests there is considerable risk of a 'race to the bottom' for standards across the UK, with no legislative underpinning to maintain high environmental standards proposed."

It goes on:

"Without agreement of common minimum environmental standards across all four nations and a clear framework outlining the interaction of these standards with trade agreements, there is a risk Ministers' ability to keep pace with EU environmental standards are jeopardised by pressure to remain competitive."

Will you expand on that and say what the implications of the UK Government internal market white paper are for the operability of the continuity bill, should it be passed?

Lloyd Austin: That comes back to one of my early comments in answer to the convener's questions. In our view, the white paper was confusing and unclear on how the market principles would be applied; how they would be balanced or qualified with environmental principles and principles of proportionality; how they could be consistent with the devolution settlement; and how they would interact with whatever is agreed in relation to common frameworks.

As a result, we felt that, if the white paper was implemented on the basis of the simplistic way in which it was drafted, that would lead to the risk of a deregulatory race to the bottom and the inability of the Scottish Government to use the powers to which the continuity bill refers in order to achieve its environmental ambitions. The pressure on the Scottish Government to enable the economy here to compete with a much more unregulated economy elsewhere in the UK would effectively

override its ambitions to maintain high environmental standards in Scotland.

I qualify that by saying that it would depend on whether the white paper was implemented in a simplistic way. We do not yet know what the detail of any legislative proposal would be, so the ultimate answer is that it is all unclear. It is unclear what the legislation will look like, what the UK-EU relationships will be and how the UK Government will proceed with the common frameworks. There is a real lack of clarity, which means that we cannot make any definitive judgments.

Nevertheless, I very much agree with Jonnie Hall on the risks and the need to balance uniformity with flexibility. Uniformity of regulation can be a positive, but equally it is true that regulation has differed between the nations of the UK for years. I am old enough to have worked with the Scottish Office before devolution, and regulations were different in Scotland in those days. There is nothing inherently bad about having different regulations in different jurisdictions. That results from the application of the flexibility principle and the concept of local appropriateness.

The question of how all those elements are balanced and how they interact is yet to be clarified.

The Convener: I did not realise that you were that old, Lloyd. I am a former Scottish Office civil servant, from all those years ago, but you look in a hell of a lot better nick than I do.

That said, we come to Patrick Harvie, who does not look in bad nick himself.

Patrick Harvie (Glasgow) (Green): Thank you, convener. Do not worry—you are doing marvellously.

Good morning to the witnesses. One of the wearily familiar themes of the whole Brexit saga has been that you can't always get what you want. A campaign that promised people all the possible upsides and benefits with none of the downsides has given way to many situations in which difficult choices have to be made.

In this instance, we could choose to place all our emphasis on protecting a jurisdiction's right to make its own choices and never to be a rule taker. We could prioritise high standards or keeping the integrity of a UK internal market with no potential barriers or divergences. However, we cannot do all those things at once. EU membership gave us not only the integrity of the UK market but membership of the EU single market, and it gave us protection for high standards. The cost was that EU countries sometimes have to accept some regulations that they would not have chosen to make if they were on their own.

Given that Brexit now places all the emphasis on UK regulatory sovereignty, do the witnesses—I direct the question to Jonathan Hall first—accept that there will inevitably be, whether in the short, medium or long term, a conflict between protecting high standards and protecting the integrity of the UK internal market? If, through trade deals with other non-UK, non-EU countries, there is such a conflict, which is more important to NFU Scotland's members: the ability of the UK to prevent divergence in the UK internal market or the ability of Scotland to protect high standards?

10:30

Jonathan Hall: I appreciate the complexity and the difficulty, and I agree with an awful lot of the sentiment that Mr Harvie has just expressed around difficult choices. We have operated in an EU single market for almost 50 years. Although we have often cursed and criticised the regulations and everything else that has come with that, equally, accepting those regulations, rules and governance has given us access to the single market and lots of other things, not least common agricultural policy spending.

I have always taken the view that, in many ways, accepting the regulations and the uniformity—to use Lloyd Austin's expression, albeit we do have a degree of flexibility—has been a price worth paying. Rather than being in isolation, we were part of the single market. As I alluded earlier, the real challenge is that we now have the prospect of a triangular relationship: the UK's relationship with the EU, Scotland's relationship with the rest of the UK, and Scotland's relationship with the EU. How we square that will be incredibly important to the interests of Scotland overall, not least to Scottish agriculture.

To answer the question, I am very clear that, as things stand, the UK internal market is more important to Scottish agriculture and Scottish food production than the EU market or, indeed, any potential export market. There is a market of 50 million-plus people on our doorstep—that is just a statement of fact.

Patrick Harvie: I am sorry to interrupt, but I want to emphasise the thing that is missing here. You mentioned the three-way relationship, but the relationship with the wider world outside the UK and the EU is about not only exports but the threat to you and your members of the importation of products that undercut standards that apply here. If there is a conflict between the desire for high standards and the desire for a uniform, integrated UK internal market, and if Scotland is unable to protect your members against the importation of goods that undercut them, that is a real threat to you and your members as well as to the global reputation of Scottish agriculture.

Jonathan Hall: I entirely agree. We have been at pains to stress to the UK Government that the future relationship with the EU needs to be as close to friction free as possible, so that we can continue to trade with the EU as effectively as we do currently, although we will not be part of the single market or the customs union. With regard to any future trading arrangements with non-EU countries, time and time again, we have maintained that safeguards must be put in place so that imported products from countries such as the US, Australia and New Zealand have to adhere to the same high standards to which we currently operate. In recent days, I have fallen out big style with some individuals over that argument. The argument is very clear in our mind: we need to put the safeguards in place.

I totally accept the dilemma that the Scottish agriculture and food industries face. On the one hand, we absolutely do not want to be undercut by substandard products. We want to retain the integrity of our products and the standards to which we currently operate. We want to be able to sell our products on an even footing with farmers across the UK, but, equally, we want to have access to the European market as we do now. As you said earlier, we are almost wanting everything, but that is the situation in which we find ourselves.

Patrick Harvie: Let me put the same issues to Lloyd Austin. I imagine that Scottish Environment LINK will place the emphasis on protecting high standards being more important than the totally frictionless, integrated UK internal market, particularly given the previous comment about there having always been areas of regulatory divergence within the UK. For example, the issue around glyphosate was mentioned earlier. If the question of whether to end the use of glyphosate came up for a decision at the EU level in a couple of years' time, and if the EU were to go for a ban—I think that Germany has changed its position on the issue—but the UK did not, would or should Scotland be in a position under the bill's proposals to decide for itself whether Scottish agriculture would match that EU standard or continue to track and keep pace with the UK decision on that issue? Under the Scotland Act 1998, that is an agriculture and environment matter, so it is a fully devolved one. However, outside the EU and under the current proposals, will we be in a strong enough position to make that choice for ourselves?

Lloyd Austin: You are right in saying that Scottish Environment LINK will always have environmental standards and ambition as our primary objective. We understand that other parties and interests have other primary objectives and that it is the role of Governments and Parliaments to balance all those issues. That is one of the reasons why I keep stressing the environmental ambitions and the need to have a strategy. Our environmental targets have some degree of statutory underpinning so that we know the purpose that we are trying to use the powers for.

In relation to trade and standards, whether that trade is within the UK or elsewhere, I agree with what Jonathan Hall said. Indeed, environmental NGOs, the NFUS and the other farming unions across the UK have joined together in a campaign to try to ensure that environmental standards, animal welfare standards and so forth are maintained in any trade deals that the UK Government does with other countries. We have, so far, been unsuccessful in getting any legislative commitment to that, but we continue to work together to achieve that aim. In that regard, the interests of agriculture and the interests of the environmental NGOs are pretty much aligned.

Under the proposals in the bill, the Scottish Government would be free to propose to follow an EU move even if the UK Government did not. What might undermine that freedom would be any proposals emanating from the UK Government's internal market white paper. However, as I have said before, we do not know for certain about those. The suggestions and the direction of travel hinted at by the white paper indicate a move towards a deregulatory approach, a uniformity approach and so on, but we have not seen the detail of the legislation. The white paper also says that the UK Government will implement the two market principles in the same way as they apply in the EU single market, but the two principles—

Patrick Harvie: The deeper problem, though, is that that is an expression of current UK Government policy but there is nothing to prevent either the same Government or a subsequent Government from making a later decision to diverge further from those high standards, whether in pursuit of a trade deal or for other free market ideological purposes.

Lloyd Austin: Indeed. It is worrying that the white paper suggests an ability for the UK Government to seek to drive a race to the bottom instead of everybody putting their commitments behind a common framework defining minimum standards, which could then generate a race to the top.

The white paper fails to explain how market principles that apply in the EU single market, which are applied in a qualified way in the current circumstances in the EU or even in the current transition period in the UK, will apply. Within the EU, non-discrimination and mutual recognition apply, but they are qualified by the need for public interest regulation and the need for local flexibility, with devolution or federal arrangements in different countries. If we are going to move those market principles from the single market in the EU

to the internal market in the UK, we need to bring across the qualifications as well as the principles. The white paper did not make that clear.

The white paper claimed that the environmental ambitions would be maintained and that it was consistent with devolution, which suggests that the qualifications will be brought across. However, the point is that it is completely contradictory and confusing, and no one knows the answer until we see the legislation.

Alexander Burnett (Aberdeenshire West) (Con): I will go to Jonathan Hall first. Last week, we heard from Michael Clancy, who said that there is a very important distinction between the continuity bill at Westminster, which is very much about an obligation to be put in place, and the bill here, which is very much about choice. Given all the concerns that we have heard this morning about economic risk and the lack of scrutiny, given all the alternatives and given that anything that is proposed here could be done through primary legislation as and when required, I have a more simple and fundamental question: do you think that the bill is necessary at all?

Jonathan Hall: That is quite a question. It is a simple one, but I am not sure that you will get a simple answer.

If we are going to respect and retain in Scotland the ability to do things with flexibility—Lloyd Austin has referred to that a few times—we need legislation to enable the Scottish Government and, therefore, the Scottish Parliament to act in the interests of Scotland on environmental matters and the governance thereof, in particular. Whether the bill needs to go as far as keeping pace with the EU is a moot point.

Legislation is required because Scotland needs to retain its flexibility in all aspects of environmental regulation as they come back to the UK. The other devolved Administrations will probably want a similar arrangement. However, whether that should lead to essentially keeping pace or alignment with the EU is another matter.

Lloyd Austin: I know that this evidence session is primarily about part 1 of the bill and keeping pace, which I will come to, but Alexander Burnett asked whether the bill is necessary, and it absolutely is because part 2 of the bill, which is on environmental principles and environmental governance, is absolutely required. Environmental NGOs have been campaigning on those things ever since the referendum as things that need to be addressed when we leave the EU. The UK Government is proposing similar measures in the Environment Bill to apply to England and reserved matters, and for Northern Ireland, as well. Our evidence to the Environment, Climate Change and Land Reform Committee makes it clear that those aspects of the bill can be improved, but they are absolutely necessary.

The keeping pace power is a political choice. How environmental standards are achieved and whether they are tied to EU standards or defined standards is a matter of political choice. Scottish Environment LINK will simply argue for the highest and best environmental ambitions possible and the means to achieve them. That is one of the reasons why I repeat my suggestion that the keeping pace power should be linked to a purpose. From the environmental perspective, the purpose is to achieve the environmental objectives of the environment strategy.

10:45

George Adam (Paisley) (SNP): Good morning, gentlemen. This question is for Lloyd Austin initially. The written submission from Scottish Environment LINK highlighted the importance of a "continued close relationship" between Scotland and the EU. We have discussed that quite a lot in detail today. However, when I read your submission, I was struck by the comment that

"on environmental matters, a continued close relationship between Scotland and the EU is critically important for continued cooperation on cross-border and shared environmental challenges."

My question is simple: what do you mean by that, so that I can get it right in my own head? Also, how do you suggest that we achieve that close relationship?

Lloyd Austin: We mean that any part of the globe should have a close relationship with its neighbouring parts of the globe. As well as neighbouring the rest of the UK, we neighbour other parts of Europe. Some of those countries, such as Denmark, are in the EU, and some, such as Norway and Iceland, are not, and we should have a close relationship with them all. There are a lot of shared environmental challenges, because pollution knows no boundaries and species and habitats cross boundaries. We share fish stocks with the countries that I mentioned and, if possible, we need to work with them to jointly manage those stocks. A lot of environmental challenges can be best addressed by different jurisdictions working together and sharing those challenges.

NGOs have no intention of not continuing our liaison with NGOs in other countries. In a personal capacity, I remain the UK board member of the European Environmental Bureau. NGOs will continue to be members of that network, and I have no doubt that the NFUS will continue to be a member of the network of farming unions across Europe. Whether Europe is defined as just the EU or as wider Europe does not necessarily matter as long as the governance arrangements for different

cross-border challenges recognise which Governments and international bodies are responsible for what. We will argue that relevant Governments and international bodies should do what is necessary to repress the environmental challenges, and the more networking and joint working, the better, irrespective of whatever constitutional or political arrangements are put in place.

George Adam: Your comment about your continued engagement in Europe is interesting, given what you say on page 4 of your submission about having some concerns about post-Brexit trade deals and their impact.

We have already discussed this a bit, but your submission says:

"We share the concerns of other third sector organisations that there must be greater transparency, parliamentary scrutiny and involvement from all devolved parliaments and stakeholders in the negotiation of post-Brexit trade deals."

Do you have concerns about the UK Government taking control of post-Brexit trade deals and not listening to devolved Governments? I know that this has been said before, but I want to get it right. Is there a concern that we could end up with flexibility taken away and a situation that is very difficult for us?

Lloyd Austin: Whether it involves the Scottish Government, the UK Government or an international body, NGOs will always want more transparency and engagement. Both Jonnie Hall and I have expressed our concern about the need for trade deals to continue to recognise the environmental, animal welfare and employment standards and so on that are applied in the UK and in Scotland. We will continue to argue that case, whoever is responsible.

Trade deal negotiations around the world have demonstrated that greater openness, transparency and engagement of subnational bodies, such as the engagement of states within a federal system or of devolved Administrations within a UK-type system, usually result in greater transparency, greater engagement with stakeholders and greater arguments about issues such as environmental and animal welfare standards and so on. The way that the Canadian provinces deal with trade arrangements is a good example.

On trade issues, the greater the involvement of all parties and the more open and transparent the process, the more opportunity there is for people to make their case—in our case, for environment standards to be maintained.

George Adam: I have a final question, which is for Jonathan Hall. You mentioned post-Brexit trade deals and said that the UK Government's approach could have an excessive effect on our flexibility, which could cause problems. Just to clear that up in my own mind, can you give me further examples of where that would be a problem for us, or for you and your industry?

Jonathan Hall: To clarify, are you talking about the standards under which imports might come into the UK under a future deal?

George Adam: I did not want to mention chlorinated chicken, because that makes the Tories a bit excitable.

Jonathan Hall: Let us set aside chlorinated chicken and hormone-treated beef—let us focus on the production standards rather than the food safety standards, if I can put it that way.

Clearly, something could be produced through different environmental and/or animal health and welfare standards in one part of the world, such as the US, and, under a free trade agreement, it could be allowed access to the UK market. If it was produced at a lower cost per unit because of the different standards, that could pose a threat to British and Scottish producers' interests. We have always highlighted that to the UK Government, and we will continue to highlight it to the UK Government.

We have governance around food safety issues: we have the Food Standards Agency and Food Standards Scotland, which ensure that the safety of food that consumers eat is the paramount consideration.

The other argument is around how the food is produced in the first place in the country of origin. Under any free trade agreement, it would be difficult for the UK to govern and police production standards in another part of the world. We know and accept that. We have always maintained that we must be mindful of a possible competitive disadvantage for domestic producers in any future trading arrangement in which the country of origin operates significantly different and lower standards when it comes to the environment or animal health and welfare. That is why we want standards to be at the front in both the UK Agriculture Bill and the UK Trade Bill.

Angela Constance (Almond Valley) (SNP): George Adam asked about the Trade Bill and trade deals, and I note that the panel members—LINK in particular, so my question is primarily for Mr Austin—have been urging the UK to make a clear commitment that trade deals will not negatively impact on environmental standards in any of the four home nations. Mr Austin, what commitments have you received from the UK Government to date?

Lloyd Austin: There have been verbal commitments in policy aspirations, which are similar to those made by the Scottish Government.

As we have said, in the UK Government's Environment Bill, there is no legally binding commitment to maintain environmental standards. The proposal made by the farming unions and environmental NGOs for the Agriculture Bill to maintain environmental standards in trade deals was defeated, but the case will continue to be made for that.

In all cases, Governments seem to believe that stating a high environmental ambition as a policy aspiration is a good thing, and we would agree. However, the UK Government has declined to put any of its aspirations into any form of legally binding commitment in any of the Brexit-related legislation. To date, I have not seen any similar commitment by the Scottish Government, whose plans remain in the form of a policy aspiration and a non-statutory environmental strategy. That is why one of our arguments is that, if the Scottish Government's strategy is to be better than that of the UK Government, statutory underpinning and linking powers on keeping pace and other matters to the achievement of such ambitions would be a good thing.

Angela Constance: We know that it is your aspiration to have commonly agreed minimum standards across the UK, which seems eminently practical. I will press you on that. How can that be achieved when nothing from the UK Government suggests that it intends to maintain such standards in the way that the Scottish Government has outlined?

I will use the UK Government's Environment Bill as an example. I put it to you that the bill is particularly weak and ineffective. Its non-regression clause would not actually prevent non-regression; all that it appears to require is a UK minister to stand up and say, "This legislation will regress standards", without any mechanism being put in place to address that. Hence there is a risk that the UK Government will just plough on.

Is it not the case that the non-regression provision in the UK legislation is backward looking, whereas, in contrast, the Scottish Government's powers on keeping pace are positive and forward looking and give us the power to maintain and align with regard to future Scottish needs and aspirations?

Lloyd Austin: I agree with you on the weakness of the Environment Bill, on which we have been lobbying for improvement. However, I am not quite sure that I find your description of legislation as being forward or backward looking very useful. In a sense, legislation is simply legislation on what that legislation covers.

As we have described, the keeping pace power is just that—it is a power. If, while the legislation was in force, the current Scottish Government or any future Scottish Government were to choose not to use that power, it could do that—it could simply do nothing for the next 10 years. Nothing in the bill requires the power to be as aspirational as you suggest that it is. I agree that the Government says that it is aspirational, but that does not necessarily make it so. That underlines my argument for linking the power to a purpose and for emphasising commitments to environmental or animal welfare standards, social protections or whatever in order to illustrate, demonstrate and make a commitment to non-regression—to borrow your term—irrespective of whether the terms "non-regression" or "dynamic alignment" are used.

11:00

I also feel that it would be better to link the power to the outcomes that we are after, rather than to alignment with a third party—in this case, the EU. There is no sign of this happening at the moment, but in theory there would be nothing to prevent the EU from lowering its environmental standards. If that happened, I would not want the Scottish Government to keep pace with an EU that was going the wrong way; I would rather that it kept to high environmental standards, full stop, if I might put it that way.

That underlines my feeling that we should do what you have suggested and have some form of commitment to non-regression from existing or better standards, but in a way that is not tied to anything else. That is why a link to the environmental strategy and our own environmental targets would underline and put into law the commitment that you suggest that the Scottish Government has.

Angela Constance: Thank you very much for that, Mr Austin.

I have a quick question for Mr Hall. Have you received any guarantees in regard to NFU Scotland's interest in trade deals?

Jonathan Hall: The sound broke up slightly there, but I think that you were asking whether we have received any guarantees from the UK Government regarding standards in trade deals. Is that right?

Angela Constance: Yes.

Jonathan Hall: My answer will be a bit like Lloyd Austin's. Yes—we have had lots of verbal guarantees and reassurance in that respect, but nothing that could be held to be a solid commitment.

The Convener: That was quite a lengthy session, in which we covered a lot of detailed ground. I thank Jonathan Hall and Lloyd Austin for their evidence.

I will suspend the meeting for two or three minutes while we ensure that the witnesses on our next panel are ready.

11:01

Meeting suspended.

11:05

On resuming—

The Convener: I welcome our second panel of witnesses to the meeting. Councillor Steven Heddle is the environment and economy spokesperson for the Convention of Scottish Local Authorities, and Mhairi Snowden is the co-ordinator at the Human Rights Consortium Scotland. Councillor Heddle wishes to make a brief opening statement, before we move to questions from the committee.

Councillor Steven Heddle (Convention of Scottish Local Authorities): Thank you, convener. I am a councillor from Orkney Islands Council and am COSLA's environment and economy spokesperson. I am also the lead COSLA representative on the Council of European Municipalities and Regions, for which I am the territorial development spokesperson. Furthermore, I have previous and present experience in various other international roles on behalf of local government, including being a member of the political bureau of the Conference of Peripheral Maritime Regions of Europe.

COSLA is the national and international voice of the 32 Scottish councils, so I am very glad to have the opportunity to give evidence the committee's inquiry. We have made submissions to the related committees on EU matters.

Our key politically agreed position with regard to the bill is that any new EU-derived powers and legislation that the Scottish Government wishes to replicate in Scotland should be the result of proper consultation of Scottish local government wherever such issues cut across existing local government competence.

The same applies to any discussion on apportionment of returned EU powers by the creation of new UK and Scottish enforcement bodies, such as environmental standards Scotland, which is foreseen in the bill, and any new UK state aid regulator.

Furthermore, when we are looking at future EU legislation, a review of the future of Scottish and UK commitments and reporting to the EU and, indeed, other international bodies, should have ownership by Scottish local government.

It is positive that both the Scottish and UK Governments have formally confirmed to COSLA that they wish to replicate the consultation arrangements for EU legislation that existed during EU membership. Members might recall from the first evidence session on the bill that there is an opportunity to do just that by expanding the section 9(2)(g) provision on consultation of local government, not just for environmental matters but for other policy areas that intersect with local government powers.

Finally, the aspiration for us in local government is to keep pace and to resonate with the democratic principles of the European Charter of Local Self-Government, for which we hope the bill will achieve unanimous cross-party support.

The Convener: Thank you, Councillor Heddle. Murdo Fraser has the first question.

Murdo Fraser: I will put to both witnesses the same question about parliamentary scrutiny that I put to the first panel. We have heard from other witnesses that it might be appropriate to use secondary legislation to make minor amendments to existing laws, but not where we are looking to introduce entirely new laws and changes in policy, because secondary legislation limits parliamentary scrutiny and the scope for consultation, and does not allow Parliament to amend what has been proposed. Primary legislation allows parliamentarians to amend what is proposed and has much higher standards in terms of consultation and scrutiny. Do you have any views on that?

Mhairi Snowden (Human Rights Consortium Scotland): Good morning. That is a really interesting question, and one that we have grappled with throughout the Brexit process. People from the consortium and many other organisations were involved in discussions at Westminster when the European Union (Withdrawal) Act 2018 was going through and Henry VIII powers were, obviously, a significant concern. In general, our experience of the Brexit process has been lack of consultation and opportunities to participate in decision making, and weakening of scrutiny, which is extremely concerning.

Our Brexit project has been all about ensuring that civil society has information about and understands the impact of Brexit. We have had loads of discussions with organisations across Scotland, and we have worked closely with organisations across the UK. The experience across the board has been of lack of consultation and scrutiny.

I understand why there might be a need for definite criteria about when the bill is to be used, but we are absolutely of the view that the powers are needed, because the EU has been a hugely

positive force in progressing human rights, and we want Scotland to go forwards, not backwards.

On the detail around scrutiny, there is certainly a discussion to be had about making sure that the powers are used only for appropriate purposes.

Murdo Fraser: Thank you. I ask Councillor Heddle the same question.

Councillor Heddle: On scrutiny, it would be disingenuous of me to say that COSLA has a well-developed position on the level of detail that you referred to in your question.

On the legal form of the bill, our main concerns are the outcome—the bigger keeping pace targets and the ambition of the bill. The main objective is for local government to be able to influence the process to get the best possible outcomes for our citizens and communities.

Regarding the level of detail that you asked about, I do not think that we have a particularly finely developed position. I would need to seek a mandate to explore that further.

Angela Constance: Good morning. I will go to Councillor Heddle first. What consultation process currently exists for local government regarding EU matters? Can you explain what consultative processes you would now like to see with the Scottish Government and the UK Government? In that regard, how could the bill be improved?

Councillor Heddle: It is a question of differentiating between legislation and EU-specific legislation. A range of consultation is available to us. In the European sphere, we have input into development of legislation through our role in the Committee of the Regions and through our ability to influence European bodies such as the Council of European Municipalities and Regions and the CPMR.

I am sorry—I am losing my thread. I need to come back to the point. I am trying to consider the entire gamut of consultative arrangements that we have. We have internal consultative arrangements that cascade in the opposite direction through our COSLA leaders and the COSLA convention. In terms of our engagement with the public, we have a range of consultation with citizens—

Angela Constance: Mr Heddle, can I interrupt? With respect, I am trying to be a wee bit helpful. If we look to the future, what types of consultative processes do you want to have in place with the Scottish Government and the UK Government?

Councillor Heddle: I was trying to explain the gamut of consultation that we have that operates in both directions. I am very firmly of the belief that local government has a place in the onion of democracy, and that we have a responsibility to the layers below us as well as to the layers above us.

Could you repeat your question?

11:15

Angela Constance: You have given an outline of current consultative processes for local government in Scotland, as part of our current position in the EU. Bearing in mind that we are being ripped out of the EU, what assurances are you looking for, on behalf of local government, from the Scottish Government and the UK Government that they will engage properly with local government? Is there anything in the bill that you think could be improved?

Councillor Heddle: We have specific proposals on that. As previous respondents have said, the bill is a bill of two halves: there is the environmental side and the keeping pace side. On the environmental side, there are well-prescribed consultation arrangements for local government in the continuity bill. We would specifically like to see that applied to the whole gamut of the bill.

As to how that will pan out, it would need to be done by arrangement with or discussion between our officers and the Scottish Government officers, and it would ultimately be for the agreement of Parliament. That would give a statutory underpinning to the consultation arrangements that would prevent ad hoc discussion that would depend on the personalities involved. It would mean that there would be continuity. We feel that that would give consistency and would lead to better governance over time.

Angela Constance: In your submission, you speak of

"insufficient consideration to the evolving UK-wide Common Frameworks."

How will that impact on the front-line work of local government?

Councillor Heddle: That is very difficult to say because, as you suggest, we are unsure about how the common frameworks will evolve and how widespread application of the commonly agreed frameworks will be.

The proposed internal markets bill seems to mean that there will be a degree of competition with the role of the common frameworks, and that is a concern. The best outcome that we foresee would be to have commonly agreed frameworks between the UK Government, the Scottish Government and local government, as an integral part of the discussions.

Angela Constance: I have a couple of quick questions for Ms Snowden. In your submission you say that

"leaving the EU has already led to a significant loss in rights".

Could you outline what they are? Could you also say whether, in your call on the Scottish Government

"to maintain and progress the highest of standards",

there are any limits placed on that as a result of the devolution settlement?

Mhairi Snowden: We are disappointed that the Brexit process has already led to regression on rights. From 1 January 2021, the Charter of Fundamental Rights of the European Union will no longer be part of UK law. It is the one part of EU law that was not brought across into the UK, and it includes some significant protections. It repeats a lot of what is in the European convention on human rights, but it is broader than that. It includes rights around non-discrimination, data protection and, particularly, children.

What we will lose through losing that charter is established, but the European Court of Justice is continually progressing it, clarifying it and moving it forward so we will lose that progression, which is why the powers to keep pace are so important.

It is important to acknowledge that this is in the context of the UK Government's having been reluctant to commit to the ECHR as part of its trade negotiations. That is deeply concerning, because the ECHR should be a basic minimum and a given, and we should be aiming to go further. There has already been regression. That is important in the context of the bill, because we must ensure that we do not regress and become the poor man of Europe when it comes to rights. That is why it is important to have the process, the duties and the keeping pace potential in Scots law.

I think that there was a second part to your question, which I have forgotten.

Angela Constance: Perhaps I could ask you about one of the suggestions in your submission. You want section 6 of the bill to be amended to include

"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."

Given that Scottish Government officials said two weeks ago that that was "unnecessary", because ministers have to do it anyway, why do you think that it is necessary? Do you see any limits to our aspirations as a result of the devolution settlement?

Mhairi Snowden: That is necessary and valuable because we are in a context in which the Human Rights Act 1998 is increasingly being challenged at UK level, so we need to do everything to ensure that it is secure in Scots law. Again, that is a basic minimum and we need to go further.

We are involved and we completely support the Scottish Government in what it is doing to bring international human rights directly into Scots law. That is for the longer term and is the most important and significant thing that we can do. The bill is a temporary measure while we come out of the EU, which is why we have to ensure that human rights are central to it.

Another aspect that needs to be discussed, which reflects what Lloyd Austin said during the previous session, is that keeping pace is not abstract; it is about people's lives and ensuring that we do not go below a minimum. There should be a purpose to the keeping pace powers that brings added clarity, and there should be more breadth to it. If we keep pace only with EU law, we will still miss out on a lot of the benefits of being in the EU, so it should be broader.

We have suggested duties to monitor and report on what is going on in the EU, in order to ensure that we do not take it on blindly without thinking about it, that we are aware of it and that there is transparency. We need to discuss it and build it in, so that we do not lag behind and become, as I said, the poor man of Europe when it comes to rights.

Dean Lockhart: My question is for Councillor Heddle. If we keep pace with all or some of the EU procurement rules, what are the implications for the public procurement activities of local authorities in Scotland?

Councillor Heddle: Inherent in that question is the question whether we would maintain our existing restrictions. We think that it is right and proper that the UK and EU should maintain broad alignment on procurement and state aid rules, as that will be beneficial to trade and the operation of our markets.

You have highlighted an issue that local government has focused on, which is the ability for us to have "buy local" clauses in our procurement rules and aspirations. That takes us back to the first evidence session, in which Mr Hall from the NFU or Mr Austin from Scottish Environment LINK said that it is a power rather than a duty.

We absolutely need the ability to diverge where that will make things better. I appreciate that there are tensions inherent in that approach; nevertheless, aspects such as exemption rules could be explored and developed. The permissions that have existed within the current arrangements show that exceptions are possible. We should not shy away from the idea that we could make exceptional arrangements that would benefit our communities while maintaining broad alignment on procurement and state aid.

Dean Lockhart: That is helpful. I want to pursue the discussion, looking at specific areas in a bit more detail. In which specific areas would you like to see divergence from existing EU regulations on public procurement? If you could deviate or diverge from existing EU restrictions on public procurement in three key areas, what would those be?

Councillor Heddle: I am afraid that I would struggle to pick three key areas. Again, I would simply be offering a personal opinion, and I am reluctant to do so, given that I am carrying a broad mandate from a multiparty organisation.

One issue that we have highlighted is the potential for a "buy local" clause.

Dean Lockhart: That is useful.

Tom Arthur: Good morning. I have a question for Mhairi Snowden. In an earlier exchange with my colleague Angela Constance, you said that you "want Scotland to go forwards and not backwards", and you spoke about human rights and how the debate on keeping pace is not about abstracts. Can you set out, for constituents of mine and people across Scotland who are perhaps not terribly au fait with the technicalities of human rights and do not have a background in law, what the practical implications of Scotland going backwards would be for people in their daily lived experience and what the opportunities would be as a result of Scotland going forward?

Mhairi Snowden: Human rights are eminently practical and are about daily life. Protections include the right to a fair trial and freedom from torture, which most of us will not experience every day, but many human rights are extremely practical. For example, there is a right to food and adequate housing, as well as a right for disabled people to have an accessible house, and a right to the "highest attainable" level of health, which is very much about equal access to healthcare.

Human rights are internationally agreed, but they are extremely relevant to all of us. In the past, debates in the media, in particular, have sometimes portrayed human rights as irrelevant, but they really are relevant. In addition, they protect those who are most vulnerable. For example, the Human Rights Act 1998 is an extremely important tool for ensuring that people who do not have the right immigration paperwork are protected and that, for example, they cannot be separated from their children when there is no reason for that to happen.

Human rights protect the most vulnerable, but they also protect all of us in our daily lives.

Tom Arthur: You have expressed a concern about the potential for Scotland and the UK to go backwards. Can you translate that into some practical examples of what that could mean?

Mhairi Snowden: As I said, we are unfortunately about to go backwards on 1 January, because we will no longer have any of the rights that come from the EU charter of fundamental rights. Beyond that, with regard to keeping pace, we know that the EU is currently looking at accessibility standards for disabled people—for example, ensuring that ATMs and various services and goods are accessible and reach high accessibility standards—and we could miss out on that. There are multiple examples.

As you know, the EU has many directives around social protections—for example, on employment and equality. Some of those matters are reserved, but there are elements that come within devolution. A lot of the elements that the EU deals with progress the human rights that we have in our daily lives, and it is important that we keep up with that.

11:30

Tom Arthur: You have spoken quite positively and with some enthusiasm about keeping pace with the European Union. Would you contrast that with the attitude and approach of the UK Government?

Mhairi Snowden: As I said, we are extremely concerned about much of the rhetoric from the UK Government around the Human Rights Act 1998 and judicial review. We are very concerned that it has not signed up to making the ECHR a basic minimum in its trade negotiations with the EU and with other countries. That should be a given, but there has been an apparent reluctance to do that.

We find that there is increasingly a divergence around human rights in the UK. The UK Government's stance is quite different, and we are lobbying it to make sure that that changes. That divergence could be positive for human rights in Scotland—we do not want a race to the bottom whereby we are all bad but there are minimum standards across the UK; we want a race to the top whereby there is a progressive realisation of human rights and they are strengthened. As I said, we are very positive about the Scottish Government's current developments to bring more of our international human rights—things like the rights to health, food and housing—directly into Scots law, which is the most positive and hopeful response to Brexit that there is. That is a long-term measure and will take a while to develop, but the bill is about the next few years, as we come out of the EU, and about making sure that we do not lag behind but keep up in relation to human rights.

Tom Arthur: My final question is on the issue of positive divergence, which you just referred to and

which features in your submission. Divergence can be characterised as negative, but the expression "positive divergence" interests me. Do you think that the bill is a vehicle for positive divergence on human rights and that that would be not only beneficial to Scotland but could make Scotland a progressive beacon in the UK and help to inform policy elsewhere in these isles?

Mhairi Snowden: Divergence would not be positive if it was going in the other direction but, in human rights, having bare minimums and then divergence can be a good thing as long as rights are more positively protected. As we say in our submission, we have worked with organisations across the UK on human rights—particularly on Brexit and human rights—and our reflections are that we need a race to the top. We can use the divergence of devolution to make sure that we are strengthening human rights in different parts of the UK and not going in the opposite direction. So, yes, divergence can be positive as long as it means that human rights are protected more and do not move in the opposite direction.

Patrick Harvie: My questions are also for the Human Rights Consortium Scotland. I have two questions, but I will wrap them up together to save a bit of time. The protection for human rights in Scotland has been stronger under the devolution framework from the beginning, because the Scottish Parliament is not able to legislate in a way that conflicts with human rights. Courts can strike down legislation if it does conflict, but that is not the case with UK legislation; courts can make a ruling, but it can take years before actions are taken. Prisoner voting is a good example of that. As soon as the Scottish Parliament had the power to legislate and a bill was before us, it had to be compliant with the human rights rulings on prisoner voting. What are the implications of that difference if some of the decisions on keeping pace or regulatory standards are made by the UK jurisdiction under the internal market proposals as opposed to being made by Scotland?

Secondly, environmental governance also raises profound human rights issues, but that is not addressed in your submission. Would you like to expand on any areas that are not covered in your written submission, such as rights issues that need to be strengthened within the proposed environmental governance measures in part 2 of the bill?

Mhairi Snowden: I will answer your second question first. We did not go into detail on environmental governance partly because Scottish Environment LINK is a member of the consortium and we knew that, as the expert on that, it had that area covered. I would agree with all the points that Scottish Environment LINK raised. Additionally, our right to a healthy environment is a human right and it also impacts our human rights. At the moment, when we talk about bringing international human rights into Scots law, the right to a healthy environment is a key part of that and will be an important protection going forward.

On your first question, which was about the implications of divergence within the UK internal market, I would emphasise that there must be some flexibility to enable each nation to respond. There is already divergence on many areas that affect our human rights, in which each nation of the UK does things differently. It is important that any common frameworks or cross-UK measures bring in only minimums and allow flexibility beyond that. Anything else would mean that we would be pulled to the bottom. At this stage, when we are looking at a massive constitutional change, it is important that we build something into the framework that will allow us to have a race to the top, so that each nation can do things differently if it means that human rights are protected, fulfilled and respected more. It is important that that purpose is reflected in the bill and that we keep that flexibility.

Patrick Harvie: Is it accurate to say that if, within the framework and the mess of Brexit legislation—the internal market proposals and the Scottish Parliament's continuity bill—any decisions about how we resolve tensions or avoid divergence are removed from a Scottish to a UK context, which also removes them from the remit of the courts, decisions are being taken that breach human rights? Is that an accurate assessment?

Mhairi Snowden: It is definitely a human rights concern if decisions that affect the whole of the UK are made in London. We recently wrote to the Secretary of State for Scotland about the UK Government's proposed commission on constitution, democracy and rights, which will look at the Human Rights Act 1998 and at the process of judicial review. There is divergence on human rights in the UK, and it is important that that is recognised when it comes to decision making and how things are agreed. For the sake of human rights, it is important that decisions are taken in Scotland and that the country is an equal partner in making common framework agreements.

John Mason: I asked Scottish Environment LINK's representative whether ministers should be enabled or required to keep pace with EU legislation. The Human Rights Consortium Scotland's evidence suggests that enabling is not enough. Could you comment on that?

Mhairi Snowden: Similarly to Scottish Environment LINK, we think that the bill could be much clearer and that it needs to have a core purpose. It should be about keeping pace not simply in the abstract but in order to protect,

respect and fulfil human rights, which both is a UN principle and runs across Scottish Government policy. For example, it is in the national performance framework. It is not new, and it should be the purpose of the keeping pace powers.

We also think that the bill should be much broader and that it should include duties to monitor and report on what is going on in the EU, because we need to make sure that we do not lag behind. The bill will cover the next few years, and we need to make sure that we do not lag behind in that period, which is why it is appropriate that it should have those duties in it.

As to whether it should be a duty, the point is that it must be a duty to use those powers to protect human rights. That should be a core purpose of the keeping pace powers.

John Mason: I think that Mr Austin, from Scottish Environment LINK, accepted that the duty could not be simplistic and blanket such that we would blindly follow everything, but that we would need to choose.

You mentioned monitoring and reporting. Is it possible, in practice, for either the Government or the Parliament to keep track of everything that is happening in the EU in that regard?

Mhairi Snowden: I think that it is. In fact, such a monitoring mechanism was a recommendation of the First Minister's advisory group on human rights leadership, some time ago. It is a very practical proposal and would be, as I said, a way of making sure that we did not lag behind. There are practical ways of doing that—there is the European Union Agency for Fundamental Rights, and there are other ways of doing it.

It would ensure that we have a process in place, over the next few years, that is not ad hoc and that does not involve decisions being made behind closed doors or picking and choosing some bits and not others. It is about putting in place a process through which we can know what the main rights developments in the EU are and consider fully, with participation, whether, were they to apply in Scotland, they would advance human rights here—and, if they would, whether we need to apply them here.

We do not want to go backwards and be the poor man of Europe when it comes to rights. In the next few years, we must have such a process, with commitments and transparency, to make sure that we do not go backwards.

The Convener: I thank our witnesses for that helpful evidence session. That concludes the only item on today's agenda. I therefore close the meeting and wish you all well.

Meeting closed at 11:43.

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