

FINANCE AND CONSTITUTION COMMITTEE

COMMON UK FRAMEWORKS CALL FOR EVIDENCE

SUBMISSION FROM

Evidence submitted by Professor Colin Reid, Professor Andy Jordan, Professor Charlotte Burns, Professor Richard Cowell Dr Viviane Gravey and Brendan Moore - on behalf of Brexit & Environment.

Brexit & Environment is a network of academics analysing how Brexit is affecting the Environment - <https://www.brexitenvironment.co.uk/>. It is funded by the ESRC's UK in a Changing Europe initiative.

1. It is deeply regrettable that we have reached this late stage in the Brexit process with so much uncertainty over the nature and extent of common UK frameworks. The weaknesses in the devolution settlement in relation to arrangements for intra-UK collaboration and dispute resolution have been highlighted in many places for some time. The fact that a “quick-fix” may be needed to deal with pressing issues arising from Brexit should not prevent a more reflective consideration of the wider structures in due course. It is again regrettable that so little progress seems to have been made on the structure of common frameworks since the issue came to the fore last autumn; much of this response is similar to one provided to the Environment, Climate Change and Land Reform Committee in January 2018, and key issues highlighted there remain unresolved.

2. Making comments at present is complicated by the current legal position. A simple answer to the handling of common frameworks is provided by the European Union (Withdrawal) Act 2018 which essentially allows the UK government to take control of all matters currently governed by EU law (whether within reserved or devolved competence), notifying the Scottish Parliament but not being restricted by any refusal of consent for proposed measures. In relation to Wales this power is politically constrained by the supporting Inter-governmental Agreement between the Welsh and UK governments, but how consultation and collaboration arrangements will evolve and operate in practice for each of the devolved nations is not yet clear, especially since statements made by the UK government suggest that these formal legislative powers will not be used for all areas where some degree of collaboration is desired. At the same time the validity of the UK's Withdrawal from the European Union (Scotland) Bill (as passed by the Scottish Parliament) is being considered by the Supreme Court, with arguments being put forward by the Advocate General which if accepted would mean that the “foreign affairs” restriction on the Scottish Parliament's competence extends a very long way, with significant implications for handling the consequences of any international agreements. Both the political and legal

background continue to shift in a way that makes constructive comment difficult and the following observations include discussion of options that may well be precluded by the legal position.

Structural issues

3. As identified in the Communiqué of 16 October 2017 from the Joint Ministerial Committee (EU Negotiations), there are many different ways in which frameworks for collaboration or co-ordination can operate: common goals, minimum and maximum standards, harmonisation, limits on action and mutual recognition. Whatever level of detail and formality is involved, a number of structural issues need to be faced. The simplest approach (at least in purely technical terms) is to confer exclusive and over-riding power on the UK authorities acting on their own – this is what the European Union Withdrawal Act 2018 provides for areas of “retained EU law”, subject to some consultation requirements. A quite different and more radical approach, reflecting the other extreme of distributing power, would be a move towards a fully federal structure with a clear separation between the UK and English authorities and comprehensive mechanisms for dealing with all matters of shared interest; this, however, does not appear to be a realistic option at present. Finding solutions to the creation of common frameworks requires a number of fundamental design questions to be considered, and different solutions may well be appropriate for different areas.

4. A difficulty here is the range of interlocking options, their level of detail and the extent to which individual jurisdictions are to remain free to adopt their own policies and make their own laws. In its framework analysis, the UK Cabinet Office set out three categories – no frameworks, political frameworks and legal frameworks. Yet frameworks can be more complex than either political or legal. At least four options can be envisaged:

- Exclusive power on matters relating to the common position could rest with the UK authorities (representing a rolling back of devolution); this is what the EU (Withdrawal) Act ultimately provides.
- A legal arrangement could be made whereby the devolved authorities contribute to (and maybe even have a veto over) the common position but are obliged to implement it once it is in place and cannot lawfully do anything inconsistent with it (similar to the UK’s relationship with the EU at present).
- A political agreement could be reached to follow the common position, whilst legislative power remains legally unfettered (this represents a political commitment to the common position without restricting the legal competences of the devolved authorities).
- The common position could be merely a recommendation, with no political or legal fetter on the devolved authorities’ powers to act as they see best (preserving maximum freedom of action for the devolved authorities but with an increased risk of divergence and fragmentation of policy and law).

5. The less intense the collaboration, the less formal the arrangements need to be, but if there is any desire to guarantee co-operation, and that this is maintained over time, legal mechanisms may be unavoidable. There may be a tension between what is desired in constitutional terms in relation to marking out separate areas of competence and what is needed to address shared substantive concerns. The reasons why Member States have moved towards close collaboration within the EU on various matters, surrendering some of their independence to act, apply also within the UK: transboundary problems, the integrity of a single market, avoiding free riders, meeting international obligations, etc. The resolution of this tension is central to decisions on the structural issues. The current reserved/devolved distinction was designed to reflect areas where uniform or distinctive policies and laws are or are not appropriate. That boundary, however, was created in the context of membership of the EU providing a broader envelope to limit divergence in devolved areas; it is therefore 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”.

Who will develop common standards/rules?

6. In developing common frameworks, the question of who is to develop common standards or rules (whether these emerge as matters of policy or of law) is fundamental and again there are several possible models that can be envisaged:

- Joint working and agreement: The UK and devolved authorities could work together to produce standards/rules which would be adopted only when all parties agree.
- Joint recommendations: The UK and devolved authorities could work together towards producing standards/rules, but these would have the status of recommendations only and need not be accepted (or implemented) by all parties, although it would be expected that they are followed.
- Lead authority acting with the consent of others: One authority could take the lead in developing standards/rules (either the UK body by default or responsibility for different topics could be allocated to different countries), but the outcomes would be adopted only when all parties agree.
- Lead authority acting with consultation: The UK authorities could be responsible for developing standards/rules, consulting the other countries but without them having a veto on the final outcome. This is what the EU Withdrawal Act and UK government statements suggest as the position for at least some areas where common frameworks are desired.
- New authorities: Power to establish standards/rules could be conferred by the UK and devolved authorities on new official bodies established for this purpose, operating across the UK.
- Specialist advisory bodies: The task of developing standards/rules could be given to new or existing bodies, but the outputs would take the form of recommendations only, with each administration responsible for deciding when and how to implement these.

In all cases there are important questions over what opportunities there should and could be for external stakeholders and the public to participate in the decision-making processes, and over scrutiny processes.

7. All of these models have implications for the formal or practical freedom of action of the devolved authorities, as well as raising questions over resources and accountability, especially where administrations are to be bound by the outcomes of joint working.

Who has the power to legislate?

8. Although much co-ordination can be achieved without legal intervention, some issues will require legislation to implement common solutions and to underpin regulatory action. Quite distinct from the questions of how standards and rules are developed and of whether any framework is itself based on a legally binding structure, the question arises of how the detailed standards and rules that emerge are to be translated into legal form so as to take full effect. There needs to be a clearly identified legislative body with the constitutional authority to make the law that is required. Again, there are several potential options:

- Exclusive power for the UK authorities: Regardless of the underlying devolved or reserved nature of the topic, power to legislate to implement common frameworks could be conferred on the UK authorities (Parliament and/or Ministers), subject to scrutiny only at the UK level. This would clearly assert the UK authorities' dominance, rather than reflecting the distribution of power inherent in the devolution settlements.
- Exclusive power for the UK authorities, subject to constraints: In this option, although it would be only the UK authorities that could legislate, they could exercise this power lawfully only if certain prior procedural requirements were met. These could require having the explicit consent of the devolved Parliaments or governments (akin to legislative consent motions but with a veto power), having consulted the devolved authorities and proceeding so long as no explicit objection is made, or simply having consulted them. This final option (consultation but no veto) is what the EU Withdrawal Act adopts for areas where the UK government considers that centralised action is appropriate.
- Where the devolved administrations are to play some role, there is the further issue of which body (Parliament or Executive) expresses the official view - the EU Withdrawal Act refers to parliamentary consent - or whether both should be involved and if so how (e.g. whether Ministers merely report to the Parliament (and if so, before or after responding), or require express approval for their response to London).
- Exclusive power for the devolved authorities: The power to legislate could rest exclusively with the devolved authorities in areas of their competence, with or without any procedural constraints involving the other jurisdictions. This approach would require careful separation between devolved matters (which could be handled only by the devolved administrations) and reserved matters (only by UK authorities).
- Shared powers: As is the case at present in relation to implementing EU measures (Scotland Act 1998, s.57), power to legislate outwith matters reserved to the UK

could be shared between the UK and devolved authorities, with either being able to take action as appropriate. This may allow for flexibility and convenience (especially where matters may straddle the devolved/reserved boundary), but raises questions over scrutiny at the different levels over the decision about who is to legislate and the content of such legislation.

- Shared powers with constraints: Legislative action might be possible at either UK or devolved level but subject to procedural requirements, ranging from consultation with to full consent from the other. For example, on a topic straddling reserved and devolved matters it might be possible for the devolved authorities to allow comprehensive legislation to be made at UK level, but with the express consent limited to that one instance without ceding future competence on the matter.

Compliance with common frameworks?

9. Whatever frameworks are established, there is a question of what happens if these are not followed (whether by one administration not taking the requisite action, by it taking incompatible action or by it acting in a way that does not wholly implement the common position). There are two stages to consider: how non-compliance is monitored and detected; and the response to any non-compliance identified. In both cases, much depends on the nature of the framework and whether it operates at a political or legal level. The more extensive the power held at UK level, the less scope for devolved administrations to act in non-compliant ways but the more seriously any non-compliance might be viewed.

10. Monitoring could be achieved largely through reporting requirements, calling on each administration to report regularly, in public, on what is being done to implement any common framework or on actions in the relevant areas that might be seen as potentially conflicting. Alternatively, a scrutiny role could be given to a distinct new body - a single shared body or one for each jurisdiction – or conferred on existing bodies. Whoever is fulfilling this role, they might be informed by reporting requirements, their own investigations or complaints from stakeholders and/or the public (followed up by either investigation or a requirement on the relevant authorities to respond where a complaint appears credible). All of these options have resource implications as well as raising questions over expertise and capacity. These issues are being explored more fully in the current discussions at UK and Scottish levels about environmental governance and the role of an environmental oversight body.

11. In the event of non-compliance, the remedy could be mere publicity, which would rely on wider political processes to achieve results, or some form of intervention sparking negotiation or other dispute resolution mechanisms between the authorities, ultimately including arbitration or adjudication. Where there is legal backing for a framework, then a judicial remedy might be available, with questions over the forum for adjudication, time-limits, remedies and who has the standing to raise actions. Experience within the EU is that States are very reluctant to use formal enforcement measures against a fellow State even when there is blatant non-compliance, which might point to a role for citizens and NGOs in invoking the compliance mechanisms.

Stability

10. In all cases a further complication is added by the balance desired between flexibility and stability, between enabling the structures to evolve even in the absence of complete unanimity and embedding features to protect them from being changed without full agreement. The desire to provide guaranteed actions and a secure future for the frameworks might point towards enshrining certain features of them in law, even if only for a fixed period. 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. At the same time, it would be undesirable to have the arrangements too firmly set so that elements that are not working well cannot be sensibly remedied.

Scrutiny

11. An overarching issue is that of scrutiny and accountability. Whether handled at UK or devolved level, much of the activity covered here will of necessity be in the hands of the Executive, both in forming and agreeing policy and in making law through delegated legislation. At each level, existing mechanisms for exercising parliamentary scrutiny and control over the Executive may have to be revised to ensure adequate and timely involvement, e.g. if there is a strong commitment to implement the outcomes of a process establishing a common framework, it is leaving it too late to use the parliamentary scrutiny of any regulations implementing that framework as the means of ensuring accountability for the decisions made. Express approval mechanisms may be very cumbersome, but at the very least, reporting and notice requirements seem appropriate, to ensure that the Parliaments are aware of what is happening in a timely manner and when there is still time to intervene. A clear route should be identified for the Scottish and other devolved parliaments to have timely input into the exercise at UK level of legislative powers in relation to common frameworks within normally devolved areas. The extent to which the different Parliaments may wish to find ways of working together in scrutinising common frameworks is a further dimension to consider.

12. Offering any Parliament a simple yes/no vote at a late stage in the process of making legislation created by the government is far from adequate as a means of scrutiny. By the time a legislative proposal is at the stage for granting or withholding consent, it is too late for the Parliament to have a say in shaping it and the option of refusing consent may well be impractical because the result might be to create a legal vacuum. There are good reasons for limiting the ability of Parliaments to amend delegated legislation, but that position is less acceptable when there is no real opportunity for the Parliament to insist that the government goes “back to the drawing board”, as will be the case when devolved Parliaments are commenting on UK legislation or when co-ordinated action is required across several legislatures.

International Agreements

13. Under the devolution settlement, foreign affairs, including making international trade agreements, are reserved matters for UK authorities. Any role for the Scottish authorities in negotiations is therefore a concession made by them. The need to comply with international agreements may be a reason for having a common framework across the UK but there is at present no mechanism for these to be imposed by the UK authorities in areas of devolved competence unless this entails a “deficiency” in retained EU law under the EU Withdrawal Act or there is reliance on the background legislative power of the UK Parliament to legislate on any matter (Scotland Act 1998, s.28(7)). Similarly, there is automatic legal restriction on the Scottish authorities acting inconsistently with an international agreement, although a political intervention can be made to restrain or require action to ensure that compliance is achieved (Scotland Act 1998, ss.35, 58); legal challenges to the exercise of these powers may be expected in controversial cases. This structure may have been adequate when international trade matters were mediated through the EU and thus there was a very clear legal limitation on the different administrations within the UK acting other than to implement timeously the requirements of any agreement. It seems inadequate for ensuring implementation of the UK’s own international agreements.

14. There appear to be two options. The first is to extend the powers of the UK authorities to ensure more efficient control of affected matters (reserved or devolved); this may be efficient but essentially overrides the devolution settlement by granting further powers over devolved matters to the UK authorities. The alternative is to develop a more sophisticated arrangement for engaging the devolved administrations in the making and implementation of international agreements, with a mechanism for resolving disputes. In some areas, such as fisheries, devolved ministers have been given a larger role, but as a privilege not a right. It seems unlikely, though that arrangements to secure a more formal role for the devolved administrations can be put in place in the limited time before Brexit takes effect.