

Common UK Frameworks – Summary of Written Evidence

The Committee invited views on proposals for post-Brexit common UK frameworks at the start of summer recess. Specifically, comment was invited on the following themes—

- What should replace the current EU policy-making processes across the UK;
- Addressing the governance gap in relation to the monitoring, implementation and enforcement of frameworks;
- The interaction between frameworks and the negotiation of new international agreements including free trade deals;
- Funding of obligations and commitments arising from frameworks.

Ten responses were received from the following individuals and organisations—

- COSLA
- Professor Michael Keating, Centre on Constitutional Change
- Scottish Centre on European Relations
- NFU Scotland
- Brexit and Environment academics
- Royal Society of Edinburgh
- RSPB Scotland
- Scottish Environment LINK
- Ian Wright and Professor David Heald, University of Glasgow
- The Law Society of Scotland

The key issues raised in the responses are summarised below.

Background/The Need for Common Frameworks

There was consensus around the need for common frameworks with the majority of respondents referring to the UK Government’s framework analysis¹ which identifies 24 policy areas where frameworks will be required, a further 82 where they might and 49 where no further action is required. There was also consensus that the establishment and agreement of common frameworks would be a highly complex exercise, both practically and politically and a degree of concern at the lack of progress made on the issue in recent months.

RSPB Scotland states that “the principles justifying EU-level cooperation and regulatory alignment on environmental matters apply equally, if not more strongly, to cooperation and regulatory alignment between the four UK nations.”

The Law Society describes the 24 areas as “important, complex and technical in nature”, noting that they comprise highly regulated policy areas and have been implemented through a variety of legislative and non-legislative mechanisms at both UK and devolved levels. It would welcome an update on work completed in this area

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686991/20180307_FINAL_Frameworks_analysis_for_publication_on_9_March_2018.pdf

since April 2018 including on the 12 policy areas which the UK Government believes are reserved.

The Law Society provides a “survey” of the 24 areas including details of the EU law concerned and the implementing legislation at a UK or devolved level as an annexe to its submission

Both Professor Keating and the RSE suggest that work will be required to define what is meant by the UK internal market which, according to Keating is “ill-defined in relation to a modern economy and welfare state.” Wright and Heald also note that prior to the referendum, “there were almost no references to the internal UK market” largely due to the fact that it was protected by being subject to EU law. For them, this raises questions in respect of the need for harmonisation across the UK and on whether the UK Government unilaterally determines common frameworks or whether the devolved administrations have rights of consultation or veto.

The SCER highlights uncertainties in respect of the future relationship between the UK and the EU and suggests that the longer-term picture “could well not emerge until some years after exit.” An “inevitable consequence” of this lack of clarity is that it will be difficult to construct the UK’s internal arrangements.

The SCER suggests that a “no-deal” Brexit would likely result in discussions around common frameworks giving way to “a crisis response” needed to cope with the resulting “severe legal political and economic consequences.” Should a deal be agreed, it is unlikely that common frameworks would be needed during the transition period (to December 2020) as the UK would continue to apply the *acquis*. Given that the final relationship between the EU and UK will need to be negotiated during the transition period a “no-deal” Brexit would remain possible at the end of the period. Again, the SCER suggests that discussions relating to common frameworks would not be a priority in this scenario.

The SCER notes that the UK Government proposes to “remain highly aligned with large parts of EU policy and the *acquis*” including in a number of devolved areas. Whilst it describes the UK’s proposals as “highly unrealistic”, their adoption would result in the objective of common frameworks shifting from managing divergence with EU law to ensuring ongoing implementation of and compliance with relevant aspects of the *acquis*.

Should the UK Government’s position move to a “soft-Brexit” the SCER suggests that the focus would shift towards adapting the UK’s internal governance, including common frameworks, to meet the requirements of EEA membership and supports “commonly agreed” common frameworks where necessary to support the effective functioning of internal UK markets and to enable future trade deals.

The Law Society provides a similar outline of the options and potential ramifications in the event of an agreed transition period or lack thereof.

The NFUS acknowledges the potential risks to intra-UK trade posed by unconstrained policy divergence running the risk of internal market distortions.

However, it is “equally clear” of the need for devolved administrations having the flexibility to develop and implement appropriate policy measures.

The NFUS notes the significance of many of the 24 areas identified as needing further work to the agricultural sector and “is comfortable” with the prospect of these areas being subject to common frameworks with the “important caveat” that agreement is “found commonly between the four parts of the UK.”

With respect to post-CAP agricultural funding arrangements, the NFUS “argues strongly” that a framework should be established. Under such a framework, the NFUS is clear that financial support “must be managed on a devolved basis” and that cross-cutting issues “should be agreed upon a common regulatory framework.”

Professor Keating suggests that the list of policy areas to be subject to common frameworks “has meant starting with the detail before the basic principles have been worked out.” Similarly, the Brexit and Environment academics describe as “deeply regrettable” the fact that so much uncertainty remains around common frameworks at this late stage in the Brexit process. However, in their view, the fact that a “quick fix” might be required to deal with pressing issues arising from Brexit “should not prevent a more reflective consideration of the wider structures in due course.”

For COSLA, a “fundamental issue” that has not been resolved in the various communiques published after JMC meetings is that there is little clarity as to what common frameworks actually are and how they might operate in practice. It notes that the various combinations of “legal, political, organisational and aspirational issues” may not result in stability and could well be contested once in operation. In COSLA’s view the Withdrawal Act provides little further clarity in this regard as does continuing uncertainty around the outcome of the Supreme Court’s consideration of the Scottish Legal Continuity Bill.

COSLA’s initial assessment of the published list of policy areas “finds that 64 of them concern local government” with “18 having a high impact, 16 a medium impact and 36 a lower impact.” It notes that many of them relate to local government powers whilst a “significant proportion concern environmental matters. It therefore welcomes the UK Government’s announcement that it will “create a consultative mechanism between the UK and local government to deal with Brexit.”

Wright and Heald state that political difficulties stem from a lack of trust between the UK Government and devolved administrations. In their view devolution in 1999 was viewed as a critical juncture in the devolved capitals but as “marginally inconvenient” for Westminster. The unanticipated nature of Brexit has therefore led to “unprecedented conflict” between the governments with the UK Government “reasserting its primacy.” Coupled with “massive cutbacks in Whitehall capacity” as a result of austerity and the “unprecedented workload” generated by Brexit, they note that “seeking agreement with politically hostile devolved administrations has unsurprisingly been a low priority for the UK Government” (as also stated by the Public Administration and Constitutional Affairs Committee (PACAC)).

Wright and Heald note that the October 2017 JMC communique suggests “a significant degree of consensus as to what a common framework should look like”

whilst pointing out that the principles set out in it “do not address fundamental issues” including whether the approach will address UK or GB issues (with implications for Northern Ireland), how the final content of frameworks will be decided, why the operation of governance arrangements is likely to differ from one framework to another. In their view, it is not enough to speak of it being the aim of all parties to agree the need for and content of frameworks without defining agreement and the mechanisms needed to ensure this outcome.

RSPB Scotland expresses concerns in respect of the Cabinet Office’s provisional assessment of policy areas in which frameworks may be required including that it was published without a methodology or detailed commentary on the decision making process. They are also concerned that “decisions seem to have been made based on a narrow consideration of internal market and trade issues, without considering the wider importance of transboundary cooperation or coordination to solve shared environmental challenges.” They express particular concern about the implications of assigning policy as requiring no further action or non-legislative frameworks only for example in the area of “nature policy.” Furthermore, they note the omission of certain policy areas from the analysis, with no explanation provided of the reasons for this, such as those relating to non-native species. Similar concerns are raised by Scottish Environment LINK in its submission.

To address these concerns, RSPB Scotland “urges the governments of the UK to make this process more transparent and to enable stakeholder participation as soon as possible.”

Interaction with the Devolution Settlements and Intergovernmental Relations

Several respondents highlighted the reserved powers model of devolution along with the “strong” constitutional convention that the UK Government will not normally legislate in devolved areas without the consent of the relevant legislature. Several respondents, including the NFUS, RSPB Scotland, the RSE, Scottish Environment LINK and Wright and Heald also highlight the challenges and recommendations set out in reports by PACAC and the Institute for Government.

The RSE notes the conclusion of PACAC that mechanisms for Intergovernmental Relations are “not fit for purpose” and suggests that new institutions may be necessary to ensure cooperation between governments and the successful development of a coherent strategy.

The NFUS states that it is “vitaly important that the current devolution settlement of policy and regulation to the constituent parts of the UK should be respected and maintained.”

Professor Keating notes that under the reserved powers model, Westminster retains the power to legislate in devolved areas subject to the Sewel convention which has “generally worked well.” However, he points out that such legislation in devolved areas “prevails only when it is the most recent, not because it is Westminster law.” Professor Keating contrasts such arrangements in the UK with those of the EU which has a hierarchy of laws governed by principles of the supremacy of EU law along with those of subsidiarity and proportionality. Such principles are “not easily

transposed to the domestic setting, where similar institutions do not exist and are not going to be created.”

Professor Keating notes that legislative frameworks will take the form of UK law and states that the UK Government has confirmed that they will be subject to legislative consent. However, given that the Withdrawal Bill makes clear that refusal to grant consent will have no practical impact, he suggests that legislative consent requirements amount to “no more than a commitment to consult” undermining the spirit of the placing of the convention into statute in the Scotland Act 2016. The Law Society also notes this fact whilst welcoming the “sunset clause” which provides for a two-year limit on the laying of regulations from two years after exit day. However, it points out that it is not “truly accurate” to describe this as a sunset clause which would require the repeal of the provision rather than a simple provision that no further regulations would be made.

The Brexit and Environment academics note that regardless of the form that common frameworks take, “a number of structural issues need to be faced.” In their view, frameworks can be more complex than either political or legal and “different solutions may well be appropriate for different areas.” They envisage at least four options as follows—

- Exclusive power on common positions to rest with UK authorities (representing a rolling back of devolution);
- A legal arrangement whereby the devolved authorities contribute to (and possibly even have a veto over) the common position but are obliged to implement it once in place (similar to the UK’s current relationship with the EU);
- A political agreement could be reached to follow the common position (meaning the legal competences of the devolved authorities might not have to be restricted); and
- The common position could be merely a recommendation with no political or legal fetters on the devolved authorities.

However, the academics note that in order to guarantee cooperation, “legal mechanisms may be unavoidable” and it is “inevitable that there will be non-reserved matters where it is thought inappropriate for there to be unlimited scope for each nation to “do its own thing.”

RSPB Scotland recommends the retention of all current EU environmental protections in domestic law and policy post-Brexit, requiring collaborative working between all UK nations “in a way that respects the devolution settlements.” An open and transparent assessment of the potential risks of divergence from these protections should be undertaken, with any changes being jointly agreed and scrutinised as appropriate by the relevant legislatures. Existing frameworks should be maintained until robust assessments have been undertaken, including on the implications of creating new frameworks on other policy areas, for example as a result of new trade agreements. Of course, any continued regulatory alignment with the EU post-Brexit would represent *de facto* frameworks limiting the extent to which UK countries could develop new frameworks in certain areas.

COSLA expresses concern that with any new UK bodies, for example those overseeing state aid, there is a risk that the UK Government “would be both a judge and beneficiary of decisions made.”

Whilst it appreciates the case for UK-wide arrangements where appropriate, COSLA recognises that this could contradict the devolution settlements in the event that any UK-wide body is a UK government body, something that is “particularly concerning” given the asymmetric nature of devolution. It therefore recommends that any such body should truly have the ownership of all governments (including local government) and should be truly independent from all levels of government involved.

Wright and Heald state that political difficulties stem from a lack of trust between the UK Government and devolved administrations. In their view devolution in 1999 was viewed as a critical juncture in the devolved capitals but as “marginally inconvenient” for Westminster. The unanticipated nature of Brexit has therefore led to “unprecedented conflict” between the governments with the UK Government “reasserting its primacy.” Coupled with “massive cutbacks in Whitehall capacity” as a result of austerity and the “unprecedented workload” generated by Brexit, they note that “seeking agreement with politically hostile devolved administrations has unsurprisingly been a low priority for the UK Government” (as also stated by PACAC).

Wright and Heald recommend that common frameworks be developed by a process similar to that for creating an EU directive with an NDPB staffed by personnel from all parts of the UK, some on secondment, being established to fulfil this role. The body should report to all four legislatures.

Wright and Heald go on to contrast the constraints on EU legislation in terms of subsidiarity and proportionality in with those on the UK Government which are political rather than constitutional. They also highlight the lack of clarity on how any framework legislation should be implemented, either by a single UK Act or through separate legislation in each jurisdiction.

Wright and Heald state that “the issue underlying common frameworks is that of delivering desired policy coordination while respecting devolved legislative competences” recommending that “the implementation of common frameworks must address this asymmetry in a rational manner.” A potential model for addressing these concerns might be the creation of a single electricity market across the island of Ireland which was implemented by the Irish and UK Governments through an MoU.

How to develop, agree and establish Common Frameworks

The RSE notes that the UK Government does not currently have a unified approach to common frameworks with structures currently being left to individual departments. This, it suggests, may not result in a coherent approach

The RSE suggests that a set of key principles will be required for the effective implementation and operation of common frameworks, namely—

- All frameworks should be reached by consensus;
- Decision making should be evidence-based with research commissioned as necessary;
- Frameworks should be no more intrusive in respect of devolved competences than is necessary to serve its purpose;
- Frameworks should operate in a “two-way street” applying both to reserved and devolved areas as appropriate, meaning the powers of all parliaments might have to be limited in certain areas.

The NFUS suggests the “guiding principle” that “no single country determines or curtails UK policy in the rest of the UK.”

Professor Keating notes that whilst “there is agreement on the principle of frameworks, there is as yet no agreement on their extent, format or how they will be made.” It is likely that some will be legislative and some non-legislative following the MoU model. He goes on to suggest that an alternative approach would be to emulate the EU system of intergovernmental policy making, noting the Welsh Government’s suggestion of a UK Council of Ministers to manage common affairs. This would mean that the UK Government would not always have the ability to dictate policy.

Professor Keating also highlights the question of how legislative frameworks will be preserved, renewed and updated, particularly after the seven year period after which all devolved powers will be returned to the devolved bodies.

The Brexit and Environment academics note a number of models in respect of who should develop common frameworks and highlight the importance of providing opportunities for stakeholder/public participation in the decision-making process. They further highlight a number of options in respect of who would have the responsibility of legislating for common frameworks, stating that “there needs to be a clearly identified legislative body with the constitutional authority to make the law that is required. In order to ensure longer-term effectiveness and stability, the academics also suggest that certain features may need to be enshrined in law whilst providing sufficient flexibility to remedy any elements that are not working as intended.

In the view of RSPB Scotland “a comprehensive analysis...still needs to be undertaken jointly by all four administrations, in consultation with external stakeholders” in respect of how frameworks should be developed and agreed, in which policy areas they will be necessary, and in terms of the pros and cons of legislative and non-legislative frameworks.

Highlighting the inadequacy of current structures relating to intergovernmental relations, the RSPB Scotland considers it unlikely that the development of common frameworks can progress in the way it recommends although it welcomes the agreement at the June 23rd meeting of the JMC “to take forward a review of exiting intergovernmental structures.” Scottish Environment LINK also welcomes this commitment but states that “it is now urgent to clarify what specific action will be undertaken, in what timeframe, whether discussions will be transparent and how stakeholders will be engaged,” noting that “there will be little chance of developing any genuinely co-designed frameworks” in the absence of an effective intergovernmental platform. To date, there has been little evidence of such an

approach as demonstrated by their understanding that DEFRA failed to share its principles and governance consultation with the devolved administrations prior to its publication.

COSLA's position is that as the return of EU legislation concerns local government, the creation of regulatory and enforcement bodies, along with reporting and future commitments "necessarily need the contribution and ownership of Scottish local government." It notes the UK Government's intention to replicate the kind of engagement local government has on EU policy through a "lighter touch" arrangement based on the Committee of the Regions model. This, COSLA recommends, should be embedded into intergovernmental arrangements at ministerial level and suggests that consideration should be given to different models in place in Italy (formal), the Netherlands and Austria (informal) and of effective and stable consultation mechanisms such as in Sweden, Denmark or Finland. It further suggests that there would be merit in exploring the Welsh Government's proposal to create a UK Council of Ministers.

Wright and Heald note the effectiveness of EU legislation, in defining common frameworks, proven over many years, and state that it would make sense for the UK to "adopt a modified EU legislative approach to defining legislation that must (or may) be enacted by the Devolved Administrations." In their view, the operation of the single market demonstrates that "cross-jurisdictional common policy frameworks can operate successfully, without inhibiting trade, even where they have been implemented through different trading structures as a result of different legislative frameworks" and there is no reason why a similar approach would not work in the UK "with Holyrood retaining all its devolved competences and implementing these frameworks as it would previously have done with EU directives."

Scottish Environment LINK "notes with regret the absence of any apparent progress at the level of the JMC" despite the urgency of the situation and recommends a "collaborative and joint approach" with frameworks setting "ambitious common standards" which put "core EU environmental principles into the domestic statute book" either through a UK-wide policy statement applied through different Acts in each nation or through a single UK Act requiring legislative consent, or through a combination of both. In its view any such frameworks "must respect the different devolution settlements of the UK. Any common or shared framework needs to be jointly developed and agreed" with "all concerned governments having an equal say in the process" along with "meaningful" parliamentary involvement from the relevant legislatures.

Scottish Environment LINK states that the agreement of common frameworks should "take into account current intra-UK government coordination methods and arrangements, how they have performed, how they could be improved and whether they are fit to meet the challenges that leaving the EU creates." In its view frameworks must be developed in a transparent way, allowing ample opportunities for meaningful stakeholder consultation, should be based on robust evidence and data. Understanding of how such frameworks would interact with future international and trade agreements along with the future relationship with the EU is also critical.

Scottish Environment LINK goes on to highlight examples of British-Irish cooperation along with coordination facilitated by the Nordic Council as examples of effective asymmetric cooperation.

Governance, Enforcement and Scrutiny

The lack of any obvious institutional body to oversee the operation of common frameworks was noted by a number of respondents, with a number of options being suggested.

The SCER states that “the role of the Scottish Parliament and Government in the governance of the future relationship is not presently defined – largely because the future relationship itself has yet to take shape” whilst noting the potential for a more specific role for Scotland’s institutions should the UK position undergo “substantial revision.”

The RSE states that there is “no obvious mechanism” to address common frameworks within the UK’s constitutional architecture and agrees with the PACAC recommendation that an independent secretariat be created to manage the development and oversight of common frameworks. The secretariat would have statutory powers to coordinate high level ministerial meetings as well as official level working groups and sub-groups focussing on specific policy areas. It is “pivotal” that such a secretariat should be seen as impartial and it should have statutory powers and be staffed by civil servants from “all legislatures in the UK and would represent the UK interest” rather than those of individual governments or departments. It is also important that the UK Government differentiate between UK and English interests. In the RSE’s view, the body should be funded by all governments in the UK with each making a proportionate contribution and should be fully transparent and accountable to all parliaments, either individually or through interparliamentary cooperation. Professor Keating also raises the question of England’s place in negotiating frameworks, pointing out that the UK Government represents both England and the broader UK interest in contrast to the EU model where the Commission stands above national interests or federal systems where federal governments have a similar role.

The RSE acknowledges the likelihood of intergovernmental disputes and agrees with PACAC that the current MoU is not fit for purpose with regard to common frameworks. It recommends that more work is required on the structures for dispute resolution.

The NFUS expresses concern about the JMC framework has “proved inadequate” to reach agreement on key issues and notes its interest “in the concept of a strengthened JMC, or an emulated Council of Ministers, which allows qualified majority voting and better dispute resolution procedures to minimise political infighting.” However, noting that the governance of common frameworks “is an extremely complex constitutional issue which is also increasingly political,” the NFUS states that it “is not equipped to comment extensively on how such governance might or could operate.” The NFUS also recommends “that farming ministers across the UK and agricultural departments must establish and maintain regular, formal and

cooperative arrangements to manage policy, legislation and delivery of regulation across the UK.”

Professor Keating notes that the role of the courts in respect of enforcement of legislative frameworks is likely to become more complicated and that an arbitration procedure may be necessary in the case of non-legislative frameworks to prevent the UK Government interpreting them at will. He notes the difficulties encountered by other countries with framework laws, pointing out that Germany abandoned them after the last federal reform whilst they “have been subject to constant litigation” in Spain and Italy.

The Brexit and Environment academics suggest that reporting requirements could assist in the monitoring of the implementation of frameworks or that a new body or bodies (either shared at the UK level or one for each jurisdiction) could be given a scrutiny role. Alternatively, this role could be conferred on existing bodies. Regardless of the option adopted, there would be resource implications as well as questions relating to expertise and capacity.

In respect of enforcement, they suggest a number of possible remedies, including “mere publicity” or a form of intervention sparking negotiation or other dispute resolution mechanisms including arbitration or adjudication. In the event of a legislative framework, a judicial remedy might be available. However, they point to the reluctance of EU member states to invoke formal enforcement measures, “even where there is blatant non-compliance” meaning there may be a role for external stakeholders in invoking compliance mechanisms.

In terms of scrutiny, the academics recommend as a minimum that reporting and notice requirements be put in place to allow parliamentary scrutiny in all relevant legislatures (and jointly through interparliamentary cooperation where appropriate). They are clear that “a clear route should be identified...for the devolved parliaments to have timely input into the exercises at UK level of legislative powers in relation to common frameworks within normally devolved areas.” In their view, “a simple yes/no vote at a late stage in the process...is far from adequate” as the option of withholding consent “may well be impractical” by then, “resulting in a legal vacuum.”

Scottish Environment LINK recommends that any governing body should have adequate resources, be independent of government, have relevant expertise and legal enforcement powers to ensure compliance. It agrees with the Brexit and Environment academics that a “watchdog body” is needed to allow external stakeholders to raise concerns and complaints.

The Brexit and Environment academics agree with Scottish Environment LINK that “guaranteed funding at an appropriate level to support the work of any joint bodies or networks will be a further requisite for long-term effectiveness.”

RSPB Scotland highlights the risk of “an emerging environmental governance gap post-Brexit” and states that “the effectiveness of common frameworks will only be as good as the enforcement mechanisms which support them.” To avoid such a gap, it speaks of the need for “some form of joint mechanism across the four nations to ensure the monitoring, implementation and enforcement of common frameworks.”

Regardless of the form such a mechanism takes (either jointly or coordinated between all four nations with some joint element), the RSPB is clear that this would require “significant changes to intergovernmental working mechanisms.”

In respect of state aid, COSLA expresses concern that the UK Government has announced its intention that the Competition and Markets Authority will have oversight in this area. This, it suggests “can easily be perceived as Whitehall acting as both party and jury on state aid issues.”

International Agreements and Trade Deals

A key issue in respect of international agreements and trade deals which was raised by the majority of respondents was the need for transparency and appropriate consultation with all levels of government along with external stakeholders.

RSPB Scotland notes that the terms of any new international agreements “could have significant implications for common environmental standards.” It notes the UK Government’s White Paper commitment to transparency and inclusivity in developing future trade policies with opportunities for engagement all tiers of government as well as businesses and civic society but expresses disappointment at the lack of clarification as to how this will be delivered – an issue not addressed in the UK Trade Bill. It “strongly recommends” that the views of stakeholders from across all four nations must be taken into account in the development of new international agreements.

In addition to potential risks to environmental protections, RSPB Scotland also notes that failure to jointly agree common environmental standards could undermine the UK’s ability to meet existing international agreements in respect of the environment.

COSLA notes that the UK’s flexibility in terms of international agreements may be constrained by the degree of alignment with EU policies that results from the final deal with the EU and is in favour of continued cooperation with European partners. It is also strongly in favour of a formal structure for ongoing stakeholder engagement when negotiating trade deals as exists in other large economies such as the USA, Canada and Australia. Recent examples of ambitious trade deals such as TTIP and CETA on which there were significant concerns over local public services and procurement obligations. In COSLA’s view any future treaties should be subject to at least the same safeguards for local public services as a “bare minimum.”

COSLA also calls for meaningful input from devolved and local government into UK contributions to EU and other international organisations such as the UN and OECD given that many agreements reached in such fora end up being adopted as national policy.

Scottish Environment LINK would welcome a clear commitment from the UK Government that trade deals “will not negatively impact environmental standards in any of the four UK countries.” In its view, “it would make sense” for the views of the devolved governments and parliaments to be taken into account given their role in implementing such agreements despite the reserved nature of the negotiations which will lead to them.

The Law Society recommends that the EU (Withdrawal Agreement) Bill is subject to appropriate consultation with the Scottish Parliament, Ministers and external stakeholders. In its view, this Bill will engage the legislative consent convention. It is important to recognise Scotland's status as a distinct jurisdiction with its own legal system in negotiations with the EU. The Law Society recommends that a "whole of governance approach" is adopted for trade negotiations, particularly where agreements would bind devolved legislatures to effecting changes in devolved competences and states that "a holistic approach" is needed including all four UK governments along with external stakeholders.

Where negotiations relate to devolved matters, the Law Society would expect the UK Government to seek the involvement of devolved administrations in negotiations. It recommends that consideration is given to seeking their consent to the UK's negotiating position, particularly where they would be expected to implement agreements in devolved areas or where the legislative consent convention would be engaged. Formal structures rather than ad hoc arrangements would therefore be advisable to facilitate trade related collaboration across the UK. In the Law Society's view, one option would be to make any agreements (or relevant sections thereof) provisional on devolved consent being provided in a similar way to the EU approach to ratifying agreements.

The SCER notes that the UK Government will be able to negotiate international agreements with third parties during any transition period. This raises the possibility that the role of Scottish institutions in such negotiations "may substantively arise even before the future relationship (with the EU) is established." It is therefore "essential" that discussions on common frameworks take place in the context of negotiations on the future relationship, as these may determine the requirements of the UK's internal arrangements.

The Brexit and Environment academics highlight the ongoing Supreme Court consideration of the Withdrawal from the EU (Scotland) Bill, noting that if accepted, the arguments put forward by the Advocate General "would mean that the "foreign affairs" restriction on the Scottish Parliament's competence extends a long way, with significant implications for handling the consequences of any international agreements."

They go on to note that any role for the Scottish authorities in negotiations would amount to a concession from the UK authorities given the reserved status of foreign affairs. However, they also point out that at present there is "no mechanism for these [common frameworks] to be imposed by the UK authorities in areas of devolved competence unless this entails a "deficiency" in retained EU law under the Withdrawal Act", aside from powers granted by the Scotland Act to legislate on any matter. Similarly, they note that there is no "automatic legal restriction on the Scottish authorities acting inconsistently with an international agreement," although political interventions can be made to ensure compliance. Whilst this structure may have been adequate under the jurisdiction of the EU, "it seems inadequate for ensuring implementation of the UK's own international agreements."

The academics propose two potential solutions as follows—

- 1) Extension of the powers of UK authorities “to ensure more effective control of affected matters (reserved or devolved)” (essentially overriding the devolution settlement); or
- 2) Development of “a more sophisticated arrangement for engaging the devolved administrations in the making and implementation of international agreements, with a mechanism for resolving disputes.” However, they suggest that “it seems unlikely” that such arrangements could be put in place in the limited time before Brexit takes effect.

The Law Society highlights the 2013 Concordat on the Coordination of EU Policy Issues which recognises the role of the devolved administrations in implementing devolved aspects of international agreements and commits to involving them “as fully as possible in discussions about the formulation of the UK’s policy position on all EU and international issues which touch on devolved matters.” It goes on to note that the Withdrawal Act means that current arrangements in respect of representation at Council of the EU will no longer apply but states that the established principle of cooperation and agreement of a common position and representation by Scottish ministers where appropriate should continue to apply in future negotiations. In its view, it is also important in respect of the UK’s future relationship with the EU, to continue cooperation in terms of mutual recognition and enforcement of judgements to facilitate business confidence and underpin continued trade post-Brexit. Similarly, the future relationship agreement must make provision for dispute resolution.

Funding

RSPB Scotland identifies two forms of funding that may be affected by frameworks – the amount and distribution mechanisms for any replacement for current EU funding such as that provided under the CAP along with the amount and distribution of existing UK/Scottish Government funding, particularly where its purpose is to meet EU-led environmental obligations. The RSPB has therefore called on the Scottish Government “to recognise the funding challenge and commit itself to working to address it within its own budget.” RSPB Scotland also recommends that the Committee challenges the UK and Scottish Governments over their plans for the management of public sector environmental funding and the implications of any common frameworks for it.

Wright and Heald note that the impact of Brexit “will bring further complexities to the devolved financing system” partly as a result of differences in per capita spending across the UK’s four nations to achieve the same policy results. They further note that fiscal risks for Scotland and Wales are intensified by the increasing dependence on more volatile funding streams compared to the previous block grant system and suggest “technical options” for the allocation of funds. They warn against “giving financial levers to the UK Government, which could result in concealed micro-management of devolved finances” and express concern “that such expenditure is likely to attract more political and media attention than its absolute size merits, thereby adding to the widespread public misunderstanding of the devolved fiscal arrangements.”

They further note that the fiscal framework model is unusual internationally and caution against assuming its resilience given the interim nature of the 2016 agreement which will be reviewed in 2021, “timing that is unfortunate in the context of Brexit.”

The Law Society notes that the funding of obligations and commitments arising from common frameworks would be subject to political agreement but recommends that each framework “should be accompanied by a detailed Financial memorandum and policy and equality impact assessments.”

Agriculture and the Environment

Scottish Environment LINK expresses concern that “the loss of common EU standards, as a result of the UK’s exit from the EU, could potentially compromise the transition of Scotland and that of the entire UK towards a low carbon and sustainable society” risking “a race to the bottom” in the absence of replacement common standards. For this reason, they have called for “an open and transparent dialogue on this crucial issue, with opportunities for stakeholder engagement and parliamentary input.”

The NFUS suggests that the key question in respect of agricultural policy relates to how the successor to the CAP will be delivered and funded. It is of the view that Brexit “provides an opportunity to move out of the shadow of the CAP” but states that it is “vital that new agricultural policy must be developed and implemented for the delivery of differing policy outcomes across the UK” and it is “critical” that post-CAP policy and implementation for Scotland is distinct from those in other parts of the UK to reflect the “unique needs” of the sector in Scotland.

In respect of agricultural policy, Wright and Heald highlight the risk that a “one size fits all policy” would reflect the needs of the largest population and ignore the more marginal markets overseen by the devolved administrations. Scottish Environment LINK express similar concerns in terms of potentially negative environmental outcomes.

Scottish Environment LINK also provides examples of the relatively low funding available in Scotland via grants in comparison to the rest of the UK and notes the “sharp decline” in public funding for biodiversity. It is therefore critical “that sources of EU funding are maintained after the UK has left the EU, but also that any frameworks are supported by adequate amounts of funding in a way that provides long-term certainty.” In its view, CAP funds should be retained but there is a “need to urgently reshape how they are spent... to revitalise rural economies” in a way that empowers and rewards land managers for providing public goods such as clean air and water.

RSPB Scotland notes that around 80% of existing environmental protections currently stem from EU law and institutions, the loss of which poses “significant and far-reaching implications.” Given that issues relating to the environment do not respect borders, a coordinated approach is necessary to address them. It agrees with the need for common frameworks to ensure robust protection of our natural

environment and previously provided a set of suggested “general guiding principles” to assist in their development.²

COSLA notes that at present, most enforcement of environmental protections is done by the Commission and sanctioned by the Court of Justice where necessary. It notes the UK Government’s commitment to recreating such environmental justice powers within the UK post-Brexit but requests “urgent clarification” of whether infringement fines would be phased out (as it prefers), replicated or absorbed by a new body.

COSLA further notes the UK Government’s intention to create a new environmental body to undertake the Commission’s role through an Environmental Principles and Governance Bill and states that it would welcome such a body on the basis that it is independent from Government and clearly separates policy making from enforcement. Indeed, COSLA goes on to suggest that two separate bodies dealing with these areas might be preferable.

Scottish Environment LINK expresses its hopes that the Scottish Government retains membership of EU agencies such as the European Environment Agency which already includes non-members states.

² http://www.parliament.scot/S5_Environment/Inquiries/RSPB_written_submission.pdf