



OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 3 November 2020



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Pàrlamaid na h-Alba

Session 5

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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
29th Meeting 2020, Session 5

CONVENER

*Gillian Martin (Aberdeenshire East) (SNP)

DEPUTY CONVENER

*Finlay Carson (Galloway and West Dumfries) (Con)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)

*Angus MacDonald (Falkirk East) (SNP)

*Mark Ruskell (Mid Scotland and Fife) (Green)

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

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

Don McGillivray (Scottish Government)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Virtual Meeting

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 3 November 2020

[The Convener opened the meeting at 09:00]

European Union (Withdrawal) Act 2018

The Convener (Gillian Martin): Good morning. I welcome everyone to the Environment, Climate Change and Land Reform Committee's 29th meeting in 2020. Our first item today is consideration of four notifications from the Scottish Government in relation to consent to United Kingdom statutory instruments.

Detergents (Amendment) (EU Exit) Regulations 2020

Waste and Environmental Permitting etc (Legislative Functions and Amendment etc) (EU Exit) Regulations 2020

Chemicals (Health and Safety) and Genetically Modified Organisms (Contained Use) (Amendment etc) (EU Exit) Regulations 2020

REACH etc (Amendment etc) (EU Exit) Regulations 2020

The Convener: Members will remember that there is an agreed protocol between the Scottish Government and the Parliament in relation to instruments being made by the UK Government under powers in the European Union (Withdrawal) Act 2018 that relate to proposals within the legislative competence of the Scottish Parliament. The Scottish Government and the Parliament have agreed on an approach to UK-wide statutory instruments—for example, to avoid duplication of effort, or where only technical or minor amendments are required.

We have Scottish Government officials with us to discuss the statutory instruments and the wider issues that they raise, and to answer questions on the notifications. I welcome Don McGillivray, deputy director in the environmental quality and circular economy division; Ailsa Heine, solicitor on environmental protection; and Emily Freeman, also a solicitor on environmental protection.

One of the issues behind a lot of the notifications is the Northern Ireland protocol. I ask

Don McGillivray to give a summary of where we are with that, because the Government has told us that there are still issues around that. Where are we on the discussions with the UK Government? What have been the practical implications of the Northern Ireland protocol so far, particularly with regard to the statutory instruments?

Don McGillivray (Scottish Government): The Northern Ireland protocol is part of the deal that the UK Government did with the European Union, so it is part of international law, and we have to implement it. The point that is most relevant in relation to the notifications is that Northern Ireland will remain part of the EU customs area and EU regulatory systems, so members will find in a number of the notifications that are in front of them that we are having to carve out Northern Ireland from the UK regimes that were being established and put it back into the EU regulatory regimes. That is quite a complex process in a number of cases, as members will see from the notifications.

That is the main point in relation to the notifications that are in front of members. There is a whole set of wider issues that relate to the Northern Ireland protocol—for example, how border arrangements will work at ports that serve Scotland and Northern Ireland, and how we will ensure that goods that are transiting from the Republic through Northern Ireland to Scotland and the rest of Great Britain are managed appropriately and do not get into the UK without appropriate regulatory compliance.

Those are the kinds of issues that still exist in relation to the Northern Ireland protocol and are still being worked through with the UK Government.

The Convener: The Scottish Government is content that the statutory instruments should be consented to and that there are no issues with them. It is a case of consenting to them so that, as we come to the end of the transition period on 31 December, everything that is covered in them will tick along while the protocol and the common frameworks are still being worked out in the background. Is that correct?

Don McGillivray: Yes. In a couple of cases—I am sure that we will come to this in the discussion—the implications of Scotland and Northern Ireland being in a different customs area means that, for example, Scottish companies will have to comply with two different regimes. That is not ideal.

The implication of the Northern Ireland protocol is that a company putting, for example, chemicals on the market in both Scotland and Northern Ireland, will have to comply with two different regulatory regimes. That is not ideal; it creates a

regulatory burden in some ways for some companies.

Our assessment is that the regulations include the minimum required to comply with international law in terms of what the Northern Ireland protocol says.

Although there are difficult issues with the Northern Ireland protocol that are still subject to discussion between the Governments, as it stands, the protocol is a part of international law, and our assessment is that the statutory instruments do the minimum that is required to comply with international law.

Mark Ruskell (Mid Scotland and Fife) (Green): I want to ask about the lists of hazardous waste. The regulations allow for the possibility of UK-wide list, but with the potential for divergence in Scotland and a separate Scottish list. Will you explain the circumstances whereby that separation of lists might emerge? Also, where do you see bodies such as environmental standards Scotland sitting in the decision-making structure at UK level? Perhaps it is too early to tell on that one, but it would be useful to get an idea about how the wider Scottish interest is being reflected in the UK list.

Don McGillivray: In essence, we start with a common UK list of waste as part of retained EU law—the EU list comes across into UK law. Regulators would say that there are some benefits in sticking with a UK list. Waste crosses borders in the UK in some circumstances, and a single list makes it simpler for regulators, or they are at least fairly consistent with one another; it also helps with waste data and tracking and so on.

Again, it is simply a case of devolved interests. What if Scotland considered that another part or parts of the UK were making decisions to change the lists in a way that we did not agree with? If, for example those decisions were departing more and more from the EU list of waste and the Scottish ministers wanted to maintain alignment with the EU, the separate Scottish power to amend the list of waste would enable us to balance up the factors of the potential benefits of maintaining consistency against the desire to keep pace and maintain equivalence with EU standards. It is in scenarios such as that where I can see there being decisions to be made.

On environmental standards Scotland, I think that the notification says that we would expect there to be a full consultation on any changes to the list of waste, which would be made by statutory instrument. I expect that there would be a Scottish Government consultation document, as normal. We would actively engage with the Scottish Environment Protection Agency and industry, and I imagine that we would want to

engage directly and actively with environmental standards Scotland if we were thinking about consulting on changing the list. ESS would be an important stakeholder, but there would be a wider opportunity for everyone with an interest to contribute to a decision, through a Scottish Government public consultation, as normal—that is my expectation.

Mark Ruskell: Who sits on the decision-making body for the UK-wide list? Is the role shared between all the environmental agencies? Will it be the office for environmental protection and the ESS?

Don McGillivray: In essence, the people who make the decisions are the four sets of ministers—the lawyers will keep me right on this. For example, if we were to make a UK amendment, it would be by way of a statutory instrument, with consent. The Scottish ministers would have to consent to the change and there would be a role for the Parliament, because the situation would be captured by protocol 2.

Obviously, underneath that level there will be supporting structures that involve officials, regulators and so on getting together to try to make common recommendations to ministers. However, the decision-making process is a ministerial and parliamentary one.

Mark Ruskell: Okay. The convener mentioned the Northern Ireland protocol. I presume that Northern Ireland will have to stay aligned with the European list—

Don McGillivray: Yes.

Mark Ruskell: In effect, we can decide whether we want to stick with the European list and align ourselves with Northern Ireland or go with the UK list, if there is divergence between the two—

Don McGillivray: Sorry. I did not mean to speak over you. Yes, that is exactly the position.

Mark Ruskell: Thank you.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I presume that there is an advantage in being able to act in Scotland without the rest of the UK in cases of urgency. I can think of a couple of examples. Fish farms matter hugely in Scotland compared with England—I do not know whether there even are fish farms in England; there might be—and urgent action might be needed, so it would be perfectly proper and reasonable for the Scottish ministers to have the power to act urgently, and then subsequently to persuade their colleagues in the other jurisdictions that an addition was necessary. The other example is offshore installations, albeit that England has some of those. Is that a fair observation?

Don McGillivray: Yes, and the statutory instrument provides exactly that power. Our view is that that is necessary to respect devolved competence. An issue could arise that affected Scotland but not other parts of the UK, on which we might need to act independently. The SI gives the Scottish ministers that power.

Liz Smith (Mid Scotland and Fife) (Con): I want to return to scrutiny. As you know, at last week's meeting, when we were considering different statutory instruments, there was a bit of discussion about whether our role related just to technical issues or there was scope for the committee to consider what could be part of a common framework. Can you provide clarity on when the Parliament will have the opportunity to give further scrutiny to the common framework that relates to environmental issues?

09:15

Don McGillivray: The common frameworks are running behind where they were expected to be. There was a hiatus of four or five months in framework development due to officials in all the Administrations being focused on other issues related to Covid and the pandemic. We are about four or five months behind where we would like to be.

We now expect only a small number of frameworks to be completed by the end of the year, which was the original planned completion date. None of the frameworks that relate to the notifications that the committee is considering today will be completed by the end of the year. However, the frameworks are now making significant progress. They have all been drafted and they have all started the official-level clearance process. In some cases, stakeholder engagement will be starting imminently.

On the timetable, the frameworks will go through a stakeholder engagement process and then a ministerial and joint ministerial clearance process, after which they will be scrutinised by Parliament. My best estimate of when Parliament will have the opportunity to scrutinise the frameworks that are related to the notifications is that it will be in the early part of next year.

Liz Smith: That is helpful information. Given that the process is four to five months behind, which I think the cabinet secretary mentioned last week, too, and that some of the negotiations have been much slower than everybody anticipated, do you anticipate that the time will be made up, or do we have to accept that four to five-month delay, especially given that Covid is in a second wave?

Don McGillivray: I think that we can make up some of the time, but it is a very structured process of official clearance, stakeholder

engagement, ministerial and joint ministerial clearance and then parliamentary engagement. There are a lot of steps to go through, so I would not overpromise in terms of how much time we think we can make up.

Liz Smith: Again, that is helpful.

I want to go back to concerns that have been raised in the Finance and Constitution Committee and in the interesting debate that we had in the Parliament last week when we considered the UK Withdrawal from the European Union (Continuity) (Scotland) Bill. The issue is about when it is appropriate to have primary legislation rather than secondary legislation. Obviously, primary legislation is about introducing policy differences, whereas secondary legislation is very much about technical statutory instruments such as the ones that we are debating this morning. Do you foresee that most of the policy scrutiny will have to be undertaken after Christmas?

Don McGillivray: Are you talking about the frameworks?

Liz Smith: Yes, very much so.

Don McGillivray: Some of that will start with stakeholders fairly imminently. The directly affected regulators, businesses, trade associations and non-governmental organisations will all start to have an input into the process fairly soon, and imminently with some of the frameworks. However, formal parliamentary scrutiny will be after Christmas.

Angus MacDonald (Falkirk East) (SNP): I turn to the REACH etc (Amendment etc) (EU Exit) Regulations 2020. I hope that all members of the committee agree that it is unfortunate that the UK Government is not agreeing to a data-sharing agreement with the EU. However, as we know, the Scottish Government is continuing to pursue that approach. I have two questions. First, is the UK Government still listening to the Scottish Government's argument, and what progress, if any, has been made? Secondly, how are businesses responding to the current situation? Do they have the certainty and comfort that are required at this stage?

Don McGillivray: I am going to be careful not to get sucked into the politics of that, convener. At official level, there is a common understanding of the benefits of a data-sharing agreement. It would dramatically simplify the whole administrative process—for Government and regulators as well as for industry—if we could simply access the information that is in the current EU registration, evaluation, authorisation and restriction of chemicals—REACH—database, which UK companies and regulators have contributed to building over the years.

As an official, I say that the best administrative solution is a data-sharing agreement and that officials in the UK Government agree with that position. It is very difficult to get any meaningful understanding of where negotiations on that are between the UK and the EU; I sit here today and I cannot say with any certainty where that will end up. As with the wider trade agreement negotiations, business would welcome early certainty on the outcome of the trade negotiation and data-sharing agreement in relation to chemicals, so that it can plan appropriately. I am clear that the industry would be supportive of a data-sharing agreement, because it would dramatically reduce its regulatory burden for transitioning to a UK regime. That is my understanding of the position.

Angus MacDonald: Okay; thank you, convener.

Claudia Beamish (South Scotland) (Lab): Good morning. I will tease out a little more about the question that Angus MacDonald was asking about REACH. I wonder about certainty for businesses, which you have already highlighted. The transitional arrangements are an obvious concern for businesses. Can you shed any further light on that, in view of the fact that it appears that the Scottish Government has said that it reluctantly accepts that there will not be data sharing with the EU? If I have got that wrong, please highlight that.

Don McGillivray: Sorry; it is more nuanced than that, as I will explain. We remain very much of the view that a data-sharing agreement is the preferred solution and we continue to make that case to the UK Government. We have certainly not given up on that outcome, and I believe that it is still an active discussion between the UK Government and the EU, although it is very unclear.

With regard to those transitional provisions, we are having to plan for a scenario that we do not want—if I can put it that way. There is no guarantee that a data-sharing or trade agreement will be signed, so we are having to prepare for what ministers regard as the worst-case scenario, which is no data-sharing agreement, which would mean that we would have to reconstruct the whole REACH database within the UK regime.

Industry has given strong feedback that the previous transitional timetable was not achievable and had too much risk attached to it and, not unreasonably, it has pointed out that EU REACH was brought in in phases, so it has argued that we should bring in the data requirements for UK REACH in a similar banded system. The change to those arrangements means that there is now a banded approach to bringing chemicals into the UK regime, with the highest volume, highest

hazard chemicals first, then medium volume and lower volume chemicals. However, that means a fairly significant extension to the overall transition time. That is still shorter than the time that was taken to create the EU REACH database, but there is no doubt that the timetable is a compromise, hence the use of the word “reluctantly” in the notification.

Claudia Beamish: It is helpful that you have clarified that there is hope—[*Inaudible.*]—simplicity that the data sharing will work for business, regulators and everyone else.

The Convener: As no other member wants to ask questions on any of the statutory instruments, I thank Don McGillivray and his team for their time and for answering our questions on the issues.

Our next meeting on 10 November will consider more notifications from the Scottish Government on UK statutory instruments and an EU-exit related Scottish statutory instrument.

That concludes the public part of our meeting.

09:26

Meeting continued in private until 11:24.

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