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# Developing the Scottish Parliament's scrutiny role after Brexit

Iain McIver and Sarah Atherton

On 25 March 2019, the Scottish Parliament's Finance and Constitution Committee wrote to parliamentary committees to explore how a more coordinated approach could be developed to the Scottish Parliament's scrutiny of the new powers arising from the UK's withdrawal from the EU. This briefing provides background to help inform the consideration of the Parliament's committees in their response to the Finance and Constitution Committee.

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# Background

On 25 March 2019, the Scottish Parliament's Finance and Constitution Committee [wrote to parliamentary committees](#). The letter set out the Finance and Constitution Committee's agreement to seek "explore a more coordinated approach with other Scottish parliamentary committees to developing the Scottish Parliament's scrutiny role in relation to the new powers arising from the UK's withdrawal from the EU".

The Finance and Constitution Committee's letter foresees developments in three areas:

- [legislation in devolved areas which previously would have been within the competence of the EU](#)
- [international treaties including trade deals which cover devolved areas and which would previously have been negotiated by the EU](#)
- [common UK frameworks which the UK Government and the Scottish and Welsh Governments agree will be needed post-Brexit.](#)

This briefing provides background information for each of these areas to help committees in considering their response to the Finance and Constitution Committee. It sets out the evolving legislative and non-legislative processes and procedures being used to ready the UK for its withdrawal from the EU. In doing so, it considers a number of high level examples, rather than a comprehensive list of, for instance, relevant legislation.

Some of the complex issues considered in this paper have been explained in other parliamentary papers. Links to any documents which may be helpful in setting out the detail of individual aspects considered here are provided throughout this briefing.

# Legislation in devolved areas that were previously EU competences

The UK Government has introduced a number of Brexit related bills in preparation for the return of powers from the EU to the UK. These include:

- European Union (Withdrawal)
- Trade
- Fisheries
- Agriculture
- Healthcare (International Arrangements) which became the Healthcare (European Economic Area and Switzerland Arrangements) Bill
- The Immigration and Social Security Co-ordination (EU Withdrawal) Bill.

Some of these Bills have passed already and others may do so before exit day.

For some of these Brexit related bills the UK and Scottish Governments agree that delegated powers should be provided to UK Ministers to legislate in non-reserved (i.e. devolved) areas (previously within the competence of the EU).

In the case of the Agriculture Bill, UK and Scottish Ministers do not agree that it contains powers for UK Ministers in devolved areas.

Reserved matters, which are outwith the competence of the Scottish Parliament, are listed in [Schedule 5 of the Scotland Act 1998](#). Anything not listed as reserved is considered to be devolved.

As the UK Government explains:

“ The [Scotland] act does not specify which matters are devolved to the Scottish Parliament, rather it specifies those matters that are reserved to the UK Parliament. Those matters not reserved by the Scotland Act are devolved to the Scottish Parliament.”

UK Government, 2013<sup>1</sup>

[Section 8 of the Withdrawal Act](#) allows UK Government Ministers to make secondary legislation that corrects deficiencies in retained EU law. These deficiencies may be in:

- either primary or secondary domestic legislation which implements EU law
- direct EU legislation (directly applicable EU regulations and decisions) and
- certain rights such as those under the EU treaties and general principles of EU law.

The powers granted to UK Ministers extend to the whole of the UK and relate to both reserved and devolved matters. The powers allow UK Ministers acting alone to correct deficiencies in devolved policy areas. Schedule 2 of the Withdrawal Act confers a similar

power on Scottish Ministers to correct deficiencies in devolved areas, and provides concurrent powers to be subject to joint procedure in the UK and Scottish Parliaments.

The Section 8 of the Withdrawal Act provides a power to allow UK Ministers to amend domestic legislation in areas of devolved competence. The UK Government indicated in its Delegated Powers Memorandum for the Withdrawal Bill that it will not normally use the power to correct deficiencies without the agreement of the relevant devolved authority. (paragraph 11)<sup>2</sup>.

The Scottish Parliament's Finance and Constitution Committee considered the Scottish Government's Legislative Consent Memorandum for the Withdrawal Bill. The Committee noted its concern at the provision of delegated powers for UK Ministers in devolved areas (at the time contained in Clause 7 of the Bill) without the need for consent from the Scottish Government or Scottish Parliament:

“ As the Committee noted in our interim report, the powers in the Bill to deal with deficiencies arising from withdrawal are wide and include the power for UK Ministers to legislate in devolved areas without a formal role for the devolved institutions. While the Delegated Powers Memorandum states that UK Ministers would “not normally” use the powers in Clause 7 in devolved areas without the agreement of the devolved governments, there is no requirement in the Bill to obtain that agreement. Neither does the Sewel Convention apply to the making of secondary legislation.”

Scottish Parliament Finance and Constitution Committee, 2018<sup>3</sup>

## **Protocol on obtaining Scottish Parliament approval to UK Ministers acting in devolved areas**

The Withdrawal Act provides concurrent delegated powers to the UK Government (Section 8) and the Scottish Ministers (Schedule 2) to make provision within devolved competence.

The UK Government agreed that it would not normally use its power to correct deficiencies to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved authority. As a result, the Scottish Government was given an informal role in consenting to the use of such powers by UK Ministers.

The Scottish Government recognised that the Scottish Parliament should have the opportunity to scrutinise the Scottish Government's role in consenting to the use of such powers by UK Ministers. The Scottish Government and Scottish Parliament agreed the [Protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union \(Withdrawal\) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament](#).

The protocol set out a process for obtaining the approval of the Scottish Parliament to the Scottish Ministers' consent to the exercise by UK Ministers of powers under sections 8 and 9 of the Withdrawal Act. The power under section 9 of the Withdrawal Act allows UK Ministers to make provision for the purposes of implementing the withdrawal agreement. A similar power exercisable in devolved areas is conferred on the devolved authorities (in Scotland, the Scottish Ministers) in schedule 2 of the Withdrawal Act.

At 17 April 2019, the Scottish Government has asked the Scottish Parliament to approve its proposed consent to 136 statutory instruments correcting deficiencies made under the section 8 power relating to devolved areas of policy being made by the UK Government.



The Common Fisheries (Transfer of Functions) (EU Exit) Regulations 2019 is no longer required which means that 135 SIs require to be made.

Of the 135 statutory instruments considered by the Scottish Parliament, 124 have been made and will come into force on exit day, or on the day set out in the regulation. 11 have not yet been made. 84 of the required 135 are subject to the affirmative procedure; 51 are subject to the negative. Of the 84 subject to the affirmative procedure, 78 have been made and 6 are awaiting completion of parliamentary stages. 46 of the 51 SIs subject to the negative procedure have been made.

Whilst the UK and Scottish Governments have agreed across a number of policy areas that a proposed SI is devolved and therefore triggers the requirement for consent, in some cases there has not been such an agreement. For example, the UK Government has introduced a regulation in relation to State Aid without seeking consent<sup>4</sup>.

Paragraph 3 of the protocol acknowledges that the Scottish Government and the Scottish Parliament recognise that it may be necessary to re-visit the protocol to consider whether its provisions should apply to other legislation relating to the UK's withdrawal from the EU.

## Other Brexit powers

The Trade Bill also contains provision for the concurrent exercise of powers by UK and Scottish Ministers or, alternatively, for joint procedure to apply in the UK and Scottish Parliaments. For example, UK Ministers may by regulations make provision for the purposes of implementing international trade agreements (replacing current EU agreements) in domestic law. As with the Withdrawal Act, these powers may cut across devolved competencies. Considering the Scottish Government's Legislative Consent Memorandum for the Trade Bill, the Delegated Powers and Law Reform Committee concluded that:

“ The Committee restates its position from its scrutiny of the European Union (Withdrawal) Bill that there must be coordination and cooperation between governments for this process to work. It therefore considers that it might be useful if the protocols stemming from the 2018 Act could be extended to regulations under the Trade Bill, and invites Scottish Parliament and Scottish Government officials to discuss this further.”

Scottish Parliament Delegated Powers and Law Reform Committee, 2018<sup>5</sup>

In July 2018, the UK Government gave a commitment that it would not normally use the powers in the Trade Bill to amend legislation in devolved areas without consent from the relevant devolved Ministers<sup>6</sup>.

The UK Government's Fisheries Bill, which is currently being considered in the UK Parliament, also includes the provision of powers to UK Ministers to make secondary legislation in devolved areas. However, unlike the Withdrawal Act and the Trade Bill, which rely on political commitments, the consent of Scottish Ministers is expressly required on the face of the Bill before the UK Minister can exercise the relevant UK power in devolved areas.<sup>7</sup>

The powers in section 2 of the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019, so far as they are exercisable within the legislative competence of the Scottish Parliament, are subject to consultation with the Scottish Ministers. This political commitment is underpinned by a Memorandum of Understanding which was developed between the Devolved Administrations and the UK Government. The Memorandum of Understanding was agreed on 20 February 2019.

It is possible that future Brexit related bills will also provide UK Ministers with powers to act in devolved areas. The consent of the Scottish Ministers to the exercise by UK Ministers of delegated powers in devolved areas will only apply if either an explicit requirement is set out on the face of the bill, or if there is political agreement between the Scottish and UK Governments. While UK Ministers may seek the consent of the Scottish Ministers, there is no requirement to seek the consent of the Scottish Parliament, which would, in effect, limit the powers of the Parliament.

The protocol covering the exercise of powers by UK Ministers under the Withdrawal Act could provide a model for consideration of similar powers provided in other Brexit related bills and enacted legislation. This might help to address concerns raised by both the Delegated Powers and Law Reform Committee and the Finance and Constitution Committee. The concern being that the Scottish Parliament does not currently have a scrutiny role in relation to Scottish Ministers providing consent to UK Ministers using powers in devolved areas.

## UK primary legislation in devolved areas

A further issue of interest to the Scottish Parliament in relation to Brexit legislation concerns disagreements between UK and Scottish Ministers about whether a piece of primary legislation relates to devolved areas.

Under the [Sewel Convention](#), the UK Parliament will not normally legislate in relation to devolved matters in Scotland without the consent of the Scottish Parliament. Such consent is signified by the Scottish Parliament passing a Legislative Consent Motion. Where there is disagreement on whether a bill relates to devolved areas, the UK Parliament will not seek the consent of the Scottish Parliament.

In the case of the UK Agriculture Bill, the Scottish Government's Legislative Consent Memorandum suggests that Parts 6 and 7 of the Bill deal with matters within the legislative competence of the Scottish Parliament in relation to the regulation of agricultural producers and agriculture support in Scotland<sup>8</sup>. The UK Government does not consider that to be the case and, does not agree that the Sewel Convention applies.

In spite of disagreement with the UK Parliament on the issue of devolved competence, the Scottish Government's lodged a Legislative Consent Memorandum<sup>9</sup>. In its memorandum, the Scottish Government explained it did not intend to bring forward a Legislative Consent Motion on this Bill or other Brexit related Bills at this time:

“ Following events on the European Union (Withdrawal) Bill the Scottish Government does not believe it should currently seek consent from the Scottish Parliament to UK legislation related to withdrawal from the EU. During the passage of that Bill, the UK Government sought consent from the Scottish Parliament, in line with the Sewel Convention. The Scottish Parliament voted overwhelmingly (by 93 votes to 30) to refuse consent. The UK Government then decided, for the first time since devolution, to continue with the Bill and legislate for matters within or affecting the responsibilities of the Scottish Parliament without its agreement. The Scottish Government believes that decisions on legislative consent by the Parliament are as significant as its other legislative decisions, because, as envisaged in the constitutional rules embodied in the Sewel Convention, those decisions involve consenting to legislation for purposes within the legislative competence of the Parliament, or affecting devolved competence, being enacted by the UK Parliament. ”

Scottish Parliament, 2018<sup>8</sup>

In its report "Devolution and Exiting the EU: reconciling differences and building strong relationships", the House of Commons Public Administration and Constitutional Affairs Committee recommended that:

“ the UK Government sets out a clear statement of circumstances under which legislative consent is not required by the Sewel Convention.”

UK Parliament Public Administration and Constitutional Affairs Committee, 2018<sup>10</sup>

SPICe has published a fact sheet providing more information on [consent processes in the Scottish Parliament](#).



# International agreements which would previously have been negotiated by the EU

## Negotiating modern international trade agreements

Following its withdrawal from the EU, the UK will be able to negotiate a series of trade agreements. Until that point, as international trade is an EU competence, the European Commission negotiates trade agreements on behalf of the UK and other member states.

International relations and the regulation of international trade are reserved under Schedule 5 of the Scotland Act. However, observing and implementing international obligations and assisting UK Ministers in respect of international relations and the regulation of international trade are devolved. Modern trade agreements increasingly focus on a commitment to mutually adopt common rules, for example in food safety and environmental standards. As a result, the UK's future trade agreements are likely to have an effect on competences devolved to the Scottish, Welsh and Northern Irish Governments.

The SPICe briefing, [Negotiation of Trade Agreements in Federal Countries](#), outlines the potential impact on Scotland of the new generation of trade agreements such as the Comprehensive Economic and Trade Agreement between Canada and the EU:

“ Schedule 5 of the Scotland Act 1998 reserves matters pertaining to the regulation of international trade to the UK Government. However, the CETA agreement includes provision for the trade of agricultural goods and food and drink, as well as public procurement. These areas impact upon devolved policy, within the competence of the Scottish Government and Scottish Parliament.”

Scottish Parliament, 2017<sup>11</sup>

## The UK Government's proposed approach to international trade after Brexit

On 28 February 2019, the UK Government published "[Processes for making free trade agreements once the UK has left the EU](#)". The paper set out the UK Government's proposals for how the UK will agree future trade deals with third countries after Brexit. The proposals do not apply to other international negotiations and treaties, including negotiations on the future relationship with the EU. They also do not apply to existing agreements that the UK is party to via its EU membership, which the UK Government is seeking to roll over under the Trade Agreement Continuity programme and for which provision is made in the Trade Bill before the UK Parliament.

The key elements of the UK Government's proposals are <sup>12</sup> :

- a strong and effective role for the UK Parliament in scrutinising the Government's trade policy and free trade agreements whilst recognising that “making, amending and

withdrawing from treaties are functions of the executive which are carried out in exercise of the Royal Prerogative”

- consideration by the UK Parliament of the Government's outline approach to negotiations which will include its negotiating objectives
- a close relationship with a specific parliamentary committee in each House as the negotiations progress enabling the committees to produce "a detailed report on the agreement that had been reached"
- parliamentary scrutiny of the final agreement under the Constitutional Reform and Governance Act 2010.

From a devolved perspective, the UK Government paper states:

“ Government is committed to working closely with the devolved administrations to deliver a future trade policy that works for the whole of the UK. It is important that we do this within the context of the current constitutional make-up of the UK, recognising that international treaties are a reserved matter but that the devolved governments have a strong and legitimate interest where they intersect with areas of devolved competence.”

UK Government, 2019<sup>13</sup>

The UK Government also highlighted three commitments in relation to dialogue with the devolved administrations on international trade matters:

- regular Senior Officials' Groups, held every six weeks
- an ongoing programme of monthly round-tables on technical policy areas
- formation of a new intergovernmental Ministerial Forum for international trade.

On the role of the devolved legislatures, the UK Government wrote:

“ We recognise that the devolved legislatures also have a strong and legitimate interest in future trade agreements. It will be for each devolved legislature to determine how it will scrutinise their respective Governments as part of the ongoing process. Equally, the means by which our Parliament in Westminster works with its devolved counterparts is a matter for the legislatures themselves, in line with their existing inter-parliamentary ways of working.”

UK Government, 2019<sup>13</sup>

## **The Scottish Government's proposals for international trade negotiations after Brexit**

Ahead of the UK Government publishing its approach paper, the Scottish Government published "[Scotland's role in the development of future UK trade arrangements](#)" on 30 August 2018. The Scottish Government outlined the key conclusion of the document:

“ Outside the Customs Union, the UK will become responsible for negotiating its own international trade agreements. The broad and increasing scope of modern trade agreements means that they often deal with, and merge, a range of reserved and devolved policy areas. The conduct and content of future trade policy, negotiations and agreements will therefore have very important implications for Scotland, and it is vital that the Scottish Government is fully involved in the process for determining them. This paper considers that decision making process and argues that the Scottish Government and Scottish Parliament must play a much enhanced role in the development of future trade policy and the preparation, negotiation, agreement, ratification and implementation of future trade deals, to help industries, protect devolved public services and ensure the highest standards of environmental and consumer protection in Scotland and across the UK. Doing so will require a significant change in the current arrangements for scrutiny and democratic engagement, which are already out of date, under strain and in urgent need of reform.”

Scottish Government, 2018<sup>14</sup>

In terms of parliamentary scrutiny of future trade negotiations and agreements, the Scottish Government's paper suggests that the current arrangements for scrutiny of trade agreements at Westminster (based on the provisions of the Constitutional Reform and Governance Act 2010) are limited. This is because the UK Parliament does not have to debate or vote on ratification and has no power to amend a treaty or be involved in treaty negotiation.

In terms of the role of devolved legislatures in the negotiation and ratification of trade agreements, the Scottish Government wrote:

“ There is not currently, and nor is there proposed to be, any legal requirement to consult the devolved administrations and legislatures, stakeholders or the public. The MoU and Concordats provide the only articulation at present of Scotland's rights and responsibilities in protecting and promoting its interests in the field of international relations and international trade.”

Scottish Government, 2018<sup>14</sup>

The Scottish Government concluded that both it and the Scottish Parliament must have a role in "all stages of the formulation, negotiation, agreement and implementation of future trade deals and future trade policy".

The SPICe briefing [Negotiation of Trade Agreements in Federal Countries](#)<sup>11</sup> examines the representation and influence of sub-state entities in federal countries in the negotiation and implementation of international trade agreements.

# Common UK frameworks post-Brexit

The term 'common frameworks' is used to describe a range of arrangements which may be established to maintain common policy, or at least to manage policy divergence.

The need for devolved legislation to comply with EU law has led to legal and regulatory consistency - albeit not complete uniformity - in a number of policy areas. This has created common approaches to policy across the UK, even in areas of devolved competence.

Without common frameworks across the UK there is an increased potential, post-Brexit, for policy divergence between England, Northern Ireland, Scotland and Wales. In some areas, policy differences may be unproblematic. In others, however, the impact could be significant.

This section aims to highlight some of the work done to date on the development of common frameworks, as well as some questions arising from that work.

A [full briefing on Common UK Frameworks after Brexit](#), written by Akash Paun from the Institute for Government, was published by SPICe in February 2018.

## Work to date on common frameworks

The UK, Welsh and Scottish Governments have agreed that, after the UK leaves the EU, there will continue to be benefit in having policy uniformity in some areas. In the absence of a Northern Ireland Executive, officials have been involved in discussions about the common frameworks process where policy intersects with the devolved competence of the Northern Ireland Assembly. In October 2017, the Joint Ministerial Committee (EU Negotiations) (JMC (EN)) agreed to a definition of common frameworks which was set out in [the communique of 16 October 2017](#):

“ A framework will set out a common UK, or GB, approach and how it will be operated and governed. This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending 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.”

UK Government, 2017<sup>15</sup>

The JMC(EN) also developed a [set of principles to guide the future approach to common frameworks](#), agreeing that common frameworks would be established where they are necessary to:

- enable the functioning of the UK internal market
- ensure compliance with international obligations
- ensure the UK can negotiate, enter into and implement trade agreements and international treaties
- manage common resources
- administer and provide access to justice in cross-border cases

- safeguard the security of the UK.

In a letter to the Finance and Constitution Committee <sup>16</sup> dated 19 September 2017, Michael Russell MSP, the Scottish Government Minister for UK Negotiations on Scotland's Place in Europe, set out an initial assessment which listed 111 areas where EU law and devolved competence intersected. In March 2018 the UK Government published initial frameworks analysis again setting out the areas where EU law and devolved competence intersect <sup>17</sup>. This analysis highlighted 107 areas subject to EU law which fall within the competence of the Scottish Parliament.

Revised analysis published by the UK Government in April 2019 listed 111 areas <sup>18</sup>. The revised version includes an indication of the way in which the UK Government sees the future framework being implemented.

On 25 March 2019, the Finance and Constitution Committee published a [Report on Common Frameworks](#).

The report's three conclusions focussed on <sup>19</sup>:

- the need for common frameworks to be delivered through agreement rather than be imposed
- the crucial role of a robust and trusted process of intergovernmental relations in agreement making and a note that the review of intergovernmental relations appeared to have stalled
- the important role of parliament and stakeholders in contributing to and scrutinising common frameworks, recommending in particular that 'Parliament has a formal role in relation to the process for developing, agreeing and implementing both legislative and non-legislative common frameworks'.

## What form may common frameworks take?

Although there is agreement over the need for common frameworks, there is uncertainty over the exact approach which they will take. In agreeing the principles for common frameworks at the JMC (EN) in October 2017, the UK, Scottish and Welsh Governments also agreed that:

“ the frameworks established would respect the devolution settlements and democratic accountability of the devolved legislatures. They would maintain current levels of flexibility; increase the decision making powers of the devolved institutions; and would be based on existing conventions and practices, such as those around not normally adjusting devolved competence without their consent”

UK Government, 2017<sup>15</sup>

In November 2017, the Institute for Government stated in its paper [Brexit, Devolution and Common Frameworks](#) that "In principle there are at least four ways that common policy frameworks could be established. In many cases, a combination of these approaches may be needed." <sup>20</sup> These were, in summary:

- the UK might agree to continue to comply with EU law as part of a new “deep and special partnership”
- new frameworks set up by legislation at Westminster for the entire UK in areas where regulatory consistency is critical, with the Sewel Convention applying
- powers devolved in full but with agreement on how governments will work together in areas where coordination is required, but legally binding frameworks are deemed unnecessary
- the creation of new intergovernmental structures by the UK and devolved governments to take binding decisions for the whole UK.

In [written evidence to the Finance and Constitution Committee](#) in August 2018, Professor Keating of the University of Aberdeen and Director of the Centre of Constitutional Change stated:

“ While there is agreement on the principle of frameworks there is as yet no agreement on their extent, format or how they will be made. Some frameworks will be legislative and some non-legislative, following the Memorandum of Understanding model presently used to deal with matters of common concern.”

Keating, 2018<sup>21</sup>

The key difference between different frameworks is that only legislative frameworks would be legally enforceable. Non-legislative approaches rely on a desire for continued commonality and cooperation.

The [UK Government's Revised Frameworks Analysis](#) breaks policy areas down into four categories <sup>18</sup> :

- those where the UK Government believes that no further action is required to create a common framework
- those where common rules or ways of working will be needed but it is expected that these can be implemented through a non-legislative agreement (e.g. a concordat)
- those where future legislation may be required
- those which the UK Government believes are reserved.

The revised analysis also provides some examples of policy areas and what future arrangements could be put in place. In the case of fisheries management and support, for example, the analysis shows how legislative and non-legislative options may work together. This would involve a "a limited set of legislative provisions, partially established in the Fisheries Bill, supplemented by a concordat that includes ways of working, dispute resolution and enforcement processes".

## Scrutiny of common frameworks

A key element in the progress of common frameworks is parliamentary scrutiny of their development and ongoing operation. [Research for the Finance and Constitution Committee](#) on the examples of the operation of common frameworks in other countries



(Canada, Germany, Norway and Switzerland) suggests that there was a gap in the parliamentary scrutiny of common frameworks, particularly at the sub-state level.

Parliamentary scrutiny was raised in the [Finance and Constitution Committee's report on Common Frameworks](#). The Committee stated that:

“ In our evidence taking on the EUWB LCM, we heard from a number of witnesses about the need for effective parliamentary scrutiny, greater transparency and meaningful consultation with stakeholders and the wider public in developing and agreeing common frameworks.”

Scottish Parliament Finance and Constitution Committee, 2019<sup>19</sup>

The Committee report set out the reasons why it believes parliamentary scrutiny is considered to be essential to developing effective common frameworks:

- it enables Parliament to fulfil their scrutiny role in holding government to account for their actions
- it enables Parliament to judge between potentially competing interpretations of intergovernmental discussions
- Parliament can provide a mechanism by which wider sectoral and stakeholder engagement can be delivered
- Parliament can ensure that in making final decisions, the different vested interests are properly balanced.

Whilst legislative common frameworks will be subject to appropriate parliamentary scrutiny, non-legislative frameworks may be more difficult to scrutinise as they will involve intergovernmental agreements.

The Finance and Constitution Committee report highlighted the [Inter-governmental Relations Written Agreement between the Scottish Parliament and Scottish Government](#) as being an avenue under which the Parliament should receive information about non-legislative common frameworks. The agreement includes the commitment to provide:

“ the relevant committee of the Scottish Parliament the text of any multilateral or bilateral intergovernmental agreements, memorandums of understanding or other resolutions within the scope of this Agreement.”

Scottish Parliament Finance and Constitution Committee, 2019<sup>19</sup>

Another issue to address in the development of both legislative and non-legislative common frameworks is ensuring that stakeholders are included in the process. Parliamentary scrutiny is seen as a potential avenue for such engagement. In its evidence to the Finance and Constitution Committee, Scottish Environment Link suggested it was important that development of common frameworks included:

“ an open and transparent dialogue on this crucial issue, with opportunities for stakeholder engagement and parliamentary input.”

Scottish Parliament, 2018<sup>22</sup>

## Issues to consider on common frameworks

In spite of the agreed need for common frameworks, and the principles surrounding them, there remains significant uncertainty over their exact nature and the role of devolved governments and legislatures in developing and scrutinising them.

The Finance and Constitution Committee Report on Common Frameworks sets out the expectation that Parliament has a formal role in legislative and non-legislative frameworks. Ongoing work with other committees of the Parliament, as well as the Scottish Government, is necessary to build a common view of what this formal role should look like. One consideration may be how the role of a legislature can promote transparency and accountability within intergovernmental decision-making <sup>19</sup> .

An issue dominating discussions is the need for more robust and fit-for-purpose intergovernmental relations given the need to mutually agree policy areas where common frameworks are required as well as the procedural detail which will follow. In July 2017, the House of Lords European Union Committee endorsed the view that:

“ the UK Government needs to raise its game to make the JMC(EN) effective. This means better preparation, including bilateral discussions ahead of meetings, a structured work programme, greater transparency, and a willingness to accept that the JMC(EN), even if not a formal decision-making body, is more than a talking-shop.”

UK Parliament House of Lords European Union Committee, 2017<sup>23</sup>

In its white paper [Securing Wales' Future](#) the Welsh Government put forward the idea of a UK Council of Ministers "covering the various aspects of policy for which agreement between all four UK administrations is required" in place of the JMC <sup>24</sup> .

On 12 March 2019, Michael Russell MSP, Cabinet Secretary for Government Business and Constitutional Relations, gave evidence to the House of Commons Scottish Affairs Committee as part of its [inquiry into the relationship between the UK and Scottish Governments](#). In his evidence, Michael Russell MSP, stated that the relationship is "poor at governmental level and at official level it has been better" <sup>25</sup>

A [summary of evidence received by the Finance and Constitution Committee](#) in response to its call for evidence on common frameworks provides a helpful snapshot of some of the concerns expressed by different sectors in Scotland <sup>26</sup> . The key issues raised by respondents related to:

- the need for common frameworks
- common frameworks interaction with the devolution settlements and intergovernmental relations
- how to develop, agree and establish common frameworks
- governance, enforcement and scrutiny of common frameworks
- common frameworks and their link to international agreements and trade deals
- funding for policies governed by common frameworks.

At the [JMC \(Plenary\) meeting on 14 March 2018](#), Ministers agreed that officials should review and report to Ministers on the existing intergovernmental structures, including the Memorandum of Understanding, to ensure they are fit for purpose in the event of the UK's exit from the EU. This review is currently ongoing.

# Conclusions

As the UK leaves the EU three issues of importance to the Scottish Parliament are that:

- former EU competences return to the UK
- the regulatory framework created by EU membership falls away
- the UK will need to negotiate new international agreements and trade deals.

All these factors will influence the future role of the Scottish Parliament (and the other devolved legislatures in the UK) and are to a large extent interlinked.

As a result, it is important that the committees of the Scottish Parliament consider how they can engage with the exercise of devolved powers by UK Ministers, scrutiny of the creation and ongoing operation of common frameworks in the UK and engagement with the negotiation of new international agreements by the UK Government.

The letter from the Finance and Constitution Committee seeking views from other parliamentary committees marks an opportunity for the Scottish Parliament to continue to develop its role in response to the UK's departure from the EU.

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