



OFFICIAL REPORT
AITHISG OIFIGEIL

Constitution, Europe, External Affairs and Culture Committee

Thursday 18 November 2021

Session 6



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**CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE
10th Meeting 2021, Session 6**

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Donald Cameron (Highlands and Islands) (Con)

COMMITTEE MEMBERS

*Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP)

*Sarah Boyack (Lothian) (Lab)

*Maurice Golden (North East Scotland) (Con)

*Jenni Minto (Argyll and Bute) (SNP)

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Kenneth Armstrong (University of Cambridge)

George Macpherson (Scottish Government)

Angus Robertson (Cabinet Secretary for the Constitution, External Affairs and Culture)

Mhairi Snowden (Human Rights Consortium Scotland)

Lorraine Walkinshaw (Scottish Government)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Constitution, Europe, External Affairs and Culture Committee

Thursday 18 November 2021

[The Convener opened the meeting at 09:01]

UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (Draft Policy Statement and Draft Annual Report)

The Convener (Clare Adamson): Good morning, and welcome to the 10th meeting of the Constitution, Europe, External Affairs and Culture Committee. Our first item of business is the continuity act draft policy statement and draft annual report.

On 29 October, the draft policy statement and draft annual report on the use of the keeping pace power in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 were laid in the Scottish Parliament. As part of our scrutiny of the draft documents, the committee will hear from Professor Kenneth Armstrong, professor of European law at the University of Cambridge, and Mhairi Snowden, the director of the Human Rights Consortium Scotland. I welcome you both and thank you for your written submissions.

We will move straight to questions. I will start with a question for Mhairi Snowden to answer initially. In your submission, you highlight that one of the key areas for debate during the passage of the continuity bill through Parliament was the transparency and openness of decision making and how stakeholders in civic Scotland would be involved in that process. Can you elaborate on those thoughts?

Mhairi Snowden (Human Rights Consortium Scotland): Thanks for the invitation to speak with the committee.

Throughout the Brexit process, one of our members' biggest concerns has been around keeping up with the EU and not lagging behind, so we were pleased to see the keeping pace powers in the continuity bill and then in the act. However, having looked at the draft policy statement and draft annual report, we are left with lots of questions. We think that transparency and scrutiny of the decision making around when to align and when not to align is crucial for making sure that we align wherever it means that we will advance or maintain rights and standards. It is difficult to see

from the policy statement or the annual report whether that is happening, how it is happening or the criteria that are being used for those decisions. We are left with lots of questions, which is concerning for transparency.

One of our questions is about consultation. There is mention of it but, again, there is little detail on what it means or looks like. There is also little detail on how the Scottish Government is keeping up with what is going on in the EU. We mention in our written submission a national mechanism for monitoring, reporting and implementation, which the Scottish Government has committed to consider, specifically for the purpose of monitoring EU developments, but that is not mentioned in the policy statement. I would be interested in hearing more details of that.

Our concern is about the need for openness and transparency, so that, when it comes to keeping up with rights and standards, we know what decisions are being made and why.

The Convener: Professor Armstrong, in your role as adviser to the session 5 Finance and Constitution Committee, you highlighted the impact that the market access principles in the United Kingdom Internal Market Act 2020 could have on policy making in Scotland. How might the Scottish Government's commitment to keep pace with EU law be impacted by the market access principles?

Professor Kenneth Armstrong (University of Cambridge): Good morning, convener. It is a real pleasure to appear before the committee. Thank you for the invitation.

As the policy statement says, there is a possibility that ministers' exercise of their discretion whether to align could be impacted by considerations of the United Kingdom Internal Market Act 2020. Before I develop that point, I will develop the point that Mhairi Snowden made. One question that the committee might want to ask is when we would know that ministers were deciding not to exercise their powers because they felt that there was a constraint emanating from the internal market act and when that was simply an exercise of policy discretion by Scottish ministers. Knowing where that distinction lies is important.

If the powers were to be used in a way that gave rise to an internal divergence—that is, alignment with the EU but internal divergence within the UK—that could trigger the market access principles. The question is in what circumstances that might happen. A good example of that would have to be something that is within devolved competence and that would also give rise to a change at EU level.

There are several examples, some of which the committee will have heard before, such as some

of the issues around the use of plastics and microplastics in products. Another issue, which is in the European Commission's work programme for next year, is the marketing of plant seeds and revisions to the legislation on that. That would fall within devolved competence. Were the Scottish ministers to seek to align with any new position under EU law, that could potentially trigger the application of the market access principles under the internal market act.

The Convener: Thank you. I should have said earlier that Mr Golden is delayed by travel problems, but we hope that he will join us at some point.

Sarah Boyack (Lothian) (Lab): It was useful to read your written evidence. Thinking about the transparency issue, both of you have mentioned how it can be tracked and the extent to which the Scottish Government makes public its different calculations in relation to new EU legislation. Professor Armstrong, your briefing paper mentions several issues, such as the deposit return scheme, minimum unit pricing and water services. Will you say a little more about the water services issue and how we could track that, given the range of key players across Scotland who would have a strong interest, such as businesses, local authorities, Scottish Water and environmental campaigners?

Professor Armstrong: The water services issue is somewhat separate from the issue of keeping pace—it is not necessarily something that would change because Scottish ministers did something under the keeping pace power. When we think about the UK internal market act, we often tend to focus on issues around goods, and the point that I was trying to illustrate with that example was that we also need to think about services.

The way in which the internal market act is structured means that certain aspects of water policy are excluded from the operation of the act, but issues of authorisation to supply water services are not excluded. Depending on how the internal market act is interpreted, it is open to saying that a water company that is authorised to provide services in England and Wales would also be able to offer those services in Scotland, despite the fact that we have a public service provider of water services in Scotland.

I am not sure that I see the issue as directly linked to the keeping pace powers; rather, it is just another example of the way that the UK internal market act opens up devolved policy-making choices to potential regulatory competition from within a UK internal market, and that clearly has implications for how devolved powers are exercised. It has been described elsewhere as a competitive model of economic unionism rather

than a more collaborative one in which we look to, for example, the common frameworks process as a way to establish intergovernmental co-operation.

Sarah Boyack: Is your issue then not about water quality and the regulation of it but about the supply of water? I am just trying to clarify.

Professor Armstrong: Yes. The water quality side of things is clearly a regulatory activity that would fall under the non-discrimination principle in the internal market act. It is clear that aspects of water services are excluded from the operation of the market access principles.

Sarah Boyack: Where you cover the deposit return scheme and minimum unit pricing, you also mention the issue of potential legal challenges. Will you say more about that?

Professor Armstrong: I can do so briefly. Bear in mind that the briefing paper that I think that you have seen was written when the United Kingdom Internal Market Bill was in the House of Commons, and subsequent changes were made to it. In fact, Michael Gove appeared before the Scottish Parliament's Finance and Constitution Committee in the previous parliamentary session to confirm that minimum unit pricing would not fall under the mutual recognition principle, although it could fall under the non-discrimination principle. If further changes are made to minimum unit pricing, after the review that will take place in 2022 and 2023, it could fall under the non-discrimination principle. In that case, a bit like the earlier Scotch whisky case, it would be up to courts to establish whether the Scottish Government's approach was compatible with the internal market act.

The bigger issue is undoubtedly the deposit return scheme regulations, which will be coming on stream from the beginning of 2022. There is very obvious and clear scope for producers outside Scotland to seek to rely on the internal market act in order to disapply and, in fact, fundamentally undermine core aspects of the regime that is established. In the briefing paper that you have seen, I set out the different bits of those regulations that I think would trigger the internal market act.

The Convener: Ms Snowden, do you want to comment on any of those issues?

Mhairi Snowden: I have just one comment, which is about transparency in the midst of such complexity. It is very important—more important than ever—that the Scottish Government is clear and public in its decision making so that it can be held to account for doing what it has said that it will do. That is ever more important, particularly because civil society organisations are really struggling to follow what is happening in the EU. There is so much law and policy there to understand, and there is understanding the

internal market act and how that applies. In all of that complexity, there must be transparency and real public criteria around decision making.

Sarah Boyack: What would work for you in terms of transparency? Would it be a website that set out the issues that were being looked at? Could there be a traffic light system, so that people could see where there would not be change, where change was being considered and where change was likely to be implemented, and so that your members and wider civic society could be consulted about change? What would work for the vast range of organisations, such as your organisation's different members, given their resources, whether they have an environmental or a human rights angle?

Mhairi Snowden: Absolutely—it should be something simple and straightforward that we can access at any time so that we know what is going on. I appreciate that that is one of the purposes of the annual reports on the keeping pace powers, as regular reporting can provide transparency. However, we note in our submission that the draft report states that, as things stand, there has been no consideration of the power in section 1(1) of the continuity act, which makes one wonder what that means. Something like a website that is clear about the forums in which the Scottish ministers will raise issues and get input from other people would be good.

09:15

As I mentioned, there is a plan—a proposal has been accepted for consideration—for a national mechanism for monitoring reporting and implementation around human rights specifically. That would include developments at a United Nations and international level, but it is also meant to include developments in the EU. Such a mechanism would be a way of making things more transparent. There are a lot of ways in which that could be done, but anything that is put in place should definitely be accessible so that people can see it and hold ministers to account through it.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): I have a question for Ms Snowden. You raised the issue of what could be done in Scotland to explain and publicise the issue of finding out about, and keeping up with, European legislation. Can you explain what—if anything—the UK, with its residual representation in the EU, is doing at this stage to keep track of legislation, and whether it does anything to publicise that?

Mhairi Snowden: That is a good question. I am not sure. I have been involved in a lot of Brexit discussions throughout the process, and I work closely with colleagues across the UK. As far as I understand it, from my involvement, there is

certainly not the same discussion on keeping pace as there is in Scotland. I cannot answer for the UK, but in Scotland we have a clear commitment to align with legislation where that makes sense. That is really positive from a human rights point of view. We want to know what is happening on that, and what decisions are being made.

Donald Cameron (Highlands and Islands) (Con): Good morning to you both. My question is for Ms Snowden. In your submission, you comment on the need for consultation, which is a point that the Convention of Scottish Local Authorities also makes in its submission. COSLA says that it is anxious to take part in consultation, but has not really had the opportunity to do so.

Given that EU law is a rapidly changing body of law, and that huge amounts of material are produced every year, I want to ask about the practicalities of consultation. How do you see that happening?

Mhairi Snowden: When we think of consultation, we often think of sending out a consultation document that people have a couple of months to respond to. Sometimes that is appropriate, but in this area, given—as you say—the amount of EU law and policy, and the various elements that would need to be considered, it would be helpful to ask the Cabinet Secretary for the Constitution, External Affairs and Culture what forums will be used for discussions. Those discussions would need to include consideration of what is most appropriate, and the impact that different elements of EU law would have on people's lives and what would really advance their rights in Scotland.

On the question of what forums there should be, there is not currently a forum on keeping up with EU law in the voluntary sector, for example, but there definitely could be, as that would be valuable. There could be discussion forums as well as formal consultations—we could have a range of things in place.

I do not underestimate the extent of EU law and policy, but nonetheless only some of it will fall within devolved competence, and there are a lot of criteria that can be applied in order to identify key aspects for discussion.

Donald Cameron: It strikes me that the standard consultation that we are all used to, in which the Government publishes a paper and invites responses within a certain timescale, would not work for this kind of thing, given that the subject is constantly evolving. Forums are definitely one way forward, but I am interested in the practicalities of how discussions happen between civil society, bodies such as COSLA and Government. Do you have any further thoughts on that?

Mhairi Snowden: The national mechanism that I mentioned would be one way of doing that. A specific resource would be set up with the core function of monitoring EU policy and enabling discussions to ensure that everything is clear. There is also a question about the links that the Scottish Government has with the European Union Agency for Fundamental Rights and how the Government is monitoring what that agency is working on and what comes out of that.

On the practicalities of consultation, there are good examples from across Government of where it has forums and brings things to the table for discussion. There are definitely practical ways of doing that consultation to identify key issues and invite comments and discussion on them.

Donald Cameron: Professor Armstrong, in your submission, you write about the application of market access principles, which you have discussed already this morning. I am interested in pursuing the matter of the EU-UK trade and co-operation agreement. What implications will the TCA have for the keeping pace powers?

Professor Armstrong: That is an interesting question. The TCA was designed to give the UK as a whole the greatest autonomy to decide its future regulatory policy. As a consequence of that, there are limited constraints built into it on the exercise of regulatory autonomy. Of course, there are the level playing field obligations, which—as you know—cover competition, state aid and environmental and labour standards.

The requirement, generally, on labour and environmental standards is, of course, to maintain the levels of standards as they stood at the end of the transition period. Any significant divergence can trigger different mechanisms under the TCA, so it is a way of trying to manage divergence, to some degree. However, crucially, it does not mandate alignment, and the TCA's mechanisms are a means only of managing divergence. Therefore, from that point of view, alignment as a policy choice remains open to Scottish ministers. The constraints are less likely to arise from the TCA directly. They are more likely to arise as a result of where policy is moving generally in that area.

Mark Ruskell (Mid Scotland and Fife) (Green): I want to ask you not just about alignment with regard to legislation that comes through directives, but about how those laws are interpreted once they are in domestic legislation. For example, with environmental legislation, there are often differing interpretations of the habitats regulations, which then go before the European Commission. There are often petitions and concerns expressed about licensing the killing of certain species and so on. Is that another area in which there could be divergence in interpretation

of laws that originally came from Europe but that are now in domestic legislation and are open to a different interpretation?

Professor Armstrong: The UK legislation that dealt with the UK's withdrawal from the EU set out that existing EU case law would be retained, as it stood at the end of the transition period. Thereafter, UK courts are not bound by future developments in EU case law. Even with existing case law, there is a mechanism for the highest courts to depart from that case law for good reasons. As you might be aware, there is some desire at a UK level to relax that even further. There was a consultation on doing it last year, and it was relaxed only somewhat.

I am not sure that courts are necessarily in a big hurry to be the leaders in coming up with new and radical reinterpretations of that law. They are very sensitive to the fact that these are significant policy questions in the UK and between the UK and the EU. In England, the Court of Appeal was recently asked to exercise its power to diverge from previous case law, but it did not find any good reason for doing so and did not indicate that it was in much of a hurry to do that.

The issue that you have highlighted is very important in that the scrutiny mechanism in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 is narrowly focused on a particular use of a particular power in respect of alignment. What is very clear from the policy statement and from Mhairi Snowden's answers this morning is that the landscape of alignment is much broader than that and that alignment itself can happen in all sorts of ways, whether through case law, soft law, policy guidance or whatever. What we really lack is a framework for analysing the explanations of why alignment happens or does not. Given the focus of the 2021 act's architecture, that is likely to be avoided in many circumstances. After all, we know from the statements that have been given and the annual report that the power is not being exercised at the moment.

However, what we do not know is what lies beyond that with regard to primary legislation or potential changes in case law or guidance that you have mentioned. Are things happening out there in the wider environment that the Parliament is not able to scrutinise as it might want to? The monitoring mechanism that Mhairi Snowden described is interesting and important.

I should also quickly highlight the Commission's annual work programme, which is a forward look at what is coming down the line. It would be good if there were some mechanism for monitoring and scrutinising that to see how much is relevant to Scotland, and to see what would explain why

Scottish ministers decide, whether by regulations or primary legislation, to align or not.

The architecture of the 2021 act is useful, but only for the very small thing that I highlighted, and it needs to be expanded to become a broader scrutiny framework.

Mark Ruskell: As you were speaking, I started to think about whether there is a role for wider public bodies. I will stick with the environment. I presume that the Scottish Environment Protection Agency and NatureScot would be very aware of any decisions that were made on environmental regulations by the Commission or the European Court of Justice and that they would at least flag up to ministers if there were potential divergence over, say, species licensing proposals.

Do you have any thoughts on the role of Environmental Standards Scotland, now that the Commission has gone? Should it play a fuller part in the architecture of scrutiny and in understanding what alignment actually means on the ground?

Professor Armstrong: In its legacy report, the Finance and Constitution Committee was very aware that stakeholders more widely have good information resources. It would be very helpful if a committee such as this could tap into them, to acquire knowledge of changes in the policy landscape.

I go back to the kinds of things that Mr Cameron was asking about earlier with regard to bringing together the different bits of sectors—ministers, public agencies and third sector organisations such as those that Mhairi Snowden represents—in some kind of forum, perhaps prior to ministers producing their reports. If the relevant stakeholders were brought together in that way, they could look at what might be good reasons for alignment and, indeed, whether there might be consensus on why alignment might not be required, given the balance that the statement says must be struck between the desire to align and the financial implications, other risks and so on. In a sense, a very open forum discussion between the relevant public and private sector stakeholders would be useful in informing the policy process with regard to when alignment should or should not happen. It would also help with scrutinising the key choices that are made by the Scottish Government.

Mark Ruskell: My last question is on how all this works with other countries that are not in the European Union but that might align or be part of an *acquis* with it. I refer to countries that are in the European Free Trade Association, such as Norway, and other countries that have a presence in Brussels and keep well informed about policy development there. How have they dealt with the question? How do they stay aware of policy

changes and develop discussions with their stakeholders and public bodies?

09:30

Professor Armstrong: The EFTA example is specific. For Norway, for example, there is a requirement to align with rules that fall from the European Economic Area agreement. Because there is a requirement, rather than discretion, to align, the flow of information is more specific. There are also different ways in which Norwegian parliamentary committees are locked into the parliamentary framework that applies to the European Economic Area agreement. Therefore, although Norway is outside the EU, there is a structural institutional framework that allows that flow of information.

It is very apparent that, outside the European Union, the UK does not have the same access to that flow of information and that parliamentary structures—the UK Parliament and the Scottish Parliament—are highly reliant on whatever the Governments can provide by way of information. The question that you might pose, which Mhairi Snowden raised in her remarks, is whether there is a role for civil society actors to do some shadow monitoring and to provide you, as parliamentarians, with the information and resources that you need to conduct effective scrutiny so that you are not solely reliant on ministerial conduits of such information.

The Convener: Does Mhairi Snowden want to come in on the points that Mr Ruskell raised?

Mhairi Snowden: I am sorry. Was that question for me?

The Convener: We were talking a lot about transparency issues. I wonder whether you, too, want to respond to Mr Ruskell.

Mhairi Snowden: I am sorry, but I missed the beginning of the question for some reason.

I agree with everything that Professor Armstrong just said. It is interesting that civil society can and does have a role in helping the Parliament to scrutinise Government decision making in a policy area. That is a huge challenge, so the Scottish Government should think about how it resources civil society organisations. Is it encouraging the ones that it funds already to continue to be involved in European networks, for example?

For many organisations, a major concern was whether they would still be able to be members of such networks as we moved out of the EU. Some of them are EU networks and some of them are Europe wide, so organisations continue to be members. However, it is really important that they stay completely plugged into them in order to have

the depth of insight and information that they can use for scrutiny.

Civil society organisations have a key role to play in all that.

Mark Ruskell: Are there any networks that we are not plugged into, or that we are unplugging from, at the moment?

Mhairi Snowden: I am sorry, but I missed the beginning of the question again.

I do not have specifics, but I know that there has been a lot of concern about EU-specific networks. Some of them have, understandably, taken the position that UK organisations can no longer be a part of them. Others have association agreements in which they have recognised the benefits. The Scottish Council for Voluntary Organisations has been looking into that closely. There is definitely concern. That is another example of side institutions of the EU that we now stand outside.

Jenni Minto (Argyll and Bute) (SNP): Thank you for joining us this morning. Mr Ruskell's questions overlap the one that I want to ask. I was interested in the evidence that Mhairi gave on advancing human rights. How are you able to continue to plug into what is happening in the EU and around the world on that? Is there anything that you want to add to what you have said?

Mhairi Snowden: I will make one other point. The ability to do that depends on the funding and resourcing of organisations. That has been a concern, because we are no longer within the EU funding structures, such as the structural funds and all aspects of—[*Inaudible.*—]—law. In our recent report, we flagged up some questions arising out of Brexit, including whether the Scottish Government is monitoring the loss of EU funding to the third sector. What, specifically, does the loss of European connections and of the resources to engage in such efforts represent?

Jenni Minto: I am learning about this every day. The Istanbul convention was signed by the UK Government in June 2012. As you mention in your evidence, however, the UK has yet to ratify it. Is ratification of such conventions something on which the Scottish Parliament could make decisions?

I do not know whether Professor Armstrong—

Mhairi Snowden: Is that question for me?

Jenni Minto: Yes.

Mhairi Snowden: The Istanbul convention would have to be decided on by the UK Parliament, because it is an international treaty. The UK Government has signed it, but has not yet ratified it, which is really disappointing, as we are coming up to 10 years since it was signed. Part of the reason for that is that the UK Government is

working towards compliance before ratifying. That is its approach, but there is a great deal of concern that it just needs to progress with ratification. It is absolutely necessary, because, nearly 10 years on, we are beginning to get left behind.

That is a really good example of where, if we were still in the EU, there would be more expectation and pressure. The EU is asking all its member states to ratify the convention, but the UK has not yet done so. There is a concern that that should happen soon and before 10 years comes up, which is in June next year.

The Convener: Does Professor Armstrong wish to respond to those questions, too?

Professor Armstrong: I have nothing to add to what Mhairi Snowden has said.

The Convener: I will return, Professor Armstrong, to something specific that you said earlier. You said that the issue concerns devolved issues that are to be considered by the Scottish Government. So much in these matters is dependent on the operation of the TCA. There is also a delegation to the Parliamentary Partnership Assembly, which will not include the devolved legislatures of the UK but will be from Westminster. This is very much a hypothetical question, but do you see the potential for a situation in which, if the common frameworks do not work and the Scottish Government wants to align with the EU in a devolved area, an executive power could be used at Westminster? How would we resolve conflict in that kind of situation?

Professor Armstrong: The common frameworks are based on the assumption that the various jurisdictions within the UK have the powers and authority to enact rules in different areas, as a way of seeking consensus, where possible, on common approaches while allowing divergence where that is legitimate.

Where divergence happens—if the Scottish Government were to decide to do something different—that is not the end of the matter in itself. For example, I think that I mentioned that the Commission's work programme contains something about revising the legislation on marketing of seeds. At the moment, that falls within the scope of one of the provisional common frameworks. It might well be taken forward in a kind of common approach, but Scottish ministers might decide to do something different. If that happens, the question then is whether that exercise of power would be constrained by other means—in particular, by other legal instruments. Could it be constrained by the 2020 act or—I do not think that this is likely—by anything in the TCA?

On the point that I think you are making, I would say that, with all such situations, we need to start

with what happens when the power is exercised, then work out the range of constraints that might exist. Of course, the other level of constraint might be international trade agreements. After all, they will be negotiated by the UK Government, with any scrutiny of them being carried out largely by the Westminster Parliament. Anything that is an obligation under an international agreement can be enforced to constrain any exercise of devolved powers.

There has to be compatibility. Indeed, there are powers in the Scotland Act 1998 to compel compliance. We must always be aware of that, but that is very difficult for those of us who are trying to get our heads round any piece of this. We must not end up with little silos containing bits of information. In a sense, the real challenge is in putting together the complexities of where the power lies and the range of potential constraints that might lie around that.

Maurice Golden (North East Scotland) (Con):

I have a specific question for Professor Armstrong. I found the three interesting case studies in the submission to be very helpful, and I am interested in whether the non-discrimination principle applies to the deposit return scheme. Is there anything that we can do in advance to safeguard against potential litigation? If not, would the scheme need to be delayed until a court gave its ruling on which principle might apply?

Professor Armstrong: That is an interesting question. The regulations exist and will come into force, and it is in everyone's interests for them to be applied. The question, then, is this: what would happen if a soft drinks producer, for example, in another part of the UK sought to argue that it could avoid the requirement to register with SEPA or to have its product authorised for sale in the Scottish market? In that case, it would be for a court to entertain questions with regard to any interim measures that the claimant might seek by way of suspending operation of the regulations, pending the final outcome. I completely understand the question.

Is there anything that we can do to anticipate any of that? The key thing about the 2020 act as a technique for managing the internal market is that it is all after the fact. It assumes that the new regulations will come into force and we will then just have to deal with the consequences, with all the uncertainty that litigation might throw up.

On the other hand, there is the *ex ante* approach of common frameworks, in which, before any new rules are put in place, you look at whether there is any risk that divergence will create problems and, if so, how that can be managed.

A UK internal market that is built solely on an *ex post facto* litigation strategy will create all the types of legal uncertainty that the committee has already heard about. I know, for example, that you heard evidence last week from the food and drink industry, the Law Society of Scotland and one of the alcohol awareness groups. The uncertainty is clear from the evidence. Any strategy that relies purely on litigation as a way of managing divergence will always create uncertainty in the environment. That is not necessarily a good thing.

09:45

Sarah Boyack: I am struck by the comment that Professor Armstrong made about the constraints just before Maurice Golden came in. How would you frame the situation differently to think about opportunities? Rather than looking at what you cannot do, how would you look at what you could do in the context of Scottish Government priorities?

Professor Armstrong: You are absolutely right to ask that. It is one of the reasons why it would be useful to have some novel type of forum to tease out what the opportunities are and what would explain why we should not take them. In all walks of life, it is always good to have a degree of professional challenge. Bringing together a range of well-informed stakeholders would provide challenge to enable us to ask, when we say that there is a risk, what that risk is. What are the risks from aligning or not aligning? Are there ways of managing or mitigating risk?

I do not know whether Mhairi Snowden will agree with this, but one of the more interesting ways of presenting all that might be to examine the European Union not only through the lens of compliance and alignment but through the lens of learning. Are there things that we could learn about, including the EU's failures? Let us be honest about those, too, so that we do not always assume that the European Union's regulatory models are successful. They might have limitations, too. Are there things that we can learn from those experiences?

Building in strategies that provide better information, that allow challenge and that allow us to learn from our nearest neighbours' experiences would help to reframe some of the issues and, to an extent, to depoliticise them. It is clear that, in this immediate post-Brexit period, questions of alignment and divergence can become highly politicised. If we change the narrative somewhat and think about what we might want to learn from the EU's experiences, that might be a way of building greater consensus.

Sarah Boyack: Thank you very much. That is a really insightful comment that could also apply

within the UK. It is interesting in terms of cross-Government and cross-parliamentary scrutiny and accountability.

Mhairi Snowden: I agree absolutely with the point about learning. Within the UK, we learn all the time about progress and developments on human rights. We learn within civil society. We constantly have discussions with Northern Ireland, Wales and England about learning on human rights developments. That is absolutely true of the EU, as well.

I flag up that the EU has no human rights organisation. We might not want to align with everything that it does if we have a core commitment to progressing human rights. Nonetheless, there are definitely learning points and elements that we want to embrace because they are good for making rights real in people's lives in Scotland.

The Convener: There are no more questions from committee members. I thank Professor Kenneth Armstrong and Mhairi Snowden for attending. It has been a helpful evidence-taking session.

I suspend the meeting briefly to allow the new witnesses to come in.

09:49

Meeting suspended.

09:52

On resuming—

The Convener: Agenda item 2 is an evidence-taking session with the Cabinet Secretary for the Constitution, External Affairs and Culture on the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, the draft policy statement and the draft annual report. The cabinet secretary is joined, from the Scottish Government, by George Macpherson, the head of policy and alignment, and Lorraine Walkinshaw, from the legal directorate.

I welcome everyone to the meeting and invite the cabinet secretary to make an opening statement.

The Cabinet Secretary for the Constitution, External Affairs and Culture (Angus Robertson): Thank you very much, convener.

We are focusing today on the European Union, particularly alignment with EU laws and standards, but I want first to highlight the background to all this. The people of Scotland have made it clear on a number of occasions, not least in the Brexit referendum, that Scotland should continue to be part of the EU, and the Scottish Government

believes that the people of Scotland should have the right to choose their future, with Scotland an independent nation and an EU member state in its own right. We will continue to advocate for Scotland's place in Europe and the world.

In the meantime, we are committed to remaining close to the European Union and to building the strongest possible relationship between the EU and Scotland. We have demonstrated that in many ways, from our policy choices to our investment in our enhanced overseas presence and our commitment to giving the warmest of welcomes to EU nationals. That approach lies behind our policy of maintaining alignment with the EU, where appropriate, in a manner that contributes towards maintaining and advancing standards across a range of policy areas. By doing so, we will protect the health and wellbeing of people in Scotland and maintain Scotland's reputation for being inclusive and outward facing. By protecting and continuing to advance the high standards that are enjoyed in Scotland, we will ease the future process of Scotland's return to the European Union.

We are doing that in a range of ways. In our policies, our grant giving, our guidance and our practice, we will take as the default the measures adopted by the European Union. We support EU standards and hope to apply them here soon.

The same will apply with relevant legislation, which is the issue lying at the heart of this morning's session. For nearly 50 years, Scotland formed an integral part of the European Union, with EU law being directly applied or with our being obliged to implement it in Scots law through powers granted under the European Communities Act 1972. Now that the UK has left the European Union, ministers have replaced that obligation with a policy of aligning devolved law with the EU, where appropriate—in other words, where it is possible and in Scotland's interests to do so.

That approach acknowledges a number of factors—this brings us to the nub of the issue. First, the literal application of EU law in Scotland might not be possible in some cases, due to Scotland's—and the UK's—current status as a third country following EU exit. For example, the law might not have been designed to be applied outside EU member states.

Secondly, the Scottish Government might be constrained from applying EU law due to international or existing legal obligations, particularly reservation by Westminster.

Thirdly, a combination of circumstances, including, for example, the operation of the United Kingdom Internal Market Act 2020, might lead ministers to judge that alignment of legal texts would not be in Scotland's overall interests with regard to that particular law under the current

constitutional dispensation. In such cases, ministers might judge that, due to circumstances outwith our control, a level of divergence would be in Scotland's interests, but such an approach will always seek to preserve the values and outcomes that we share with the European Union, ranging from tackling the global climate emergency, protecting our environment and supporting smart and sustainable economic growth to recovering from the pandemic. Scotland will not deviate from those common aims.

In short, we need to make it clear that, although the power in section 1(1) of the 2021 act provides an important means of achieving alignment, it is not the only means of doing so. As the policy statement sets out, our starting point is to align via policy development. If a law is required, primary legislation might be more appropriate in some instances, but the preference is for specific domestic powers, if available, to be used for making secondary legislation.

That does not mean that the power in section 1(1) of the 2021 act is unimportant—far from it. It provides an important backstop when a legislative change is needed for alignment, but primary legislation is not necessary when subject-specific enabling powers are not available or are not appropriate. Although we have not yet needed to call on the power in section 1(1), it is critical in maintaining the Scottish Government's ability to make subordinate legislation, where appropriate, to ensure that we keep devolved Scots law aligned with EU law as it develops, and we will not hesitate to use the power in future where appropriate and necessary.

With regard to the two documents that are before the committee, part 1 of the 2021 act requires the Scottish ministers to publish a statement of their policy on the approach to be taken, the factors to be taken into account and the process to be followed when considering whether to use the power under section 1(1). Prior to the policy statement's publication, it must be laid in draft before the Scottish Parliament. Therefore, in accordance with section 7(3) of the 2021 act, the current statement is laid in draft for a period of 28 days, and I look forward to considering members' representations on the draft in preparing the policy statement, which will be laid before the Scottish Parliament for approval.

Part 1 of the 2021 act also requires the Scottish ministers to prepare and lay before the Scottish Parliament a report that explains how the section 1(1) power has been used during the reporting period, how it has been considered for use and how it is planned to be used over the coming reporting year. The report must also set out how the use and planned use of the power have furthered or will further the purpose of the power in

section 1 to contribute to maintaining and advancing the standards that are mentioned in section 2.

Finally, the Scottish Government's first draft report covers how the section 1 regulation-making power has been used from its commencement on 29 March 2021 to 31 August 2021. The report is laid in draft for a period of 28 days. Representations are invited on the future use of the power, as described in the draft report, and I look forward to considering such representations from members in preparing our final report.

I hope that that short introduction has given members some helpful background on the important issue of alignment, and I look forward to the committee's questions. I am also delighted to be joined by my colleagues, who will no doubt be able to answer any technical questions about the application of the measure by the civil service.

The Convener: Thank you, cabinet secretary.

I open the questioning by highlighting a general theme that has arisen from the submissions and, indeed, from some of the evidence that we have heard this morning. I hope that it will help our understanding of how the Scottish Government is being informed of what is happening in Europe, given that we no longer receive EU directives. What are the capacity issues around being able to take on board and assess what is happening? How might the Scottish Government consider communicating those decision-making processes and that information to the wider Parliament and, indeed, to this committee?

10:00

Angus Robertson: The situation is in flux, given that the United Kingdom has only recently left the European Union and that the institutions that were in place to manage the interrelationship between EU institutions and member states—in this case, the UK, which is now a third country—have been changing.

Committee members will be aware of the role that was played by UKRep—the United Kingdom permanent representation to the European Union—which was extremely well staffed with extremely competent officials with understanding of the full breadth of the work of the European Union and its institutions. That has now changed. There is a UK mission to the European Union—UKMis—and how it reports to the United Kingdom and, by extension, the devolved Administrations is also subject to change. Those things are not in our power. We did not choose to leave the European Union or to downgrade our representation to European Union institutions, but we are having to deal with the consequences of a changing—and, in my view, worsening—situation.

As to how we deal with that, a central team in the Scottish Government's directorate of external affairs works closely with Scotland house in Brussels and with Scottish Government lawyers—I have excellent examples of my colleagues in both those fields sitting next to me. They work in support of the policy directorates across the work of the Scottish Government in considering the Government's policy to maintain and advance EU standards where appropriate. The team supports that work as part of DEXA's on-going business to enable policy areas to understand the international context of their work. The team ensures that policy areas consider where alignment might be possible and how it can support ministerial decision making in considering alignment alongside the range of information and other priorities that the Government must consider in reaching policy decisions.

Before Mr Ruskell manages to catch the convener's eye, I have a confession to make in relation to the work of the committee on that very question. I put on the record that, during the early stages of devolution—between 1999 and 2001—I advised members of this committee's predecessor on the very question of the scrutiny of the European legislation that was before it. I think that I am right in recalling that not a single member of the committee now was on the committee then.

One of the big differences between how the committee has worked recently and how colleagues worked then is that a considerable amount of time was taken up with what was known as the sift of European documentation, which related to how the committee could continue to understand what was coming from European institutions and what it—and, by extension, the Scottish Parliament—needed to understand about particular European Union regulations, directives and so on to ensure that the Parliament and the Government were best informed.

During the past 20 or so years of devolution, the committee has taken the view that that was not an efficient and effective use of its time in maintaining optimal scrutiny of what was emanating from Brussels. Having sat on the European Scrutiny Committee in the House of Commons for 15 years, I can attest to how much time and effort were spent looking at the papers that emerged from Brussels, often with not tremendously great effect. However, because it might be helpful, I flag to the committee that European memoranda on European proposals, regulations, laws and so on are extant; they continue to be produced. Therefore, if committee members, the clerks or anybody else wishes to spend a lot of time—it takes a lot of time—doing the individual or collective sift, as was done previously by this committee and the European Scrutiny Committee

of the House of Commons, they will still be able to do so.

Dr Allan: I do not think that this question is tangential; it is closely relevant to what you have just said. You have had some recent correspondence with Lord Frost about the Northern Ireland protocol and the wider implications that that might have for Scotland. You have used quite strong language. Why have you said that you are “alarmed” by the state of the conversation between the UK and the European Union about that protocol?

Angus Robertson: Members will be aware that the United Kingdom is actively considering whether it should use what are known as article 16 powers in relation to the Northern Ireland protocol. That would, in effect, be the UK unilaterally saying that it does not think that the agreements that it reached and signed with the European Union are fit for purpose. Given what has been emanating from discussions with the European Union in recent weeks, one would have reason to believe that Lord Frost and his colleagues are actively considering pursuing that course of action: unilaterally repudiating an agreement that I think I am right in saying was described as “oven ready” and a huge negotiating success.

There will be consequences if the UK proceeds with that approach. Brexit has already caused economic damage. Members are well aware of the estimates that have been made by neutral organisations, which have assessed the quantum of damage from Brexit as being at least twice that caused by the coronavirus pandemic. UK exports to the world's biggest single market are down by more than 15 per cent. The Scottish Government's view is that anything that leads to yet further worsening of relations with the European Union and of the impact on our economy would be a hugely retrograde step. That is my first observation.

My second observation is that for the UK Government to be considering doing such a thing without any active or serious consultation with the devolved Administrations of the United Kingdom is yet another sad example of how taking back control from Brussels also means taking back control from Edinburgh, Cardiff and Belfast. That is a retrograde step.

We have tried to flag that up with Lord Frost, as have a great many people in Northern Ireland, because the matter relates specifically to Northern Ireland. The danger is that turning away from the agreement that was reached might lead to a worsening of community relations in Northern Ireland—that is a euphemism for the potential return of violence. That is not in anyone's interests, and all of us should ensure that that does not happen.

In answer to your question, Dr Allan, we are very concerned about the UK's aggressive approach to diplomacy. We are very disappointed that it has taken that approach without any active consultation with devolved Governments across the UK. I, and colleagues in other devolved Administrations, have called for discussion to take place before any precipitous decisions are made on article 16. I very much hope that the UK Government will step back from its threatening position, which also undermines the belief of European Union decision makers in the UK as a trusted partner that will deliver on what it agrees. That is to our detriment, notwithstanding the fact that we did not agree to Brexit and do not wish the Northern Ireland protocol to be treated as it is being treated by the UK Government. We are caught up in the backdraft of all that.

Do we know whether the UK Government will proceed with article 16 and repudiate the Northern Ireland protocol? No, we do not. It might have been a negotiating tactic to try to get some concessions from the European institutions—which, I might add, have signalled very loudly that they are willing and open to making improvements to arrangements where they can be made.

I simply leave with you the thought that, should the UK Government go ahead in using the article 16 powers, it is widely expected that the European Union will consider countermeasures to the UK's aggressive approach. That means that there is the potential for tariffs to be imposed by the European Union on products from Scotland. That is not expected to happen immediately, given the time factors that have been built into the process, but it is entirely possible that, should the UK Government continue with its aggressive approach towards the European Union, we, our businesses and our exporters might be caught up in the consequences.

I therefore use this platform to appeal to everybody to keep cool heads. Let us try to maintain good relations with the biggest single market in the world and to improve, not worsen, the relationships between the UK Government and the European Union. The same point has been underlined by a great many people in Northern Ireland, and I hope that the UK Government listens to them, too.

Dr Allan: Given the continual—

The Convener: Before you go on, Dr Allan, I should say that we are moving far away from the documents that are before us today, although I absolutely agree with the cabinet secretary's comment that the situation is very much in flux with regard to the elements affecting the decision-making process.

Dr Allan: I wanted to ask about the Northern Ireland protocol, but if that is off topic, I will not ask anything at all.

The Convener: If your question relates to the submissions that we have received and the evidence that we have heard about how the Northern Ireland protocol might affect decision making with regard to these powers, please continue.

Dr Allan: It does not. It relates to the Northern Ireland protocol itself, so you can move on, convener.

The Convener: Thank you very much. I call Ms Boyack.

Sarah Boyack: It has been good to get so much evidence from a range of stakeholders. A key issue that all of them have raised is transparency. Indeed, you have talked about sifting what is coming and the major effort that will be required in that respect not just by Government but by civic society, businesses and the Parliament.

On the question of how the Scottish Government can assist the process, it was suggested earlier that there could be a website on which people could see, through, say, the use of a green, orange and red flag system, where the Scottish Government intended to align with the EU, where it did not and where it was thinking about it. Have you or your officials thought about such a move, and have you had any joint ministerial discussions within the Scottish Government on how you might manage and monitor that process and how you might communicate that not just to the Parliament but more widely to businesses, civic society, the Convention of Scottish Local Authorities and so on?

Angus Robertson: That is a very important question, given that we are at the start of the process of how we manage our way through this situation. I must stress at the outset that I do not want that to go on as long as it might, but, with a fair wind, some good fortune, the acceptance that the people of Scotland have voted in a democratic election that they should be able to determine their relationship with the European Union within this parliamentary session and a referendum then taking place, we will see ourselves on a glide path to rejoining the European Union in the short term. That is my and the Scottish Government's preferred outcome, and it is the preferred outcome of the majority of MSPs.

10:15

In the meantime, we have to find the optimal way of managing the alignment process with the

European Union. There are a range of different ways in which the Scottish Government is best able to incorporate, match or exceed European Union standards. We should also bear in mind that, when we begin re-accession discussions with the EU after a yes vote in a referendum, we will want Scottish membership of the European Union to happen as quickly as possible and with the greatest possible ease. As we know, fulfilling the *acquis communautaire* is a key provision of EU membership. Working back from that position, we need to understand that we are not in the European Union and that we are therefore a third country, so it is not a simple matter of saying that every single thing that emanates from European institutions can be instantly transposed in exactly the same way as it was when we were in the European Union.

I and my officials are very seized of that, not just because of the work that the Scottish Government needs to do but because of the work that the committee does. I know that the committee wants to be kept informed of how the Scottish Government is dealing with regulations, directives and so on, but—this is very important—there are also stakeholders who have a direct or indirect interest and can provide advice. Indeed, the committee has been hearing from some of those stakeholders, and I have read the evidence that has been provided to it.

There are a range of ways in which the Scottish Government signals that it is consulting on measures. I am satisfied that, with the way in which that approach is working so far in relation to any measures being considered for alignment, stakeholders are being properly informed about proposals and people are having the opportunity to take part in consultations, give advice or share their thoughts. However, as I said at the start of the session, we are in an emerging situation with regard to making the system work. It is not a finished product, and I am keen for my officials to work with, for example, the clerks of this committee on the optimal way of ensuring that you—and, by extension, others, by which I mean stakeholders—are best informed about measures that are coming forward.

You could take a top-line strategic approach to the European institutions and look at, for example, the European Commission's annual reports and plans for the years ahead and the priorities of the incoming presidencies of the European Union. It would be very helpful if the Scottish Government could signal what we expect to come through those processes and how we intend to remain aligned with the proposals and priorities. There are also specific measures that can be taken. I do not want to speak too long in answering one question from Ms Boyack, but I will just say that I have a list of particular measures that have gone through the

internal process of how we best manage to retain alignment. If anyone is interested in hearing a little bit more about that, I would be happy to share it.

Sarah Boyack: Thank you, cabinet secretary, but I asked two specific questions, and it would be good to get your feedback on both of them. The first was on the suggestion about a website in which everything is made very transparent and that makes it clear where you intend to align, where you do not intend to do so, and where you are thinking about it to ensure that the range of different interest groups from civic society, the third sector, businesses and COSLA can see what is coming next.

I also asked about ministerial working groups that are responsible not just for on-going monitoring but for planning ahead. In that respect, I am interested in hearing about what is happening not just internally in the Scottish Government but with other devolved Governments as well as with the UK Government.

Angus Robertson: I am perfectly happy to take away specific suggestions from colleagues on which transparency mechanisms would be most workable. I have no ideological or administrative position on whether it should be one way or the other; we can take away your suggestions and work with clerks and members of the committee on what might be the best way of doing things.

As for ministerial working groups, I would say that such matters operate largely at an official level. Things come back from Scotland house in Brussels and one takes a view, in conjunction with legal and external affairs colleagues, on whether proposals are such that alignment measures need to be taken. That has not been escalated to any ministerial working group that I have sat on, because no issue has arisen that has needed a cross-departmental approach. We are making this work by taking matters directly into directorates and areas of ministerial responsibility, and, thus far, nothing that I am aware of has required anything more than that.

Perhaps I can flag up some of the areas in which decisions on alignment have been required, just to give members a sense of the scope of that activity. Issues relating to Transport Scotland and the transposition of EU directives and secondary legislation are being managed through the Scottish statutory instrument process. Members will be aware of on-going issues with regard to single-use plastics and seed potatoes. There are also issues relating to plant health, gene editing and genetically modified crops, UK statistics and district heating—I could go on. Those are all active issues on which the Scottish Government is working to retain alignment. I should also confirm that they are issues on which the Scottish Government has been open to consultation and

working with interested parties and those who are closely involved in such matters.

Seed potatoes, for example, are a really big issue in the agricultural sector, now that our access to the European market in that respect has been closed. Our interlocutors in that policy area are very well aware of the Scottish Government's position, and they are working very closely with us.

We will do our best to continue to work with stakeholders and the committee on the best way of managing that and what format might be used, whether it be a website, sifts or whatever. All of those different models have been tried, and a balance needs to be struck between doing that sort of thing effectively and efficiently and not doing it that way.

Sarah Boyack: I appreciate those comments, given that the issue of tracking the Government's considerations has been raised by quite a few witnesses both orally and in written evidence. The proposed approach would very much help with transparency. After all, the annual report is welcome, but what about the rest of the year? What about the Government's forward planning? There is also the issue of not just being able to deal with what has already been decided at the EU level but having the capacity to anticipate what is coming next. Many witnesses from whom we have heard would very much welcome a commitment in that respect.

Angus Robertson: That is totally understood. I should also have highlighted the undertaking to ensure that the alignment status of issues that are covered in any proposed legislation in the Scottish Parliament is clearly flagged up. In other words, there is an awareness of how those things figure with regard to the specific matter of legislation.

Sarah Boyack: I am talking not just about issues on which you have decided to use legislation but issues on which you have decided to use other methods or have decided explicitly not to use legislation or to act in that way.

Angus Robertson: I understand the point.

Mark Ruskell: My question is in a similar vein. Wider transparency is important. The report that is before us talks only about the use of the section 1 powers and not about alignment in the broadest sense, which, as Ms Boyack has just explained, is about not just legislation but the interpretation of law.

I want to move on from that conversation to think about what the different levels could be. You have described some of the challenges that parliamentary committees face with the sift process, but you have also said that consultation on those areas generally takes place with stakeholders. What kind of in-depth information

can we get, particularly in areas in which, as you have said, there might be a divergence that is in Scotland's interests? How can that be flagged up at an appropriate level for the committee and stakeholders? That is not really clear in the report that is before us, and it is clear that decisions have been made where Scotland has diverged from the European Union.

Angus Robertson: First, the Scottish Government's position is that we wish to remain aligned with the European Union, but I appreciate that you are drawing attention to those cases in which there has been a degree of divergence. Perhaps my colleagues might want to flag up specific examples, but I can give plenty of examples of areas in which we have wanted to retain enhanced standards. Divergence in that sense does not necessarily mean that one's decision will result in a lessening of standards. There have been specific and often very technical cases in which we have wanted to ensure that we have even higher standards.

Nevertheless, I get the point at issue: how can one be fully aware of all of this? Clerks and colleagues have had discussions to explore ways in which that can happen, and I am open to understanding what the best way of taking that forward might be. Ms Boyack has suggested one way. On the other hand, one could have a very paper-based system—and then one would realise that such a system would take up all of one's time and would not help with having a laser-like focus on the areas that the committee would probably be most interested in. I want to be helpful in that respect, so we are looking at different ways of doing that.

Do colleagues want to add anything?

George Macpherson (Scottish Government): One example of an issue on which we have not had alignment is a UK measure that we consented to, which was the UK statistics statutory instrument and the concordat on statistics. That SI, which repeals the remaining EU regulations that oblige the UK to transmit statistics to Eurostat, is very much a consequence of Brexit, but the fact is that we are no longer in alignment with that requirement. That said, it is important to highlight that the concordat advocates certain standards with regard to the provision of statistical information, and the Scottish Government has made it clear that we will remain in alignment with that outcome even though the process in question has changed.

Another example that I might mention is the Heat Networks (Scotland) Act 2021. As its purpose is to allow district heating schemes to be established in Scotland with greater ease, it aligns very closely with EU measures. However, it is not a clear-cut situation, and the legislation illustrates

quite well the point that alignment decisions are not necessarily a simple question of aligning or not aligning. Although that aspect of the act aligns with EU measures, parts of the EU directive in question relate to consumer protection, and those sections are reserved to the UK Government. Progress in that respect is on-going, and we are making representations to the UK Government on the best way of ensuring the implementation in Scotland of UK-wide consumer protection legislation that would take account of our interest in making it easier to establish heat networks.

Mark Ruskell: That is useful. I think that the cabinet secretary explained things well earlier when he talked about laws that are effectively redundant now that we are outside the structure of the European Union and those areas in which powers are reserved under the current settlement. However, there are also the conscious decisions to diverge, and transparency in that respect is perhaps missing at the moment.

Perhaps I can give you an example. An assumption has been made that we are in alignment with the EU climate change laws, because we have our own climate change legislation, which was updated quite recently with enhanced targets that actually go beyond EU law. However, I am doing a piece of work with a colleague in the Bundestag on the EU taxonomy, which is effectively part of EU law, with regard to which sectors are deemed to be climate neutral and therefore worthy of investment in the European Union. As I am sure the cabinet secretary is aware, that is a big area of debate not just in Germany but elsewhere in the EU. Are we or are we not aligned with the EU taxonomy on green investment, which is part of EU climate law? Has there been any consideration of that? If so, where did the conversation go? That is one example in which things are not entirely clear.

10:30

George Macpherson: On that specific example, I am not aware of the position, and I would need to speak to colleagues about it. I am not the lead official for that area.

Mark Ruskell: [*Inaudible.*]—area of alignment with EU policy, such as climate.

George Macpherson: Indeed. A key part of the European Commission's work plan for 2022 is the fit for 55 package, with the range of methods that the EU is considering pursuing this working year in order to meet and enhance its climate targets. That is an area that colleagues in the directorate-general for climate action are considering very closely. Exactly how we will respond to that is still under consideration. We can certainly provide more information on that.

Mark Ruskell: That shows the level of information that it would be useful for wider stakeholders to understand, particularly if we are going to get into a debate about joining the EU. We might like what is in the EU taxonomy and we might like the way that European investment is going, but we might not. That is an example of where that level of information and consideration within the Scottish Government—I hope that there is consideration of that—

Angus Robertson: That is entirely helpful. The purpose of having a committee session such as this is to gauge what members of this committee and the Scottish Parliament more widely regard as the optimal way to understand processes. Our default position is that the Government wishes Scottish legislation to be de minimis in alignment with that of the European Union. That is our position.

Mark Ruskell: Unless it is not in Scotland's interests. That is what you caveated earlier.

Angus Robertson: Indeed. However, the baseline position is that we are trying to remain as aligned with the European Union as we can be and as it makes sense to be. I understand that, for you to be able to understand how that is working in relation to specific measures, you will have queries about how it works. You have a range of ways whereby, if you are unaware of how things are working, I, as the cabinet secretary with lead responsibility for external affairs, can answer on that, through answers to direct questions in the chamber and written questions, and through statements from the Scottish Government in relation to specific legislation.

We possibly need to draw together the range of ways in which one can access information about things, so that it is obvious how one does things or can do things, and so that we can make it absolutely clear how we are going to flag up and incorporate information about the processes that we are using in relation to specific legislation and proposals by the European Union. If there are additional ways in which we can proportionately answer such queries—for example, I refer to Ms Boyack's suggestion of a website, although people are also interested in paper—those are all things that can be looked at. From our perspective, it is a question of how we get a balance between doing what we are doing—we are remaining aligned—and ensuring that you have as much information as you require for your purposes in scrutinising the Government's work. I am entirely open to considering how we can best do that.

Donald Cameron: Those of us who were members of Parliament in the previous session, as veterans of both continuity bills as they went through Parliament, recall your predecessor, Mike Russell, saying that the keeping pace powers

were crucial and necessary. I can hear his voice even now saying that. The fact remains, however, that they have not been used. Perhaps more strikingly, there are no current plans to use them. Given that background, we are entitled to ask why not.

There are two important background points to that question. First, there has been a huge amount of EU legislation in the past year: I think that a total of 1,650 legal acts have gone through this year. Secondly, and to reinforce points that Sarah Boyack and Mark Ruskell have made, many people who have made submissions to us want greater rationale and more explanation as to why decisions to align, or not, have been taken.

Angus Robertson: I am sure that Mr Russell will be delighted that he is in your thoughts. You obviously have the advantage of having been involved in the process at a time that I was not. I deal with the ball as it is at my feet. The committee will know that the power is there in legislation for it to be used, and it is the Scottish Government's intention to do so, but not within the current reporting period.

I will draw your attention to an issue that you might want to come back to in order to understand how the decisions are made. The recast drinking water directive came into force on 12 January 2021, following formal adoption by the European Parliament on 16 December 2020. There is a two-year transposition window. The Water (Scotland) Act 1980 provides for regulations to be made insofar as they relate to standards that must be met by water that is for human consumption. However, the recast directive introduces a much wider set of requirements, such as those relating to risk assessments of catchments, supply systems, internal plumbing systems and so on.

I flag that up to the committee as an area in which we are considering using the powers. When Government ministers have said that it is important that they have that legal club in the metaphorical bag to be used in certain circumstances but have not yet used it, the question, of course, is why they needed the power in the first place. The answer is exactly for circumstances such as those.

I have looked closely at the whole area, and it strikes me that, because the range of ways in which that Government can legislate and introduce regulations is very broad, we should seek to use the most sensible way of doing that—Mr Cameron, as a lawyer, will know that. Being pragmatic, Government has sought to make sure that it does that in the most appropriate way. In short, the process was proposed for a good reason, is there for a good reason and will be used for a good reason, but has not been used yet. Other methods have been used to deliver the Scottish

Government's intent of retaining alignment with the European Union.

Donald Cameron: Are there other means of alignment through primary or secondary legislation? You have helpfully provided a table that describes what you have transposed using Scottish statutory instruments. Can you help us to understand why you made the choice to use other secondary legislation and not the keeping pace power? I am interested in your comment at the beginning of this discussion when you described the keeping pace power as a "backstop". Is that how you see it? Is it a safety net to be used when all else fails and there is no other method to use? Is that the best way of understanding the section 1 power?

Angus Robertson: It is probably appropriate to defer to my colleague on the legal aspects of that, but it is not too difficult to get one's head around the fact that there are different ways in which Government can regulate and retain alignment, or the speed and efficiency with which it can do that. It is a case of trying to work out which is the best of the clubs in the bag—I use that metaphor for a second time, although I am not a good golfer—to make sure that we are incorporating or retaining alignment within the legislation in Scotland. Perhaps my legal colleague can fill in some of the gaps.

Lorraine Walkinshaw (Scottish Government): The section 1(1) power is largely the replacement for the section 2(2) power in the European Communities Act 1972. The Scottish Government's policy on using subject-specific powers to align with EU law in preference to the general section 1(1) power is in line with the approach previously taken to the use of section 2(2) of the 1972 act.

Angus Robertson: We are trying to maintain continuity in how we do things. Our practice is evolving as we try to find a way to use the new legislation and to work with the new reality of the UK as a third state. We are applying our administrative approaches to ensure that we are delivering on the alignment target. We are using the full panoply of measures, but we did that previously; it is not new.

Donald Cameron: It is important to make two points about that. There is a difference. First, under the previous provision, you were mandated to do that, whereas it is now a policy choice. Secondly, although we could argue the pros and cons forever, there is now an absence of input at EU level from the UK and Scottish Governments as a result of Brexit. Do you accept that there are now differences in how that works?

Angus Robertson: Absolutely. It is my view and that of the Government that it is detrimental

that we are no longer in the room and able to influence the decisions that are made at European Union level. We seek to change that. You are right that that is a description of the facts. There is a change in circumstances. We must ensure that we are making the best decisions in the best possible way in the circumstances.

Jenni Minto: I return to the issue of transparency. Last week and this, the committee took evidence from various organisations that have raised concerns about what might be called a race to the bottom if we are not aligning with EU law. They mentioned the environment and public health, and today we heard about human rights. How is the Scottish Government liaising with such organisations to allow us to learn from their experience and from the connections that they have across the EU or more widely, so that we can know about the legislation that impacts on those areas?

Angus Robertson: There is a full panoply of engagement. I am sure that many of you feel that we spend half our lives in Teams meetings. I certainly do, whether that is meeting with COSLA or with any number of other organisations. Our colleagues in Government deal with stakeholders, some of whom you have taken evidence from. It is helpful to get that evidence. I have previously said to the committee that input from those stakeholders is valuable, because it allows us to reflect on how things are working and on what we need to do more or less of. I stress again that we want to ensure that we do that as well as we can.

The Scottish Government's intention is to retain what we believe are the higher standards of the European Union, rather than join the race to the bottom that is signalled by the approach of the United Kingdom Government to no longer being part of the European Union. If anyone is concerned that decisions are being made in Scotland with the intention of diverging from or diluting the higher standards of the European Union, I can give them an absolute assurance that that is diametrically opposed to the Scottish Government's aims.

The trade agreements that are being forged by the UK Government illustrate a weakening of standards compared to those previously agreed by the European Union. We are right to be concerned about a race to the bottom, but the Scottish Government is not in that race. We are racing to try to maintain high standards in their own right, so that we have the highest standards, but also so that, when we rejoin the European Union, we can do so with the greatest of negotiating ease, because we will in effect be fulfilling the standards of the *acquis communautaire*.

Jenni Minto: I will raise an issue that we were asked about earlier. Previously, organisations

would have had funds, or would have been able to apply for European funds, to support their structure and to enable them to feed in. This is probably not an issue for you, cabinet secretary, but I make a plea to the Scottish Government to recognise that in the forthcoming budget.

10:45

Angus Robertson: Thank you for putting that on the record. You have the advantage of having been in the previous evidence session; I was not. That is helpful. We go through the written and oral evidence, take away suggestions that have been made, and consider them.

Scottish organisations were represented in Brussels for a long time. They were co-located in the same building, which was an excellent model that ensured that local government and other organisations with an interest in European Union decision making were in the same building with Scottish Government officials. I want us to repeat that model when we become a member state of the European Union, because it is clearly the best one.

On the absence of funding, we do not have enough time in this evidence session to consider the replacement of existing European Union schemes with the anaemic and underpowered versions from the UK Government. Members should consider what has happened in respect of the Erasmus programme and how much less has been spent on the Turing scheme, and how much less has been spent on economic support through the UK compared with the structural funds and other European Union regional funds. That is no doubt another area in which people will, unfortunately, find that they are in a worse-off position than they were in when we were part of the European Union.

We will definitely take that away. I want people to be informed and to have the administrative capacity to inform and influence Government thinking and decision making. Obviously, we live in constrained times. If the Cabinet Secretary for Finance and the Economy was sitting here, she would no doubt impress on me the need for us to be financially responsible. We are, of course, financially responsible, but we need to ensure that we have the best governance that we can have.

If there is a feeling that it might not be obvious who made that point, can that be shared with me and officials, please? We will then have a look at any specific proposals that have been made.

Sarah Boyack: I want to follow up on that issue, as that is a valuable area of questioning. Some witnesses have suggested the concept of having different forums in which people could exchange best practice and be helped to keep up with what

is happening in Europe through briefings. That links with the point that COSLA made about its joint links with local government across the EU. Bringing those together would help the third sector, raise civic society connections and be good for transparency for businesses and our parliamentary scrutiny.

Angus Robertson: Yes. Exactly that point was made in a discussion that I had with the voluntary sector. The Scottish Council for Voluntary Organisations has had extremely positive and mature links with colleagues across the rest of the European Union. I think that Irene Oldfather, who is an erstwhile colleague who is very well versed in how Europe works, is involved in that.

Colleagues in the SCVO were extremely keen to ensure that we use Scottish civic society's links and, by extension, those of local government and professional organisations, for example, so that we are fully sighted on developments. We need to look at all the ways in which we can ensure that we are up to speed and have the best co-ordination and the best practice. We need to look at what we are doing with this and that, take that away and work out a format.

I have given the example of speaking with the SCVO. We are already having such discussions. However, there is the question of the format and regularity of discussions and the extent to which they are structured around particular proposals that emanate from Europe or the priorities of the European Commission or of an incoming presidency. We want to be flexible to ensure that we capture experience, insights and good will.

That is a very good suggestion.

Sarah Boyack: Advance planning and advance notice would help—

Angus Robertson: Understood.

Sarah Boyack: —because, as well as enabling you to draw on that expertise, that would address the issue of transparency, the importance of which came across strongly in the evidence to us.

Angus Robertson: There is also a flipside, which is that we have colleagues in the third sector who are involved in projects, planning and other priorities, and we might not be aware of what those are. Therefore, it is a two-way street. I completely agree that we want to make sure that we are as well aligned as possible in that regard.

George Macpherson: There are two key documents here, the first of which is on the Scottish Government's approach to policy making. That document sets out exactly how we take forward the policy process. A key part of that is consultation with stakeholders. The Scottish Government values stakeholder input. We acknowledge that a wider range of interests and

expertise leads to better policy making. That is part and parcel of our standard approach to the development of any policy.

The second key document is the Scottish Government's international framework, which sets out that there are opportunities to be had and experiences to be gained from engaging with the international for a, especially in the European Union, in developing our approach to policy. We acknowledge that there are potential impacts or things to be learned about the approach to take there.

It is therefore a requirement for all policy directorates in their areas of specialisation to take consideration of both those documents. We expect them to have such conversations as part of their engagement with stakeholders, whether that is about legislation or policy development. As the cabinet secretary said, we might be unaware of the precise nature of the engagement that is taking place across every policy area. That is part and parcel of the job of developing policy.

Angus Robertson: Notwithstanding the on-going policy engagement that takes place, I see the advantage of speaking to organisations such as COSLA and the SCVO. There are undoubtedly other organisations that we could speak to, and I would welcome any suggestions from colleagues about who might want to take part in such a process. I think that it would make sense for us to take that away and explore with those organisations how we can best work together with that specific aim in mind, and I am keen that we do that.

Sarah Boyack: Such engagement helps you as a Government, it helps the organisations in question and, if we are kept up to speed with that, it helps us with our parliamentary scrutiny.

Angus Robertson: Indeed.

The Convener: Mark Ruskell has a supplementary question.

Mark Ruskell: When our predecessor committee considered the replacement for the registration, evaluation, authorisation and restriction of chemicals—REACH—regulations, one of the points that the non-governmental organisations raised at the time was that they very much valued the EU policy development forum, not just in relation to policy development, but from the point of view of on-going scrutiny of the evolution of those regulations over time in the EU. With the advent of the UK REACH regulations, there was a real sense of loss that that forum had not been replaced. As a result, although NGOs might be consulted, they are not involved in co-producing the regulations and taking part in their on-going scrutiny and evolution. The depth of EU

policy making has been lost, and I think that that is worth reflecting on.

Angus Robertson: We need to do more than reflect on that. We need to see whether there is anything about the way in which we are working that might be considered by some people to be less engaging and involving. If there are lessons that we should take to heart from that process about how we do things—for example, lessons that we should do things differently, do more or do less—I am very open to learning them.

Much of the work of the EU and its institutions is not newsworthy in the sense of providing headlines from day to day, but that is because the iterative process that the European institutions use is such that it brings member states and the different parts of civic life along with it. The loss of our participation in that process is one of the huge tragedies of our leaving the EU. In the meantime, we should do what we can; learn best practice; and get back into the European Union as a member state as quickly as possible—I will not sign you up to that, Mr Golden.

Maurice Golden: I always enjoyed my time on the European Committee of the Regions—a very important forum. I hope that we can continue to feed into that process in some way, shape or form.

We discussed consultation exercises. On any decision not to use powers, what sort of consultation exercise is conducted with COSLA and other relevant stakeholders?

Angus Robertson: I will defer to colleagues on the technical aspects of any specific measures. With regard to what has emanated from European decision making, there is not a long list of things that we are not proceeding with. We are trying to remain aligned.

It is easiest to explain non-alignment with, for example, water control measures that apply to Mediterranean nations. We do not need to align with those, because we are not a Mediterranean nation. There are all kinds of examples. That, to me, having reviewed everything, is the biggest single reason that something is not proceeded with—that it has no impact on us whatsoever, in the current framework wherein we are a third-party state.

I am not aware of any significant proposals on which we have taken the view that we will not proceed with it and will not remain aligned because we think that it is a terrible idea. The tendency is that things are not proceeded with because they do not impact on us.

I do not want to pluck ideas or particular measures off the top of my head. My colleagues might have a list of regulations or directives that have nothing to do with us; there are quite a lot of

them. Were we a member state, of course, we would have needed to do what member states need to do. However, given our circumstances, as we currently find ourselves outside the European Union, we do not need to do those things.

Maurice Golden: Is there a routine consultation on such issues, however brief? I should just mention that, with regard to the Mediterranean example that you provided, I would say that Dundee is the Milan of the north.

Angus Robertson: I hope that I am not opening a can of worms, but I do not think that the Scottish Government liaised with Dundee City Council about regulations pertaining to water management in the Mediterranean.

I understand the tensions around the wish to have maximum transparency and understand every single proposal. As I said at the start, I have lived in that world. I have sat on your side of the fence and, week in and week out, gone through piles of things that are largely not relevant or interesting. I understand that there is still a wish to say, “I would like to see what is happening, if I may, please, thank you very much.” I get that. However, I am sure that members appreciate the tension between that wish and just saying, “Listen, there is a whole range of things on which we don’t need to consult, because they have absolutely nothing to do with us.”

I see that my colleague’s hand is raised. We are going to get some examples of regulations that have nothing to do with us.

George Macpherson: Yes. I mention the habitats directives, in which there are specific mentions of particular habitats in Europe, or of particular species of animal in Europe, that are protected. It would make no sense to make efforts to apply that in Scotland, because we do not have those habitats or animals in Scotland.

Regulations on product standards are coming up, I think, that will go into extremely detailed recommendations on, for example, the exact size of product labelling in a particular context. Such aspects are small technical or operational decisions that, ultimately, when we consider them against our approach of outcome-based policy making, do not alter the outcome that we are seeking to achieve. That outcome is to remain in broad alignment with the European Union and to ensure that we protect and advance the standards that we enjoyed as a member of the European Union.

11:00

Since late 2020, there have been of the order of between 1,000 and 2,000 pieces of EU legislation. The vast majority of those are technical or

operational. We would not expect to prioritise going through all those with a detailed analysis or consideration of exactly how they do not apply, because the application or non-application will be obvious.

I come back to the point that, when something is relevant or when there is a factor that we need to consider, our approach to consultation and policy making stands. It would be strange for the Scottish Government not to consult COSLA about something that would impact on local government responsibilities, so we would carry out that consultation, and we would replicate that across the policy areas, where that is relevant.

The Convener: Mr Cameron will ask the final question.

Donald Cameron: I just want to pursue that issue. There might be situations in which the Scottish Government chooses positively not to align with EU law. I am trying to think of an example. Say that the EU took a view on the use of pesticides that did not meet the same policy aims as the Scottish Government's. Do you accept that there could be situations in which you might choose not to align, and not simply because that is not relevant or not necessary? Do you accept that there may be divergence?

Angus Robertson: Yes, and that is a good example. There is an example in relation to plant health where there has been a divergence, but it has been a divergence upwards. What is the Scottish Government's policy objective in relation to the European Union? It is that we remain aligned as best we can, using the different ways that we have outlined. However, when things come along on which we want to have enhanced standards, that is exactly what we have been doing.

I understand that people want to be assured that we do not want a diminution of standards, and I am delighted that we are hearing that from Conservative members, too. If there has been a divergence, we have sought to have higher standards. I will probably not pronounce this properly, but one area that has been flagged up to me is about Xylella. Is that correct?

George Macpherson: That is correct.

Angus Robertson: Fantastic—I got the pronunciation correct. That is an apposite and timely example of the approach that has been taken in Scotland. It is not to diverge in the sense that we wish to disapply or have significantly worse standards; it is that, *de minimis*, we want to have the same standards, but they could be higher. Incidentally, that approach was open to the United Kingdom Government and the Scottish Government prior to our being taken out of the European Union against our wishes.

The Convener: I said that that was the final question, but I have a supplementary question on that point. You said that we have gone to a higher standard than the European Union and that there is no divergence, but the UK Government has not done so. One issue that was raised in the evidence that we have received was about how that might affect market access principles in the UK, particularly in relation to Xylella. Can you explain what you think the outcomes of that might be?

Angus Robertson: I will give my colleagues a moment to think about that, specifically in relation to the point that you raise.

More generally, the question has been an apposite one in relation to single-use plastics. That is where the internal market act intersects with the common framework arrangements that preceded the act. Those arrangements gave the ability for there to be divergence in policy in different parts of the UK. That was agreed by the United Kingdom in the House of Lords, and I have been trying to make progress on that in recent months.

I have some good news to share with the committee. Last week, I chaired a meeting on common frameworks with the UK Government, the Welsh Government and the Northern Irish Government on making progress with common frameworks. I have to say that, in stark contrast to my other suboptimal experiences, that is an example that shows that it is possible to make progress. I commend my colleagues from the UK Government and from Wales and Northern Ireland, as well as the officials who were involved.

Should the common frameworks operate in the way that they can, it will be possible to make the kind of decisions that we want to make on single-use plastics, for example, regardless of the approach that the UK Government takes. That may apply elsewhere, and specifically to the point that you raised, convener.

I do not know whether either of my colleagues wishes to say anything on that, but I am informed that the UK Government has chosen to do the same as the Scottish Government on Xylella. I commend it for following the Scottish Government's lead.

The Convener: I welcome that clarification on that particular issue, by way of an example of what might happen. I am not sure that it will be as easy for everything else.

Thank you very much for your attendance, cabinet secretary. I also thank your officials from the Scottish Government.

11:06

Meeting continued in private until 11:12.

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

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