

Finance and Constitution Committee – 4th Report (Session 5) on Common Frameworks: Scottish Government Response

Introduction

The Scottish Government welcomes the Committee's timely and comprehensive report on Common frameworks. It is an important contribution to ongoing consideration of one of the implications of EU exit for devolution and the powers of the Scottish Parliament.

The Scottish Government's response has grouped the Committee's recommendations thematically in the interests of clarity and read-across. However it is perhaps useful to set out briefly the wider context in which common frameworks are being considered, including issues around definition, the process by which they will be established, and how they relate to the wider, and far-reaching, constitutional consequences of EU exit.

What are Frameworks?

As the UK leaves the EU the UK Government and the devolved governments have agreed to work together in some devolved areas currently subject to EU law. As the Committee is aware, the UK administrations have agreed a set of principles which set out in more detail where we might need common frameworks and why, as well as how, we are approaching this work. These principles, which include the commitment to respect devolution and the democratic accountability of the devolved legislatures, are set out in Annex A, and remain the key reference point in considering the purpose and operation of common frameworks.

A framework may take different forms and be implemented in different ways. Fundamentally frameworks are ways of working between the four administrations in a post-Brexit UK.

A framework will set out where there is agreement to take a common UK, or GB, approach, and how that will function. A framework could potentially take a variety of forms, for example: common principles or goals; a collective evidence base; minimum or maximum standards; harmonisation; limits on action¹; or mutual recognition. Form should follow function, with the precise nature of any framework dependent on the policy area, and the objectives being pursued.

Frameworks may be implemented by legislation, by executive action, by memorandums of understanding or by other means depending on the context in which the framework is intended to operate. Where a framework includes formal governance arrangements, whether on a statutory or administrative basis, Scottish Ministers will remain responsible for decisions taken in respect of devolved matters, and will be accountable to the Scottish Parliament for these decisions. Where

¹ On this point, it is important to stress that the frameworks statement of principles agreed at JMC (EN) in October 2017 makes clear that any framework will "maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules".

statutory arrangements are required, these will be subject to the relevant parliamentary procedure.

Frameworks, Devolution and the Constitutional Consequences of Brexit

Common frameworks are part of wider activity necessary to address the constitutional implications of Brexit. Leaving the EU would mean leaving a complex ecosystem of laws and treaties, relationships and interdependencies that has developed incrementally over the last 50 years. Leaving the EU requires action to protect devolved powers, and to safeguard devolved interests as regards future relations in respect of EU and wider international matters, including trade deals. It also requires a reform of the arrangements for the conduct of inter-governmental relations

The Scottish Government of course believes that Scotland's interests are best served by being an independent EU member state, and events since the 2016 referendum have made that case all the stronger. However, for as long as Scotland is part of the UK, we will work to ensure that devolution is respected, protected and enhanced, and that Brexit is not a pretext to roll back or dilute devolved powers. We will also resist any moves to constrain devolution in the name of a vaguely defined "UK internal market". We welcome the report's comments in this regard.

As the Committee's report makes clear, consideration of frameworks therefore leads into wider questions. Among these are the need for overarching governance arrangements post-Brexit to ensure consistency not just across common frameworks, but also in relation to, for example, a clearly defined role for the devolved governments and legislatures at every stage of negotiating, concluding and implementing trade deals that touch on devolved interests.

The Scottish Government's response sets out some of these wider necessary changes including: where and how power sits and is exercised across these islands; meaningful legal protections for devolution, underpinned by judicial oversight; a genuine relationship of equals between governments; and adjustments to the outmoded doctrine of parliamentary sovereignty to take account of the realities of devolution.

Process

It has always been the overarching planning assumption that frameworks would be implemented by the end of the transition period. In other words, they are meant to be longer-term agreements on common ways of working, not legal fixes necessary for a functioning statute book at the point at which the UK leaves the EU, should that day come.

In March 2018 the UK Government undertook an initial analysis of the 153 areas of EU law that intersect with devolved competence in each devolved administration. That report categorised which areas would require legislation to implement common rules and ways of working, those areas which were likely to require non-legislative

agreements, and those areas where no additional action was considered to be required. The initial analysis also listed 12 areas that the UK Government believed were reserved, but that the Scottish and Welsh Governments, and the Northern Ireland Civil Service believed were devolved and subject to ongoing discussions.

A phased approach since has been adopted to the development of frameworks. More detail on the process being followed is provided at Annex B.

Since April 2018 framework development work has focused on detailed policy development and the drafting of framework outlines in each of the priority framework areas on a without prejudice basis, given the ongoing uncertainty about the UK's future relationship with the EU. This work has enabled policy teams to reflect on the working arrangements that will be required, and to consider whether there is a need for a legislative underpinning for those arrangements. The outcome of these discussions is recorded in framework outline agreements.

Once completed each outline agreement will set out:

- the area of EU law under consideration, the current arrangements and any elements from the policy that will not be considered. It will also record any relevant legal or technical definitions.
- a breakdown of the policy area into its component parts, explain where the common rules will and will not be required, and the rationale for that approach. It will also set out any areas of disagreement.
- how the framework will operate in practice: how decisions will be made; the planned roles and responsibilities for each administration, or third party; how implementation will be monitored, and if appropriate enforced; arrangements for reviewing and amending the framework; and dispute resolution arrangements.

Based on this technical work undertaken by policy teams, on 4 April 2019 the UK Government published a further iteration of the analysis and categorisation of the framework policy areas².

The analysis in the report set out a number of changes:

- an increase in the number of policy areas from 153 to 160;
- it reflected conclusions reached so far by policy teams that primary legislation will not be required in 3 of the 24 areas originally proposed: Hazardous Substances Planning; Nutrition; and Public Procurement;
- the number of areas where non-legislative arrangements are being considered has reduced from 82 to 78; and
- the number of areas where no further action is required to create a framework has increased from 49 to 63.
- A reduction from 12 to 4 in the number of areas where discussions are ongoing as to whether they are devolved or reserved.

2

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf

As further work is undertaken to identify the new arrangements that will need to be implemented by the teams with the detailed technical and operational knowledge of the individual policy areas, it is likely that further changes will be made to the categorisation.

Once policy development is completed following stakeholder engagement, final framework proposals will be put to Ministers. The next phase of work will be to prepare and implement the final framework proposals which will include preparing the implementing legislation and non-legislative elements of individual frameworks, and then taking those through legislation and non-legislative mechanisms.

At this stage primary legislation is only being considered in a small number of policy areas, and in these areas only some elements of the framework will be implemented in primary legislation. The Scottish Government's view is that legislation is only likely to be required where necessary to enable functions to be exercised, or, similarly, to establish co-operation arrangements that could not be established by non-statutory means. In no circumstances would the Scottish Government consider legislation that adjusted the devolution settlement so that Ministers were no longer responsible for the exercise of functions, or accountable to the Scottish Parliament for doing so.

In some instances legislation could be accompanied by substantive non-legislative arrangements articulating agreed ways of working between the administrations. In the majority of areas, non-legislative arrangements, such as concordats, are being considered and it is envisaged that fixes to EU law that have been put in place under the EU (Withdrawal) Act may provide the basis for interim or longer term framework arrangements, depending on the outcome of negotiations with the EU.

In reality therefore, many frameworks are likely to be a mixture of legislation (primary and/or secondary) and non-statutory arrangements. The nature of the scrutiny procedures put in place will need to reflect this complex picture.

Response to Committee Recommendations and Conclusions

Responses are grouped thematically: the paragraph numbers from the report are retained for ease of reference.

Agreeing Common Frameworks by Negotiation and Consent

22. *As the Committee stated in our interim report and supplementary report on the European Union (Withdrawal) Bill (EUWB), we strongly believe that both the process for agreeing common frameworks and the actual content must be arrived at through agreement and not imposed.*

23. *We therefore welcome that the progress made with common frameworks has been achieved on the basis of negotiation and agreement between Governments.*

64. *We welcome that common frameworks have, to date, proceeded on the basis of agreement between the Governments and that common frameworks will respect the devolution settlement. As we stated in our interim report on the EUWB LCM, "the process for agreeing common frameworks and the actual content must be arrived at through agreement and not imposed".*

The Scottish Government welcomes these recommendations. The starting point in the negotiation and implementation of any new frameworks must be that the reality of devolution is recognised and respected. We will only agree common frameworks where these are in Scotland's interests.

The Scottish Government is doing all we can to secure Scotland's place in the EU, in line with the wishes of the majority of people in Scotland. If Brexit does happen, that will require a new approach to inter-governmental relations across the UK, founded on the principle of progress by agreement, and based on equality, with no hierarchy of administrations. The wider implications of Brexit for inter-governmental relations are considered below.

As the three statutory UK Government reports to date on the use of S12 regulations under the EU Withdrawal Act make clear³, where discussions on frameworks proceed on the basis on negotiation and agreement between governments, it is possible to make progress without the threat of UK ministers unilaterally adjusting the competence of Scotland's democratically elected parliament and democratically accountable ministers. The S12 powers are incompatible with established constitutional practice in the UK, and have been shown to be unnecessary – S12 should now be repealed.

On 4 April, the UK Government published an updated report on officials-level consideration of frameworks across the four UK administrations⁴. The report shows that some progress can be achieved with this approach, which the Scottish

³ <https://www.gov.uk/government/publications/the-second-european-union-withdrawal-act-and-common-frameworks-report>

⁴

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf

Government will continue to take so long as the UK Government does not attempt to impose policies and laws on Scotland against our democratic will. As the Scottish Government has made repeatedly clear, any new and additional constraints on devolution would be unacceptable in any form. Any new arrangements agreed should have the same effect for all governments, but will in no way adjust the Scottish Parliament's ability to legislate in devolved areas.

Parliamentary Scrutiny

24. *It is clear however that any finalisation and agreement of common frameworks will be in the longer term. This provides time for the Scottish Parliament and others to contribute to the development of these frameworks and this report sets out our expectation of what that role should be.*

66. *Some common frameworks may be developed on an interim basis depending upon the outcome of negotiations with the EU, whilst in the event of a 'no deal' scenario "a wide range of pragmatic and practical arrangements" will be required in non-legislative areas. We seek confirmation from the Scottish Government that these interim frameworks and 'practical arrangements' will be made available to the Scottish Parliament for scrutiny. We will look to work with the Scottish Government to develop proportionate and timeous scrutiny procedures.*

99. *We welcome confirmation that officials are working together on common frameworks but note that the number and range of potential types of frameworks being developed by different policy areas adds complexity. Given this approach we recommend that each agreed common framework is laid in every relevant Parliament to better facilitate transparency.*

138. *Legislative common frameworks will be subject to Parliamentary scrutiny through the usual legislative procedure which provides for greater transparency and stakeholder engagement. Non-legislative approaches, however, do not provide an automatic right for Parliamentary consideration and amendment either during development or once agreed which could mean Parliament being presented with the equivalent of a 'fait accompli' with little scope to influence or test the compromises that have been made in order to secure agreement.*

139. *We welcome the Cabinet Secretary's recognition that a Parliamentary role in nonlegislative common frameworks is "absolutely essential" and the Scottish Government's commitment that Parliament should have an opportunity to consider and agree legislative and non-legislative arrangements for common frameworks, in line with the current IGR agreement.*

141. *We recommend that Parliament should have a formal role in relation to the process for developing, agreeing and implementing non-legislative common frameworks. We welcome the Scottish Government's commitment, in its response to the EUWB LCM to "consider, with the Parliament, appropriate procedures for such consideration" and we therefore ask the Brexit legislation working group to take this matter forward as a matter of priority.*

172. Parliamentary scrutiny and stakeholder involvement in the development and operation of common frameworks can also build trust and ensure that agreed frameworks are as robust as possible and should work as envisaged. As such we reiterate our recommendation that Parliament should have an opportunity "to scrutinise and agree non-statutory arrangements for common frameworks as well as legislative arrangements."

The Scottish Government welcomes these recommendations and recognises the crucial role Parliamentary scrutiny will play in the development, implementation and oversight of any future Common frameworks.

The Scottish Government has made clear that it agrees with the Committee that the process for the agreement of common frameworks must be transparent and inclusive. We have also previously given a commitment to update the Committee on a regular basis, and will continue to do so.

Last year the Cabinet Secretary for Government Business and Constitutional Relations wrote to the Convener offering to consider some joint working between the Scottish Government and the Committee to engage with stakeholders to ensure we fully understand their needs and priorities with regard to these framework arrangements. Discussions are ongoing between officials and the Clerks about the nature and timing of any such event given the continuing uncertainties of the Brexit negotiations.

We will continue to keep the Committee and Parliament fully engaged in preparations for a possible no-deal exit, while acknowledging the uncertainty and confusion that is a consequence of the UK Government's approach to EU negotiations.

The Scottish Government has made clear that the UK Government should take immediate steps to rule out the possibility of a 'no deal' exit but as a responsible government we have a duty to prepare for all eventualities and to minimise and mitigate the impacts in Scotland as far as we are able to do so.

From the Scottish Government's perspective devolved governments can only agree to any no deal arrangements that are without prejudice to future long term Framework arrangements and that respect devolved competence. Such arrangements would therefore have to:

- be temporary in nature;
- preserve decision making for Scottish ministers;
- reflect a cross government approach in line with the framework principles agreed by JMC(EN) in 2017; and
- respect the accountability of Scottish Ministers to the Scottish Parliament for decisions made in those devolved areas.

It is important to emphasise the short-term nature of any working level agreements made under this process: if such arrangements were to form part of future frameworks they would have to go through the proper framework process, which would of course include parliamentary scrutiny. Working level agreements are

interim arrangements and will not become frameworks without parliamentary scrutiny.

In addition, consideration will have to be given to whether any further parliamentary scrutiny is required where it is proposed that the SIs previously considered by Parliament on the basis that they would relate to powers to be used in the event of a no-deal Brexit, and on a short term basis until a longer term framework had been agreed, may now themselves be considered as the basis of longer term arrangements.

The Scottish Government is committed to work with the Parliament to develop a suitable scrutiny procedure and would welcome the views of the Finance and Constitution Committee as well as other committees, from their experience of the current existing examples of agreed processes on which we can draw, such as:

- the protocol agreed between the Scottish Government and the Scottish Parliament to ensure adequate scrutiny of the large number of statutory instruments required to ensure a functioning statute book on EU exit⁵;
- the written agreement between the Scottish Parliament and Scottish Government on inter-governmental relations⁶; and
- existing processes for parliamentary scrutiny of concordats, MOUs and similar agreements.

It may however be easier to develop a proportionate approach to scrutiny and draft the protocol once there is greater clarity about the range of forms frameworks may take. Consideration will also need to be given to what role the Parliament might have in the ongoing monitoring and scrutiny of frameworks post-implementation. In the first instance we suggest it would be helpful to agree some shared principles on which such scrutiny should be based. These principles could perhaps assist in identifying the key stages in the development or operation of a framework at which the Scottish Parliament is likely to want to consider whether it wishes to undertake scrutiny of the framework.

Environmental Principles

42. Given the different approaches to environmental principles being proposed by the UK and Scottish Governments, we seek clarification from the Scottish Government as to whether this represents a common framework where the Governments have agreed to policy divergence, and if not, what impact two sets of differing environmental principles will mean for common frameworks.

43. Given these differing approaches, it will also be important to ensure that there is clarity as to where responsibilities will lie in future in the environmental field and that there is no encroachment on devolved competence without the consent of the Scottish Parliament. This also demonstrates the increased complexity that the Scottish Parliament will face in undertaking scrutiny in common framework areas and

⁵ http://www.parliament.scot/S5_Delegated_Powers/20180911CabSec.pdf

⁶ http://www.parliament.scot/20160309_IGR_Agreement3.pdf

which could have resource implications which the Scottish Parliamentary Corporate Body will have to address.

The Scottish Government's current consultation on Environmental Principles and Governance in Scotland closed on 11 May. As the consultation paper made clear, responsibility for environmental policy and law are devolved to the Scottish Parliament and Scottish Ministers, and this will have to be reflected in future arrangements for environmental governance, as accountability cannot be separated from responsibility. Any arrangements to ensure the implementation of policies and laws relating to Scotland's natural environment must respect the responsibility of the Scottish Parliament.

All four UK administrations are developing policy on maintaining the four EU environmental principles and ensuring effective environmental governance within each administration after any EU Exit. As the committee is aware, on 5 April, the Cabinet Secretary for Government Business and Constitutional Relations set out the Scottish Government's intention to bring back the provisions on keeping pace with EU law in new legislation and to put in place the legislative and institutional arrangements that will be required in maintaining the role of environmental principles in developing future Scottish environmental policy and legislation⁷.

The Scottish Government will wish to be satisfied that the UK Environment Bill does nothing to cut across or confuse accountability for environmental standards and improvement. On 4 February, the Chair of the House of Commons Environmental Audit Committee invited the Scottish Government to submit evidence to the Committee's consideration of the UK Government's draft Environment (Principles and Governance) Bill. The Cabinet Secretary for Environment, Climate Change and Land Reform responded to that invitation in a letter on 26 February⁸, setting out Scottish Ministers' concerns about how the proposals in the Bill would interact with the devolution settlement.

The Scottish Government is currently considering the detail of the consultation responses. An independent analysis of the responses will be published and the Scottish Government will set out a systematic approach to addressing future environmental principles and governance needs in Scotland. The Scottish Government will continue to work with this Parliament, the UK Government, other Devolved Administrations, our public bodies and stakeholders to ensure that we have effective measures in this area across the UK that are proportionate and respect the devolution settlements.

UK Internal Market

60. *At EU level the internal market is defined through Treaties and legislation. In the absence of such provision, however, it is not clear what the UK equivalent is. We therefore question how common frameworks can be developed to "enable the*

⁷ <https://www.gov.scot/news/continuity-bill-update/>

⁸ <https://www.parliament.uk/documents/commons-committees/environmental-audit/190226-Rosanna-Cunningham-to-Chair-Environment-bill.pdf>

functioning of the UK internal market" when that UK internal market is not defined as such in law.

65. *We strongly agree that the ongoing work to define the UK internal market also respects the devolution settlement such that enabling the functioning of the UK internal market must not and will not be at the cost of adjusting the devolved competencies without the consent of the Scottish Government and Scottish Parliament.*

The Scottish Government welcomes these recommendations, particularly that any adjustment of devolution without the consent of the Scottish Parliament in respect of the "UK internal market" would be unacceptable.

The European Single Market is a highly complex and consciously designed supranational "ecosystem" of law, regulation, institutions and principles that has developed over many years.

The committee is right to highlight the definitional challenges around the concept of the "UK internal market". We agree that this proposition, which, as the committee notes, carries no legal definition, should not be deployed to adjust devolved competence without the consent of the Scottish Parliament. As with the dispute over returning EU powers in the EU (Withdrawal) Act, it would be unacceptable that Scotland is taken out of the EU against our will, and then subject to new constraints on devolution as a consequence.

The Scottish Government is not convinced that a significant gap will emerge in the operation of the internal market across the UK on exit. In our opinion, any issues that do emerge on exit can be addressed through mechanisms in individual frameworks in line with the agreed JMC statement of principles on frameworks⁹.

We recognise however that a range of views have been expressed on the UK internal market, though it is the view of the Scottish Government that these issues should not be overstated or overcomplicated. However, consideration of internal market issues has of course always been a key aspect of agreeing the scope of common frameworks, and we remain committed to working through the cross-border issues that arise within the UK within common frameworks as per the agreed statement of principles

The Scottish Government's starting position is that the functions under consideration in frameworks discussions are properly devolved matters. Accordingly, governance arrangements must respect the devolved nature of these functions.

Devolution case law has already established that it is entirely legitimate to make divergent policy choices that have a market impact – for example banning smoking in public places. We will resist all attempts to roll back the ability to make devolved policy choices tailored to Scotland's particular needs and circumstances.

⁹ <https://www.gov.scot/binaries/content/documents/govscot/publications/minutes/2017/10/joint-ministerial-committee-communique-october-2017/documents/954f2bef-d7f1-4170-b2ba-6596d5c3d19b/954f2bef-d7f1-4170-b2ba-6596d5c3d19b/govscot%3Adocument>

Where, as part of developing devolved policy, it is in Scotland's interests to consider questions of, for example, intra-UK trade, we will of course continue to do so.

Managing Policy Divergence and Protecting Devolution

61. *For both the UK and Scottish Governments, the key focus of common frameworks appears to be managing policy divergence across the UK. We therefore consider that resolving by negotiation the extent to which policy divergence can exist within common frameworks is critical to securing longer term agreement to common frameworks.*

140. *This matters since the Scottish Government has committed "not to create divergent policy" in some areas where it would cut across future frameworks. We welcome the Scottish Government's commitment that non-legislative frameworks will not limit Parliament's ability to legislate in devolved areas. The practical impact of this commitment however is that the Scottish Government has committed not to introduce or to support legislation both now, and in the future, if they are to maintain agreed frameworks. The Committee will consider further whether this could imply an inappropriate limit on Parliament and we will seek views of other Committees (both in the Scottish Parliament, the UK and other devolved Parliaments).*

The Scottish Government will not accept any new constraints or limits on the exercise of devolved competence, and is clear that nothing in the process of considering Common frameworks will in any way alter the competence of the Scottish Parliament or Scottish Ministers: we would not agree to any arrangement that did so. Arrangements for any framework will be entered into on a voluntary basis.

We will consider where it is in Scotland's interests to agree common UK approaches in the absence of EU rules, but any such approaches must be agreed between equals, not imposed, and the same rules must apply in the same way to all actors. It will not be a matter of agreeing in any way to limit the powers of the Scottish Parliament or Scottish Ministers.

The starting point must be however a recognition that the current devolution settlement and EU law already allows for often significant policy divergence, and that the frameworks principles agreed at JMC, including the stipulation that any agreed framework will "maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules".

Application of EU Principles

62. *In our Interim report on the EUWB LCM, we stated our belief that the application of general principles of EU law to common frameworks is a critically important area of work. As we heard, the UK and Devolved Governments already have experience of managing policy divergence within the requirements of the EU internal market underpinned by principles such as subsidiarity and proportionality. These principles enable flexibility for tailoring policies which common frameworks*

also seek to achieve. We therefore seek clarification from the Scottish Government as to whether it has considered (or will consider) underpinning the development of common frameworks with such principles.

63. Given the UK and Scottish Governments are each developing environmental principles to underpin their policy development we seek information from the Scottish Government on whether it also proposes to enshrine other EU principles into Scottish law.

As noted above, the European Single Market represents a set of uniquely complex and consciously designed supranational arrangements, encompassing law, regulation, institutions and principles enshrined in the treaties and EU law. Principles such as subsidiarity and non-discrimination both operate within this complex “ecosystem”, and define its operation.

The best means of ensuring the continued application of these principles in a UK setting is for Scotland – and the whole of the UK – to remain in the EU. The Scottish Government believes that the principles agreed at JMC (EN) in October 2017 are the primary point of reference in determining the nature and purpose of any common frameworks that are agreed necessary in the absence of EU rules. However, as noted above, we intend to bring forward new legislation to ensure that Scots law continues to align with EU law and ensure no regression in standards and protections currently enjoyed.

In his letter to the Presiding Officer on 5 April¹⁰, the Cabinet Secretary for Government Business and Constitutional Relations set out the Scottish Government’s intention to bring back the provisions in the Scottish Continuity Bill on keeping pace with EU law in new legislation, underlining the Scottish Government’s commitment to no regression in standards should EU exit take place.

Ensuring Consistency between Frameworks and Related Agreements in Related Areas such as Trade and International Agreements

85. In our EUWB LCM report, we state that consideration needs to be given to the interaction between common frameworks and the EUWA, Trade Bill, International treaties and agreements. To date we have not heard any evidence that these different forms of agreement making are being considered in any 'joined up' manner and there is a risk that an agreement in one sphere could be inconsistent or conflict with that in another.

86. We therefore seek confirmation from the UK and Scottish Governments of how they plan to ensure consistency across common frameworks and agreements in other spheres. Where non-legislative common frameworks require revision to reflect subsequent agreements such as trade agreements or international treaties, we seek clarification of the process for making such revisions including an opportunity for Parliamentary scrutiny and agreement.

¹⁰ https://www.parliament.scot/S5_Finance/General%20Documents/Letter_from_Cabinet_Secretary_-_Continuity_Bill.pdf

The committee makes an important point on the need to ensure consistency and read-across between any future Common frameworks and other cross-cutting issues such as future trade deals and compliance with international obligations. The next phase of inter-administration frameworks activity agreed at JMC (EN) is designed in part to help surface and map these types of dependencies. Work to review policy development during the next phase (phase III) of frameworks activity will also look at issues of consistency.

While international relations is a reserved matter, the observation and implementation of international obligations is a devolved responsibility. The MoU on Devolution (and associated Concordats)¹¹ sets out the UK Government's commitments to cooperate with the Devolved Administrations on negotiating and implementing international obligations.

The most effective means of ensuring any future frameworks are compatible with international agreements – including trade deals - is to ensure that the dependencies between these international agreements and devolved matters are fully taken in to account, with appropriately enhanced roles for the devolved institutions in such matters.

These points are set out in detail in the Scottish Government August 2018 proposals for a much enhanced role for the Scottish Government and Scottish Parliament in the preparation, negotiation, agreement, ratification and implementation of future trade deals¹².

We have been clear that there is an urgent need for reform of inter-governmental arrangements on international relations, not least because of the fundamental changes leaving the EU would bring about.

The Scottish Government believes that significant changes are required to ensure:

- that the potential impact of international treaties on each of the devolved nations is considered at the outset;
- that the Scottish Government's voice is heard as the UK Government develops its international ambitions, with appropriate arrangements in place for establishing UK strategic international priorities that take account of Scotland's interests;
- that robust governance structures – including dispute-resolution mechanisms – will be in place to prepare negotiating positions for relations with third countries and the EU; and
- that the Scottish Government and Scottish Parliament are recognised as equals with the UK Government and Parliament in their respective areas of competence, and, where necessary to fully carry out their respective functions, full consideration is given to appropriate enhanced powers to

¹¹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf

¹² <https://www.gov.scot/publications/scotlands-role-development-future-uk-trade-arrangments/>

negotiate certain international agreements and fulfil international obligations after the UK has left the EU.

New arrangements on international relations, agreements and obligations should be established, ensuring that they are in place before negotiations get underway in earnest on the future partnership with the EU. Without prejudice to the specific proposals made by the Scottish Government in respect of trade, and the ongoing discussions on future arrangements in that area, these new arrangements should contain principles, structures and mechanisms to ensure that Scotland's voice is feeding into the UK Government's international ambitions, from early policy influencing, through negotiations to implementation and scrutiny.

The UK Government and devolved administrations are equals in their areas of competence, and this should be recognised in the level of respect between them. As such, the Scottish Government should be involved in policy development in reserved areas which will impact on devolved areas, whether directly or indirectly.

Inter-governmental Relations and Managing Frameworks Disputes

87. We note the on-going review of IGR initiated by the JMC, however, progress with this review appears to have stalled. One of the principles for common frameworks is to, by agreement, ensure compliance with international obligations whilst respecting the devolution settlement. We agree with witnesses that it is vital therefore that there is a robust and trusted process of inter-governmental relations, especially in relation to dispute resolution if this principle is to be delivered upon. We recommend that the review of IGR is taken forward urgently and request clarification from the UK Government of the timetable for completing this review.

88. A clear and trusted mechanism to resolve disagreements between Governments is essential if common frameworks are to be agreed rather than imposed and any disputes with subsequent implementation addressed quickly and effectively. We note that one of five IGR review workstreams includes "how we seek to avoid and resolve disagreements in the future". Given this work is to inform common frameworks, we request further information from the Scottish Government on the progress of this work stream and how the timescales for its completion will enable it to inform work on dispute resolution and enforcement mechanisms for common frameworks.

Despite our efforts alongside the other devolved governments, the Scottish Government shares the committee's frustration at the slow pace being made in relation to the pressing need for new machinery and procedures for inter-governmental relations across the UK. We agree with much of what the Welsh Government set out in its paper 'Securing Wales' Future'¹³, and we have since set out the principles on which the Scottish Government believes new IGR machinery should be based:

¹³ https://gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%C2%B9%20Future_ENGLISH_WEB.pdf

- equality between governments,
- a firm statutory basis for the devolved institutions, underpinned by judicial oversight
- a real – rather than symbolic – statutory basis for the Sewel Convention – again subject to judicial oversight, and
- an adjustment to the outmoded doctrine of unlimited Parliamentary sovereignty to take account of the realities of devolution, just as it was adjusted to take account of EU membership.

The Committee is correct that the ongoing quadrilateral review of Inter-governmental relations is considering the issue of future dispute avoidance and resolution in parallel with work on common frameworks. The Scottish Government is clear that the current dispute resolution protocol is inadequate in that it permits the UK Government determine whether issues raised qualify as disputes, and to act as the final judge even in matters where it is involved as a party to the dispute.

The Process for Identifying Frameworks Areas

97. *We note the ongoing work to refine the policy areas that will be subject to common frameworks but, to date, no information has been made available about why certain areas have been identified over others as being subject to common frameworks. This has meant that Parliament and others have had no opportunity to understand how and why these areas are regarded as requiring common frameworks. We recommend that the further iteration of policy areas to be consulted on clearly identifies and explains the reasons for any changes.*

98. *We recognise that both legislative and non-legislative approaches may be necessary to securing agreement in different policy areas. However, given the number of frameworks that could arise over time (and the time frames over which they could endure) greater transparency over the reasons why a particular approach has been adopted for each common framework would support more effective scrutiny. We recommend that the Scottish and UK Governments include this information as part of each agreed framework.*

The phased approach to policy collaboration at officials-level between UK Government and the devolved governments is designed in part to address these points.

Determining the scope and nature of the intersect of EU law with devolved competence, and from that what may be needed by way of a common UK approach if and when the UK leaves the EU is an iterative process, although it is important to emphasise that the original analysis and categorisation was undertaken by the UK Government without the involvement of the devolved governments. The April 2019 frameworks analysis, referred to above, provides the most recent overview of this process. We will continue to keep the committee and Parliament updated.

As further policy work is undertaken by policy teams with detailed technical and operational knowledge of individual policy areas, it is likely that further changes will be made to the categorisation.

Level of Detail Provided in Agreed Frameworks

108. *There is a balance to be struck between providing sufficient information to give effect to agreed frameworks without being overly detailed so as to risk their agreement by UK and Devolved Governments. We consider that the final agreed frameworks require to have sufficient information so as to ensure that those required to implement them can clearly understand their purpose and the outcomes they are designed to achieve.*

109. *We therefore recommend that frameworks (especially non-legislative frameworks) should include the following, most of which the UK Government has confirmed is currently being considered:*

- *their scope and the reasons for the framework approach (legislative or non-legislative) and the extent of policy divergence provided for;*
- *decision making processes and the potential use of third parties;*
- *mechanisms for monitoring, reviewing and amending frameworks including an opportunity for Parliamentary scrutiny and agreement;*
- *the roles and responsibilities of each administration; and*
- *the detail of future governance structures, including arrangements for resolving disputes and information sharing.*

The Scottish Governments agrees with this approach: iterative framework policy development will consider among other things the scope, application, governance, implementation and oversight arrangements for any common framework, and this will be recorded in the outline framework agreement. The final shape of any future framework will of course depend on a variety of factors, including the nature of the intersect of EU law and devolved competence, the terms of the UK's withdrawal agreement and the shape of the UK's future relationship with the EU, should it in fact leave. As set out in response to paragraph 61, while frameworks will set out the extent to which future co-operation is necessary or desirable, we will not accept any framework that seeks to limit or proscribe otherwise legitimate policy divergence.

Stakeholder Engagement and Involvement

136. *Despite commitments from the UK and Scottish Governments that there is a role for Parliament to scrutinise common frameworks this has not yet been made manifest in the approach adopted by the JMC. Whilst we welcome the phase 3 proposals for consultation on some outline frameworks as well as the next iteration of policy areas, this will not extend to seeking views on future working arrangements between governments currently being considered. We also seek clarification from the Scottish Government of what the proposal for a "controlled process of stakeholder engagement" would entail and the reasons for not consulting more widely during this phase.*

137. *We recommend that in order for Parliament and stakeholders to meaningfully contribute towards framework development, the future approaches being considered by the UK and Devolved Governments are included in the consultation. Such a collaborative approach will help build confidence that future common frameworks will endure over governments and will work on the ground.*

The Scottish Government recognises the central role that full and sustained stakeholder engagement will play in the design and implementation of any future common frameworks. The iterative process already described above entails a controlled process to test initial proposals with stakeholders so that further work can be undertaken to refine and calibrate these. As set out, the planning assumption is that final frameworks do not have to be agreed and implemented until the end of the transition period: a comprehensive programme of stakeholder engagement will be a necessary part of this process.

At this stage, the intention is to explore with key stakeholders where policy thinking has reached between the administrations – it is not about testing final or near-final proposals. Plans are at an early stage and the intention is that all legislatures will be part of future engagement activity. The Scottish Government will work with subject and other relevant Scottish Parliament committees to facilitate meaningful engagement during the development process.

Oversight Arrangements

165. *Whatever the final governance arrangements for each framework we consider that, in order to respect the devolution settlement, those who exercise oversight in relation to devolved areas should be accountable to the Scottish Parliament. This is irrespective of whether those functions are undertaken by new or existing Scottish or UK bodies. We therefore request confirmation from the UK and Scottish Governments that common frameworks will reflect this approach.*

166. *As we did in our report on the Trade Bill LCM, we recommend that any frameworks which propose UK wide oversight agencies should also recommend diverse representation to ensure that they are viewed, both domestically and internationally, as credible and transparent. The Committee therefore recommends that the need for diverse representation, including as a minimum knowledge of the relevant Scottish, Welsh and Northern Ireland sectoral area, should be reflected in any appointment process.*

167. *Given any monitoring bodies will require to endure across successive governments we seek clarification from the Scottish Government that any new Scottish agencies or changes to existing agencies' functions will be set out in legislation. This approach will ensure that information about the funding, expertise and accountability mechanisms necessary to fulfil those monitoring duties is clearly set out and supports those functions to endure across successive governments.*

The Scottish Government agrees with these recommendations. We will not accept any diminution of accountability in relation to the oversight of framework arrangements in devolved areas. Any new frameworks must be compatible with the

October 2017 JMC frameworks principles, including that they “will respect the devolution settlements and the democratic accountability of the devolved legislatures”.

On the question of any new UK-wide oversight structures, the Scottish Government has made clear that these will only be agreed where it is in Scotland’s interests to do so, and where there is no diminution of existing accountability to the Scottish Parliament and Scottish Ministers. It is imperative that these are not just diverse in their composition, but that the devolved institutions have a clear role in the scrutiny and appointment process, which should include a requirement for the consent of the devolved institutions.

We envisage that any changes to the functions of existing bodies would require legislative changes and would therefore be subject to Parliamentary scrutiny in the usual manner. However, we do not envisage the creation of multiple new bodies to support and monitor any future frameworks.

Reporting and Complaint Mechanisms

168. Given the wide range and complexity of governance arrangements being proposed as well as the potential for existing arrangements to be supplemented by new arrangements, there is the potential for those individuals and organisations (subject to those arrangements) to be unclear as to how to raise concerns. We therefore seek confirmation from the Scottish Government on whether common frameworks will include information on the following –

- *public reporting requirements;*
- *Parliamentary accountability;*
- *complaints processes.*

173. As we heard, there may be a role for external stakeholders in invoking compliance mechanisms when governments are less keen to act. We therefore seek information from the Scottish Government as to the extent to which it envisages that stakeholders and the public will be able to raise complaints or concerns in relation to potential non-compliance with or activities contrary to common frameworks.

174. We also seek clarification from the Scottish Government of the extent to which non-judicial remedies are being considered including arbitration or adjudication in relation to disputes arising from alleged non-compliance with frameworks.

Information around governance, monitoring, enforcement and complaint mechanisms will be set out in individual frameworks outlines. The next phase of frameworks policy development will consider these questions in more detail, and this will include stakeholder engagement on where we have reached in initial thinking on the scope of where frameworks might be necessary or desirable, and on associated governance arrangements.

Funding

185. *The Committee notes that the ongoing review of inter-governmental relations has not yet completed its deliberations but is clear that the review must address issues relating to how any replacement inter-governmental structures will be funded. We also note that the current IGR dispute resolution mechanism has only been used in relation to disputes relating to funding. Given this previous experience and the number of types of frameworks being proposed, we consider it vital that common frameworks are clear about the funding and expenditure arrangements necessary to successfully deliver them.*

186. *In addition, as frameworks are to endure over a number of years then we consider any funding necessary to deliver them should also be committed over the longer term.*

187. *We note that the first and second quarterly reports on common frameworks are silent on funding for common frameworks and therefore seek clarification from the Scottish Government as to the extent common frameworks will:*

- *include a clear funding statement and any explanations to how any figures are derived;*
- *identify who will provide those funds as well as the likely costs which may fall on others;*
- *confirm the time frame over which any funding will be provided.*

While it is true that most of the disputes considered under the existing protocol set out in the Memorandum of Understanding between the UK Government and the devolved governments relate to aspects of funding, this is to be expected given that that process was only intended to be used in exceptional circumstances when the dispute could not be avoided or dealt with through informal channels, and, explicitly, is not suitable for disputes which are primarily political in character.

The Scottish Government has been clear that any costs related to EU exit should not have a detrimental impact on Scotland's public finances. We continue to press the UK Government to consider fully the financial implications of EU exit for Scotland, including the potential costs of common frameworks so that Scotland is not disadvantaged or adversely affected as a result.

We agree that any funding solution should be sustainable and will require a degree of commitment from the UK Government. Although EU exit was not Scotland's choice, we will work with the UK Government to mitigate the worst effects in Scotland.

It is important that repatriated powers transfer to the Scottish Parliament, along with a sustainable funding package. This will ensure that decisions can be taken in the best interests of the Scottish economy and Scottish people.

Decisions around funding for frameworks may take place as part of the UK Government 2019 Spending Review, depending on the timeframe that the Review covers. Details of the Spending Review have yet to be confirmed. The Scottish

Government is ready to engage on funding and would like to do so at the earliest possible opportunity.

Conclusions

188. Whatever the terms of any UK exit from the EU, common frameworks will be required over the longer term, to deliver common policy and regulatory approaches in some areas currently governed by the EU. We welcome the progress being made with common frameworks on the basis of negotiation and agreement between Governments. As we state in previous reports we strongly believe that common frameworks must be arrived at through agreement and not imposed. We consider that key to this is resolving by negotiation the extent to which policy divergence can exist within common frameworks.

The Scottish Government agrees that progress is possible where the process is managed on the basis of negotiation and agreement, and the UK Government's own assessments confirm this. They have shown that S12 of the EU Withdrawal Act is unnecessary, and this section should now be repealed.

The Scottish Government welcomes the emphasis placed on protecting devolution and defending the powers of the Scottish Parliament, and reiterates that any common framework agreed will in no way constrain devolved competence, in line with the frameworks principles agreed at JMC in October 2017.

189. A robust and trusted process of inter-governmental relations (especially dispute resolution) is also vital to agreement making. Parliamentary Committees across the UK consider the Joint Ministerial Committee mechanism not fit for purpose, with the Interparliamentary Forum on Brexit calling for more effective inter-governmental and interparliamentary mechanisms to examine common frameworks and to deliver greater transparency. As we heard, however, the current review of IGR appears to have stalled and we therefore recommend it is taken forward urgently.

We agree with the consensus of opinion across parliamentarians and academics that the current inter-governmental relations mechanisms including the Joint Ministerial Committee are not fit for purpose and will not bear the weight that will be placed on them post-EU exit. We also agree the joint inter-governmental relations review needs to progress with a greater degree of urgency. In the absence of progress on that joint review, the Scottish Government is currently undertaking its own review of inter-governmental relations to assess the changes that would be required to ensure that they meet Scotland's specific needs.

The view of the Scottish Government is that the best arrangement for co-operation and good relations with the other governments of our islands is independence. If we are to take part in a debate, even in the short term, on reformed inter-governmental relations in the UK, it is clear that a new settlement is needed. This new settlement must be based on:

- recognition of equality between governments,

- a firm statutory basis for the devolved institutions, underpinned by judicial oversight
- a real – rather than symbolic – statutory basis for the Sewel Convention – again subject to judicial oversight, and
- an adjustment to the outmoded doctrine of unlimited Parliamentary sovereignty to take account of the realities of devolution, just as it was adjusted to take account of EU membership

190. Parliamentary Committees at the Scottish Parliament and across the UK to develop a co-ordinated approach. We consider that the final governance arrangements for each framework should ensure that public bodies which exercise oversight in devolved areas should be accountable to the Scottish Parliament. We also make a number of recommendations about the content of non-legislative frameworks which will facilitate greater transparency and accountability.

The Scottish Government will not accept any diminution of current arrangements to ensure transparency and accountability to the Scottish Parliament. Transparency and parliamentary scrutiny of future frameworks arrangements – legislative or non-legislative – will be central to their implementation, operation and oversight. The Scottish Government looks forward to continuing to work with the committee on this and the other issues raised in its report.

Frameworks statement of principles agreed at JMC (EN), October 2017

The following principles apply to common frameworks in areas where EU law currently intersects with devolved competence. There will also be close working between the UK Government and the devolved administrations on reserved matters and excepted matters that impact significantly on devolved responsibilities.

Discussion will either be multilateral or bilateral between the UK Government and the DAs. It will be the aim of all parties to agree where there is a need for common frameworks and the content of them.

The outcomes from these discussions on common frameworks will be without prejudice to the UK's negotiations and future relationship with the EU.

Common Framework - Principles

Common frameworks will be established where they are necessary in order to:

- enable the functioning of the UK internal market, while acknowledging policy divergence;
- ensure compliance with international obligations;
- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
- enable the management of common resources;
- administer and provide access to justice in cases with a cross-border element;
- safeguard the security of the UK.

Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:

- be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent;
- maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules;
- lead to a significant increase in decision-making powers for the devolved administrations.

Frameworks will ensure recognition of the economic and social linkages between Northern Ireland and Ireland and that Northern Ireland will be the only part of the UK which shares a land frontier with the EU. They will also adhere to the Belfast Agreement.

Phased approach to frameworks development agreed between the UK and Devolved Governments

A 5 phase approach to the development of Frameworks has been developed. Please note that timings are indicative, and progress will vary by frameworks area.

PHASE 1 of multilateral engagement on common frameworks took place between October 2017 and March 2018 and focused on establishing the principles and proof of concept for this programme of joint work between the UK Government and Devolved Administrations.

PHASE 2 running from April 2018 onwards, focused on detailed policy development. The final stage of this phase of work is to sight UK and Devolved Government policy Ministers on framework outlines and seek their clearance to undertake informal multilateral stakeholder engagement on a without prejudice basis.

PHASE 3 is intended to provide a period of review, consultation and more detailed policy development up to and beyond March 2019. It has been broken down into the following work streams.

Work stream 1: Further Policy Development

- Explore in detail the interaction with the Future Economic Partnership and identify related timescales for implementation;
- Continue to explore further dependencies including the DA role in the negotiation of trade agreements and other international obligations.

Work stream 2: Stakeholder Engagement

- Policy teams will test initial outputs through informal multilateral stakeholder engagement in specific policy areas without prejudice to Ministerial views and other stakeholder engagement as appropriate.

Work stream 3: Seeking Agreement

- Completed framework outlines will then be submitted to policy Ministers and endorsed through relevant collective agreement processes and JMC(EN).

PHASE 4 will cover preparation and implementation of final framework proposals, from March 2019 onwards.

PHASE 5 will comprise any post-implementation arrangements from December 2020 onwards.

Timings for the phased approach are indicative and are intended to provide flexibility for policy teams to move through the phases at different speeds depending on the dependencies and circumstances of individual policy areas.