CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE

3rd Meeting 2022, Session 6

27 January 2022

UK Internal Market Inquiry

1. The Committee is carrying out an inquiry on the UK Internal Market. The aim of this inquiry is to consider the implications of the UK internal market for Scotland including how devolution will work going forward.

2. This is the final evidence session as part of this inquiry and the Committee will take evidence from—

    - Angus Robertson MSP, Cabinet Secretary for the Constitution, External Affairs and Culture, Scottish Government
    - Donald Cameron, Deputy Director, Constitution and UK Relations, Scottish Government
    - Euan Page, Head of UK Frameworks, Scottish Government

3. A SPICe briefing of the key issues which have emerged throughout the inquiry can be found in **Annexe A**.

Committee Clerks
January 2022

SPICe The Information Centre
An t-Ionad Fiosrachaidh

Constitution, Europe, External Affairs and Culture Committee

3rd Meeting, 2022 (Session 6), Thursday, 3rd February 2022

UK Internal Market Inquiry – evidence session with the Cabinet Secretary

Background

The Committee has held four evidence sessions as part of its inquiry on the UK internal market.

11 November 2021: Session with stakeholders including Scottish Environment LINK, Food and Drink Federation Scotland and Alcohol Focus Scotland. Then from the Law Society for Scotland and the Institute for Government.

2 December 2021: Protocol on Ireland and Northern Ireland with Dr Billy Melo Araujo of Queen's University Belfast and Seamus Leheny of Logistics UK, followed by an academic panel of Professor Nicola McEwen representing UK in a Changing Europe, Professor Jo Hunt of Cardiff University and Professor Stephen Weatherill of Oxford University.

16 December 2021: Session with Jonnie Hall, Policy Director, NFU Scotland

13 January 2022: Office for the Internal Market

The interconnected nature of constitutional arrangements has been a central feature of evidence throughout the enquiry. Today's evidence session provides an opportunity for the Committee to discuss with Angus Robertson MSP, Cabinet Secretary for the Constitution, External Affairs and Culture the Scottish Government's view of the UK internal market and the interconnected constitutional considerations and arrangements, such as common frameworks.

This paper sets out four key issues which have emerged throughout the inquiry:

- The structure of the UK internal market and the impact of the UK Internal Market Act 2020 on devolution
- The challenges of regulatory alignment/divergence and monitoring its impact
- Common frameworks
- The scrutiny challenge in executive decision making and intergovernmental relations

Where relevant, a brief update on the factual position is given in addition to a brief summary of the central challenges for the Parliament. The paper also suggests some lines of questioning which the Committee may wish to explore with the Cabinet Secretary.

The structure of the UK internal market and the impact of the UK Internal Market Act 2020 on devolution

The structure of the UK internal market and the impact of the UK Internal Market Act 2020 (UKIMA) and the operation of the internal market on devolution have been explored throughout the inquiry.

The market access principles set out in the UKIMA do not change the competence of the Scottish Parliament or Scottish Ministers. They will, however, have an impact in practice. As the Committee's Guidance on the UK Internal Market notes in relation to the UKIMA internal market rules:

"The Act does not introduce any new statutory limitations on the competence of the Scottish Parliament or Scottish Ministers. But in practice, regulatory competition may constrain the ability of the devolved authorities to exercise their executive and legislative competences. Specifically, UKIMA may not affect the Scottish Parliament's ability to pass a law, but may have an impact on whether that law is effective in relation to goods and services which come from another part of the UK."

Professor Stephen Weatherill stated that *"the UK Internal Market Act 2020 contains a structural bias in favour of market access, and against local regulatory culture".* In oral evidence, Professor Weatherill expanded on this, telling the Committee:

"Any internal market is based on a fundamental problem, which is that constituent elements of the internal market might regulate trade differently, and that leads to obstacles to trade within that internal market. There needs to be a way to manage the tension between unimpeded trade and regulatory autonomy that is exercised by the constituent elements within the internal market. The way that all internal markets manage that tension is to put to the test regulatory choices that are taken by constituent elements—is there a value in the local regulatory initiative that is sufficiently strong to override the interest in unimpeded trade in goods and services between the constituent elements of the internal market…The core point is that the EU is more generous than the UK in accepting possible justification for local rules that obstruct trade. The EU internal market is more generous to local regulatory

autonomy and more restrictive of trade within its internal market than is the UK's internal market."

Jess Sargeant of the Institute for Government discussed the balance of the internal market with the Committee, and whether UKIMA allowed for sufficient policy divergence, saying:

"There is an argument that the United Kingdom Internal Market Act 2020, as it is written, with very few exclusions for things such as environmental objectives or public health, does not quite strike the right balance, and the legislation is something that we should be continually monitoring, thinking about and assessing. We know that the office for the internal market will assess the economic impact of future regulatory divergence, the operation of the common frameworks and the 2020 act itself, but it is not clear who will assess the policy impact, which is really important."

Professor Nicola McEwen et al highlighted the tension between trade and regulatory autonomy in written evidence, stating:

"Internal regulatory divergence may also make it more difficult to strike external trade deals if the central government is unable to commit to trade rules that will apply throughout the state. In some federal countries, sub-state governments are involved in discussions surrounding trade negotiations to help avoid implementation problems once deals are reached. However, UKIMA facilitates the striking of new trade deals by providing that the market access principles apply not only to goods produced in other parts of the UK, but also to goods imported into other parts of the UK…All internal markets, whether federal or multi-level states or international treaty systems, have to strike a balance between regulatory divergence and economic unity."

In oral evidence, Professor McEwen discussed this further, saying the UK internal market "privileges the value—in and of itself—of unfettered access for businesses across the UK over the value of regulatory autonomy and the potential divergence that emerges from that".

The Committee received evidence from business and industry that a well-functioning internal market was crucial at an economic level and functionally in terms of supply chains. The Food and Drink Federation (FDF) and the Northern Ireland Food and Drink Association (NIFDA) joint submission highlighted this, stating:

*"food and drink manufacturing industry is a hugely important part of Scotland, England Wales and Northern Ireland's economy, turning over £105bn in 2019…*existing supply chains are highly integrated across the four nations, with ingredients and products potentially crossing borders multiple times including in NI with the Republic of Ireland."

In oral evidence, FDF explained that it continues to *"advocate for the avoidance of barriers to trading within the UK as this is of critical importance to our members' already disrupted supply chains"*, highlighting that it *"is vital that the industry has a clear opportunity to access markets throughout the United Kingdom."*

NFU Scotland also made clear the importance of a well-functioning internal market, stating it its written submission that the UK Internal Market *"is critical to the interests of Scottish agriculture and the vitally important food and drinks sector it underpins"* and supports the intention to ensure that it *"continues to operate as it does now – with free movement of goods and services produced to the same basic regulatory standards."*

The effect of new constitutional arrangements on the ability of the Scottish Parliament to legislate effectively has been another point of discussion throughout the inquiry. The Institute for Government's written submission highlighted this point, saying:

"These arrangements do not change the terms of the devolution settlements – under the terms of the European Union (Withdrawal) Act 2018, devolved powers previously exercised at EU level returned to the devolved legislatures. But they have significant implications for how these devolved powers may be exercised, and therefore for devolution itself."

Professor Jo Hunt told the Committee in oral evidence that:

"The internal market act views devolution and the potential for divergence as an obstacle and a potential irritant to the economic integration of the UK, which is prioritised and privileged through the market access principles of the act."

OneKind, an animal welfare charity, also highlighted the gap between the legislative position and the practical effect of the UKIMA, writing:

"The Act undermines devolution and will limit the ability to the Scottish Parliament and Government to improve farmed animal welfare standards. An important point of the Act is the unique mechanism by which it has practical effect. It does not invalidate any laws in any part of the UK but it renders them of no effect in relation to certain goods. That is important as any part of the UK can pass whatever legislation it wants but in practice there is no point in making rules that can be avoided."

Jonnie Hall, Policy Director of NFU Scotland similarly argued that the flexibility of devolution was in danger of being lost because of UKIMA, telling the Committee:

"A raft of issues that came under EU law have now been transposed back to come under UK and Scots law. That should allow for some flexibility in a devolved sense, but such flexibility is now almost secondary to the fact that the internal market act drives a coach and horses through that idea."
Professor Nicola McEwen et Al gave the view that the UKIMA could have a longer-term chilling effect on legal and policy reform within Scotland. In oral evidence Professor McEwen suggested this may be an area the Committee would wish to explore with the Scottish Government, saying:

"It is difficult for us from the outside to identify a chilling effect because, inevitably, that implies that things are not coming forward that might otherwise be. In your scrutiny of ministers, it would be good to probe that."

Alcohol Focus Scotland made a similar point, highlighting the 'deterrent effect' which UKIMA could have on Scottish legislation, saying:

"It is about the deterrent effect. Why would you legislate if it would apply to only a very narrow set of products? You would not have the intended policy effect. You would simply disadvantage Scottish-based companies. From that point of view, it curtails the Scottish Parliament's ability to make meaningful change and progress on protecting public health, the environment and so on."

Professor Jo Hunt of Cardiff University had a different take on UKIMA, considering that it *"was introduced very much as an insurance policy relating to what might be needed to manage international trade negotiations."*

Professor McEwen suggested that the Committee may wish to take a lead in considering the long-term impact of the UK internal market on devolution, saying in oral evidence:

"the Office for the Internal Market and its function in scrutinising the implementation of the internal market act and the market access principles, but, to my knowledge, nobody is tasked with scrutinising the impact of the act on devolution and regulatory autonomy. The committee, perhaps in collaboration with colleagues in other legislatures and with the academic community, might want to take that on board, because that is another important dimension."

It may also be helpful for the Committee to note that post EU exit UK legislation may also have an impact on the ability of Scottish Ministers to effectively exercise executive powers in devolved areas.

In a paper previously shared with the Committee, Dr Christopher McCorkindale explored this issue in relation to the Subsidy Control Bill. The Bill requires all public authorities (including the devolved governments and public bodies in Scotland, Wales, and Northern Ireland) to satisfy themselves that any subsidy is compatible with a set of subsidy control principles.

"Under the Bill there are additional powers by which the UK Government might intervene with regard to the exercise of executive power by Scottish Ministers. Clause 55, for example, allows the Secretary of State to 'call in' subsidies awarded by public authorities where there is a risk that the subsidy will not meet the subsidy principles and requirements or where the subsidy is likely to negatively impact competition and/or investment within the UK. Clause 60 allows the Secretary of State to make a post-award referral of subsidies to the Competition and Markets Authority where the same risks apply. There is no equivalent power on the part of the devolved administrations."

Dr McCorkindale raised in his paper to the Committee whether the Subsidy Control Bill and the executive asymmetry it creates:

"fits a more general post-Brexit pattern of UK primary legislation that – in the face of legislative dissent – nevertheless constrains the scope of existing and future devolved executive power. Neither EU law (as it applied pre-EU withdrawal) nor the TCA as it applies now have required subsidy control measures and enforcement to apply internally to the UK. These internal requirements are 'gold plated' by the subsidy control principles…and require Scottish Ministers (as well as the Scottish Parliament and public authorities), and their UK and devolved counterparts, to consider the impact of subsidies on and across the constituent parts of the UK."

Members may like to explore with the Cabinet Secretary:

- What assessment the Scottish Government has made of the impact of the UK Internal Market Act 2020 on devolved matters.
- The Scottish Government's view on the justifications for divergence from the market access principles of UKIMA (which are more narrowly drawn than in the EU single market) and what impact this is likely to have on policy in particular areas, for example, public health.
- Whether the Scottish Government has identified any areas of policy/legal reform which it is unlikely to consider because of UKIMA. I.e. Has the Scottish Government identified any areas where there is likely to be a chilling effect as a result of UKIMA.
- The Scottish Government's views on the executive asymmetry created in post EU exit UK wide legislation.
- How the Scottish Government envisages UKIMA, common frameworks and keeping pace with EU law working together in devolved areas.

The challenges and opportunities of regulatory alignment/divergence and monitoring its impact

Throughout its inquiry, the Committee has received evidence on the potential impact of regulatory alignment and divergence. This is a complex area given:

- The interconnected nature of the UK internal market, common frameworks, the Protocol on Ireland and Northern Ireland.
- The Scottish Government's commitment to keep pace with EU law in some areas.
- Commitments in the EU-UK Trade and Cooperation Agreement and the potential for commitments in other bilateral trade agreements.

The Committee received evidence on the importance of regulatory alignment for business as well as the economic advantages of a strong UK internal market.

The written submission from the FDF and NIFDA highlighted the impact on their members were standards to become an area of political dispute, saying:

“Any system which is arrived at must have minimal invasion on our member’s operations. Mutual recognition on production standards (be it environmental, labour or animal welfare) must be agreed at political level. More cost, audits, bureaucracy will not be welcomed.”

In oral evidence, the Committee the FDF expanded on this, explaining that it *“is not concerned about anything as far as mutual recognition is concerned.”* In its view the *“issue might become more about divergence or differences between regulation”* if consequently *“goods were not allowed to be placed in the market in England, that would be of significant concern to the Scottish food industry.”*

Jonnie Hall of NFU Scotland explained the potential detrimental effect that divergence could have on the agriculture sector, saying:

“because of the very nature of the provisions in that act, there is nothing to prevent something that is produced to a different standard or to a different set of regulations and therefore at a different cost being sold or used in Scotland to either the advantage or disadvantage of Scottish agriculture and indeed not necessarily to the knowledge of the Scottish consumer.”

Jess Sargeant from the Institute for Government also highlighted the potential competitive disadvantage which could be created by regulatory divergence, saying:

“one of the challenges will arise if the UK Government takes advantage—as it would argue—of its post Brexit freedoms by taking action to make businesses more competitive compared with under EU regulation. If the Scottish Government keeps pace with EU law in some areas, only Scottish producers will be required to comply with the new requirements. Any goods that are imported from England, where the UK Government is acting for England only, will not have to continue to comply with the Scottish Government’s regulations replicating EU law, which could put them at a competitive advantage, and therefore Scottish producers at a competitive disadvantage.”

Logistics UK explained in its written evidence that UK food produce now has third country status when entering the EU Single Market creating *"a huge burden on GB exporters."* In oral evidence the Committee discussed this further with Logistics UK saying:

"The impact is that food exporters in Scotland or elsewhere in GB have to comply with sanitary and phytosanitary legislation to export goods such as seafood, dairy produce or bread, whether to Northern Ireland or to anywhere in the EU. That means that they need export health certificates."

At present there is a grace period on certain exports, but when this ends there will be a need for greater checks. Logistics UK explained that this could mean checks on up to 30% of goods imported from GB into Northern Ireland.

"That is not feasible for the number of lorries that arrive in Northern Ireland daily. We are talking about 1,200 lorries a day arriving in Northern Ireland, about half of which come in from the port of Cairnryan in Scotland. It would not be feasible to have that number of checks right now. Checks are done at about the 5 per cent level, but we definitely need some type of agreement on those coming in at the end of the grace period, because I think that we would struggle to comply with that. In conclusion, there is a lot more paperwork, so there are administration and staffing costs for exporters."

The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (section 1(1)) confers a power on Scottish Ministers to allow them to make regulations with the effect keeping Scots law aligned with EU law in devolved areas (referred to as the "keeping pace" power). Scottish Ministers have indicated that, where appropriate, they would like to see Scots Law continue to align with EU law.

Dr Billy Melo Araujo of Queen's University Belfast explained in oral evidence to the Committee that even if Scots law aligned to EU law, businesses would still require to demonstrate compliance with EU law when trading, saying:

"Irrespective of whether Scotland diverges from EU rules, there will be checks, customs declarations and procedures, including regulatory compliance checks…the fact that you have the same rules does not mean that the regulatory compliance checks do not take place; it just means that the regulatory burden on Scottish traders is reduced, because they do not have to comply with two different sets of regulations to have access to the EU and Northern Ireland markets. They still have to prove that their goods are compliant with EU rules. There is also the potential application of EU tariffs, where goods that come from Scotland are deemed to be at risk of being moved on to the European Union."

In written evidence Dr Melo Araujo also explored the relationship between the Protocol and other new constitutional arrangements such as frameworks, writing:

"The Protocol may undermine the development of UK-wide minimum standards to the extent that it ties NI to the EU regulatory framework in relation to trade in goods. In NI, under the Protocol, EU law will prevail over domestic UK law meaning that common frameworks will only apply in NI to the extent that they do not conflict with

applicable EU law. Any change in EU law or in any of the three administrations has the potential to lead to regulatory divergence…identifying and avoiding regulatory divergence with NI will be no easy task because of the sheer complexity of NI's post-Brexit regulatory regime. This regime is shaped by the interaction of EU law falling under the scope of the Protocol, the UK common frameworks, UK law, changes to retained EU law and NI law and policy."

In oral evidence, NFU Scotland explained its ongoing concern at the potential impact of Scotland pursing EU alignment at the same time as the UK Government pursued an agenda of divergence, saying:

"we certainly have a UK Government that is starting to test the boundaries of diverging from the EU at the same time as we have the Scottish Government remaining pretty much aligned with the EU, especially on environmental regulation and so on... I am still trying to square the triangle, if that makes sense, of Westminster, Edinburgh and Brussels and where that leaves the likes of Scottish agriculture and food producers operating within a single market in the UK."

Scottish Environment LINK and environmental charity Fidra both provided evidence on their concerns over a potential "race to the bottom" on standards, arguing for permitted divergence where this was in the public interest.

Evidence from Professor McEwen and academic colleagues highlighted the link between trade and regulatory divergence:

"one reason for concern about internal regulatory divergence is its impact on the ability of the UK Government to strike trade deals with the EU and other trade partners. The UK Parliament can, by implementing trade deals in primary legislation, give effect to their rules throughout the UK. However, such legislation, to the extent that it impinges on areas of devolved competence, engages the Sewel Convention, thus risking conflict between the UK and devolved governments. Moreover, unless such legislation itself is protected against subsequent modification, it may not prevent future regulatory divergence."

The Institute for Government indicated in its written evidence that if the UK Government negotiated a trade agreement on the basis of some *"side bargains"* in the margins of trade negotiations and these were in devolved areas, the responsibility to implement those may sit with devolved governments who may choose not to.

The Law Society of Scotland's written evidence noted the establishment of the Parliamentary Partnership Assembly (consisting of members of the UK and European parliaments) and the lack of any mechanism for the devolved legislatures to be able to express views to either United Kingdom Parliament or the European Parliament. It suggested that:

"The Government should explain how the devolved legislatures and administrations will have a role in this process. It is important that the devolved legislatures are involved because under the various devolution statutes international relations including those with the European Union are reserved to the United Kingdom

whereas the implementation of agreements in areas of devolved competence lie with the devolved legislatures and administrations."

Evidence has also explored the opportunities in regulatory divergence. The Institute of Government, for example, stating that divergence can *"act as a 'policy laboratory', allowing different parts of the UK to introduce different policies, evaluate their successes and learn from each other."* Professor McEwen et al making a similar observation, explaining that:

"Among the attractions are the ability to: reflect local preferences and thereby strengthen democratic accountability; reflect distinctive institutional frameworks; and respond to distinctive demographic, economic and geographic needs and concerns. Divergent policies can also spark policy innovation, and new ideas introduced in one territory might be picked up by, and/or adapted to, other territories within and beyond the state."

Professor Weatherill made a similar point in oral evidence to the Committee, saying:

"In principle, the idea of having regulatory experimentation, regulatory learning and regulatory emulation within an internal market is attractive. If you allow different constituent elements to do different things, one constituent element might find the best way to solve a particular problem and that understanding can be shared directly or indirectly with the other constituent elements, which might follow suit…The problem with the United Kingdom Internal Market Act 2020 is that, if one constituent element chooses to experiment with its regulations by introducing stricter rules for products than apply elsewhere, the stricter standards are undermined by imports from another constituent element of the UK that do not need to comply with the stricter rules of the experimenting constituent element…There is a dynamic in the UK internal market that is antagonistic to regulatory learning".

Similarly, Professor Nicola McEwen spoke about the potential benefits of divergence:

"There are lots of potential benefits to divergence in principle. The point is that, although the internal market act and the scope of the market access principles do not prevent regulatory divergence, they potentially prevent it from having the same effect that it might have had in terms of achieving the policy goals were that legislation not in place. That potentially has a knock-on impact on the scope for learning, experimentation and seeing whether something works that we have had so far under devolution."

At last week's evidence session the Committee heard from the Office for the Internal Market (OIM). OIM *"assesses whether the Internal Market is operating effectively and provides expert and independent advice to UK government and devolved administrations.*[1]" OIM will provide reports or advice on specific regulatory provisions, including proposals relating to such regulatory provisions. Such reports or advice are provided upon the request of the UK Government, Scottish Government, Welsh Government or a Northern Ireland Department.

[1] Office for the Internal Market webpage

Members may like to discuss with the Cabinet Secretary

- What discussions the Scottish Government is having with business and industry about the challenges it is facing/may in future face if there are different regulatory regimes in place. For example, in exporting to NI.
- What impact regulatory alignment/divergence will have on Scottish businesses/industry/agriculture particularly if regulatory alignment with the EU is not something sought across the UK.
- What opportunities the Scottish Government sees in regulatory divergence/what opportunities it sees in alignment.
- The Scottish Government's view on the impact of future trade agreements in devolved areas.
- How decisions to ask OIM to consider a matter will be made and whether the Scottish Government has considered making any advice/reporting requests of OIM to date.

Common frameworks

The frameworks programme has been significantly delayed. The UK and devolved governments had agreed to work to a date of end March 2022[2] to have all frameworks finalised and operational.

There are expected to be 24 common frameworks which apply to Scotland. Of these:

- 1 (Hazardous Substances (planning)) is finalised.
- 9 provisional frameworks have been published (2 were considered by the session five Health and Sport Committee and the remainder have yet to be scrutinised by the Parliament).
- 14 are awaiting publication (the majority of these remaining provisional frameworks were expected to be published by 16 December 2021, however, only three were published. No firm timescale for publication has been communicated for the remaining frameworks although it is anticipated that this will be throughout January).
- Most frameworks have been operating on an interim basis since 1 January 2021 in spite of being unavailable for scrutiny by legislatures.

[2] See Thirteenth European Union (Withdrawal) Act and Common Frameworks statutory report, paragraph 1.9

On 6 December 2021 the Cabinet Secretary wrote to the Committee with an update on the common frameworks programme and its interaction with the UK Internal Market Act.

On 9 December 2021 the Thirteenth European Union (Withdrawal) Act and Common Frameworks statutory report was published, detailing progress on the frameworks programme from 26 June to 25 September 2021.

A Process for considering UK Internal Market Act exclusions in common framework areas was published on 10 December 2021. UK Government Ministers have the power to disapply the market access principles set out in the Act where the UK Government has agreed with one or more of the devolved governments that divergence is acceptable through the common frameworks process. Although UK Ministers can disapply the market access principles in such circumstances, they are not obliged to do so.

The process for considering exclusions does not set out a role for the devolved legislatures. Exclusions can be proposed by the UK or devolved governments and are discussed through framework forums. If an exclusion is agreed, the relevant UK Minister will lay regulations in the UK Parliament. A notification of the regulation would come to the Scottish Parliament under Statutory Instrument Protocol Two.

The UK government announced a review of EU retained law in September 2021.

Common frameworks have been a central issue in the Committee's inquiry. In particular, transparency around the frameworks process at both a stakeholder and Parliamentary level has been raised as a concern.

In oral evidence, Scottish Environment LINK told the Committee:

"we are clear that we need strong common frameworks. We have not received much in the way of public update in the past year or so about their development."

Jonnie Hall of NFU Scotland shared NFU's similar frustration at stakeholder engagement on common frameworks, saying:

"An agriculture framework exists, but the grouping seems to be nothing more than a talking shop. It has not met yet, despite our pressing for it to be up and running so that Governments and key stakeholders can feed into the process and so that everyone is aware of what is happening and can not only work towards what are, in many ways, the same end goals, but do that in different ways. That is the whole point of devolution."

Alison Douglas, Chief Executive of Alcohol Focus Scotland, also highlighted issues of transparency in the frameworks process as a concern, saying:

"people have raised the issue of the transparency of the common frameworks and the ability of civil society organisations and the voluntary sector to scrutinise and input into that process. That is a major concern for us."

The written submission from Professor Nicola McEwen et al noted the lack of transparency in the common frameworks process and suggested interparliamentary working as a means to improving scrutiny saying:

"Evaluation of Common Frameworks is hampered by the lack of transparency in the Frameworks process. Of the 32 Frameworks announced by the UK Government, only 11 have been published, ten of which appear to be provisional…The Committee may wish to ensure that these are shared with relevant portfolio committees. Strengthening engagement with sister committees in the Senedd and the Northern Ireland Assembly may also enhance the capacity for scrutiny."

On 14 December 2021, the House of Lords Common Frameworks Scrutiny Committee wrote to the UK Government on the Blood Safety and Quality, and Organs, Tissues and Cells (apart from embryos and gametes) provisional common frameworks.

The letter noted the Committee's concern at *"the absence of a commitment to more meaningful ongoing stakeholder engagement"* highlighting its report of March 2021 which *"concluded that frameworks were weakened by the lack of stakeholder consultation and recommended that future reviews of frameworks should include an open and well-publicised stakeholder consultation process that reaches beyond the small number of stakeholders previously consulted."*

In the letter the Committee made a recommendation that *"the first two-year review should include an open consultation process with stakeholders and the frameworks should be updated to include an ongoing commitment to stakeholder engagement where necessary."*

Professor Jo Hunt of Cardiff University highlighted the transparency and scrutiny challenge for legislatures saying:

"when Parliaments are engaging with those frameworks, they are not looking at final policy decisions on particular issues; they are looking at the frameworks for managing decision making. Therefore, it is important to ensure that steps are built into how those frameworks work that enable the on-going oversight and engagement of Parliaments in that process—that is the challenge. It is not the case that the framework is a done deal and that provides an answer and a final output on a particular policy issue; rather, the framework should be an ongoing, living constitutional document."

The House of Lords Common Frameworks Scrutiny Committee has also raised the matter of ongoing Parliamentary scrutiny of frameworks, saying:

"We note the absence of any commitments in the texts of these frameworks to publish reviews of the frameworks or to update legislatures on the outcomes of reviews. The Government has separately committed to improving transparency in Intergovernmental Relations. Transparency in this area should include regular statements to legislatures on the functioning of these frameworks. We recommend that the frameworks should be updated to include a commitment to update the House of Lords, House of Commons and the three devolved legislatures on the

ongoing functioning of these frameworks after the conclusion of the two-yearly reviews."[3]

The session five Finance and Constitution Committee recommended that the Scottish Government should have to report on the operation of each common framework, noting interactions with cross-cutting issues such as keeping pace with EU law, on an annual basis[4].

In his paper to the Committee of January 2022, Professor Michael Keating explained:

"From the outset, there was some ambivalence about the purpose of Common Frameworks. One view is that they might be used to make common policies across the UK or GB, jointly agreed by the UK and devolved governments…The Welsh Government has favoured this approach..The other view is that Frameworks should provide for as much autonomy as possible for devolved governments to make their own distinct policies. This is in line with the Scottish Government's preferences, focusing on its right to act independently in devolved areas…In the event, the focus of Common Frameworks has been on process rather than policy substance. Indeed, they are being described as 'policy neutral'. Some of them suggest that minimum standards might be agreed but mostly the emphasis is on notification and discussion of divergence. Some suggest that joint policy-making might be possible."

Jess Sargeant of the Institute for Government argued that frameworks should be the primary means of discussing divergence, saying in oral evidence:

"common frameworks should be the primary mechanism through which discussions of divergence happen. We have to accept the reality that the legislation [UKIMA] is now on the statute books. The act is a backstop to be used in the event that we cannot reach agreement through common frameworks and intergovernmental agreement, which is really important."

Professor Kenneth Armstrong of Cambridge University set out in his submission to the Committee the tension between UKIMA and common frameworks, saying:

> *"Unlike the statutory internal market, the common frameworks programme is a means of managing divergences before new rules are adopted. But unlike EU techniques for managing new draft regulatory requirements which legally mandate notification and stand-still obligations, the cooperation envisaged under common frameworks do not take binding legal form.*
>
> *The problematic relationship between common frameworks and the UKIM Act should be obvious. At a political level, the analysis of proposed new rules through intergovernmental cooperation within the auspices of a common framework may result in new regulatory divergences. However, legal enforcement of the Act*

[3] Letter of 14 December on the Blood Safety and Quality, and Organs, Tissues and Cells (apart from embryos and gametes) provisional common frameworks.
[4] Legacy Expert Panel Report to the Finance and Constitution Committee, 12 February 2021

> *leads to the disapplication of new rules if they are inconsistent with the market access principles. That has the potential to undermine common frameworks, with intergovernmental negotiations conducted in the shadow of the reach of the Act."*

The way in which common frameworks have been developed and will operate raises some significant scrutiny challenges for the Scottish Parliament.

- Common frameworks are intergovernmental agreements and the scope for parliamentary influence in their development is significantly limited with scrutiny taking place at phase four.

- The ongoing operation of frameworks will take place at an official level between government departments. It is therefore unclear how much information the Parliament may be able to access to scrutinise the effect of frameworks on policy-making.

- The Scottish Government and the UK Government have differing objectives in relation to frameworks. The UK Government is seeking "high levels of regulatory coherence". The Scottish Government believes that they are about "allowing legitimate policy choices"[5].

- The impact of common frameworks on the Scottish Government's stated policy position of keeping pace with EU law.

[5] Legacy Expert Panel Report to the Finance and Constitution Committee, 12 February 2021

Members may like to explore with the Cabinet Secretary:

- At what stage the frameworks programme is at and what the cause of the significant delays has been.
- The purpose of frameworks – are they about common policy making or maximum permitted autonomy.
- The role of stakeholders in the frameworks process – including in the ongoing operation of frameworks.
- The Parliament's role in the ongoing scrutiny and oversight of frameworks.
- What work the Scottish Government has undertaken to assess any issues coming out of the operation of frameworks on an interim basis which will be addressed in provisional frameworks presented to the Parliament for scrutiny.
- The process for exclusions under UKIMA in common framework areas. Specifically:
    - What the scope of exclusions is likely to be – whole framework areas or specific matters of EU retained law contained in frameworks.
    - The transparency in the exclusions process and the role for legislatures.
    - Whether any exclusions are under discussion at present.
- What assessment the Scottish Government has made of the impact of common frameworks on its ability to keep pace with EU law in framework areas.
- Whether the Scottish Government has had any discussions with the UK Government on the review of EU retained law.

The scrutiny challenge of executive decision making and intergovernmental relations

Professor Jo Hunt highlighted the scrutiny challenge of the new constitutional arrangements considered as part of the Committee's inquiry during oral evidence, saying:

"Throughout the entire system, whether we are looking at the frameworks or the operation of the internal market act, which we know has built into it all sorts of

opportunities for executive action to change the existing provisions, there are multiple points at which concerns arise about transparency and the scrutiny opportunities."

On 13 January 2022, conclusions to the review of Intergovernmental relations were published. Part of the new intergovernmental relation mechanisms is a three-tier system of intergovernmental forums which replaces the Joint Ministerial Committee. The top tier of the new system being a new forum for the Prime Minister and leaders of the devolved governments called the 'Prime Minister and Heads of Devolved Governments Council'. This top tier will meet annually

The middle tier has an interministerial standing committee which will meet monthly to discuss strategic and political issues on both the domestic and international agenda. This standing committee will also be expected to resolve disputes escalated to it from the lower tier. The middle tier also has a Finance: Interministerial Standing Committee and there is an option for other time-limited interministerial committees.

The bottom tier comprises portfolio-level Interministerial Groups. In a blog for the Centre on Constitutional Change, Professor Nicola McEwen explains:

"These groups focus on devolved areas (e.g. IMG (Culture)) as well as reserved areas that have an impact on devolved matters (e.g. IMG (Trade)). Some of these are already up and running. Some long-standing committees (e.g. in agriculture and fisheries) have been rebranded to fit the new format. Others have yet to be established. These include committees that engage the often politically contentious work of the Home Office, and one intended to give the devolved governments a voice in relation to the UK-EU Trade and Cooperation Agreement…The UK government hopes that this bottom tier will carry the load, with a technical focus that helps to avoid policy issues being escalated to political disputes."

In oral evidence, the Committee was reminded of the "formal agreement is already in place whereby committees are entitled to be informed of the Scottish Government's participation in intergovernmental discussions and agreements"[6].

Giving evidence to the Committee, Jess Sargeant of the Institute for Government highlighted the importance of well-functioning intergovernmental relations given the new constitutional landscape post EU exit:

"At a minimum, it is important that the interministerial machinery is functional, but it is not fully functional at this point. The priority is to create a new system that works."

Professor Nicola McEwen suggested that *"The alternative to the legalistic and centralising approach of the UK internal market act is an intergovernmental approach."* Professor McEwen continued:

"That of course has challenges for parliamentary scrutiny, but it is the most potentially devolution-friendly approach to managing the internal market and the

[6] Professor Nicola McEwen, Official Report, 2 December 2021, column 39

economic union. Whether it actually works like that through the frameworks process, I have some doubts, partly because the frameworks are fairly narrowly defined and, as time moves on, we would expect more regulations that do not connect as easily to the frameworks or fall within their scope."

Professor McEwen went on to say that an intergovernmental process alongside the frameworks programme was an alternative to capture areas outside the scope of frameworks. Highlighting that that approach *"is the system that we see in many other countries that are similarly trying to manage diversions and autonomy along with economic union, which is a challenge for every multilevel system."*

Members may wish to discuss with the Cabinet Secretary:

- Whether the Scottish Government has considered how parliamentary scrutiny can be built into executive-led decision-making processes arising from EU exit.
- What the conclusions of the review of intergovernmental relations mean in practice and whether the Scottish Government is content with the new intergovernmental mechanisms.
- How the Scottish Government can improve transparency around intergovernmental discussions and decision making. What mechanisms for transparency surround the new three-tier approach to intergovernmental forums.

Sarah McKay, Senior Researcher, SPICe Research
12 January 2021

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.

The Scottish Parliament, Edinburgh, EH99 1SP www.parliament.scot