



The Scottish Parliament
Pàrlamaid na h-Alba

CULTURE, TOURISM, EUROPE AND EXTERNAL RELATIONS COMMITTEE

AGENDA

12th Meeting, 2018 (Session 5)

Thursday 3 May 2018

The Committee will meet at 10.00 am in the Robert Burns Room (CR1).

1. **Decision on taking business in private:** The Committee will decide whether to take item 3 in private.
2. **Article 50: UK Common Frameworks:** The Committee will take evidence from—

Professor Michael Keating, Professor of Politics, University of Aberdeen and Director of Centre on Constitutional Change;

Professor Nicola McEwen, Professor of Territorial Politics, University of Edinburgh and Co-Director of Centre on Constitutional Change;

Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh.
3. **Scotland's Screen Sector: Commissioning:** The Committee will consider a draft response to Ofcom's consultation on the Review of Regional TV Production and Programming Guidance.
4. **Scotland's Screen Sector (in private):** The Committee will consider a draft interim report.
5. **Article 50: UK Common Frameworks (in private):** The Committee will consider the evidence heard earlier in the meeting.

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The papers for this meeting are as follows—

Agenda item 2

Note by the Clerk CTEERC/S5/18/12/1

PRIVATE PAPER CTEERC/S5/18/12/2
(P)

Agenda item 3

PRIVATE PAPER CTEERC/S5/18/12/3
(P)

Agenda item 4

PRIVATE PAPER CTEERC/S5/18/12/4
(P)

Culture, Tourism, Europe and External Relations Committee

12th meeting, 2018 (Session 5) Thursday 3 May 2018

Article 50: UK Common Frameworks

Repatriated competences and frameworks

Paper for Scottish Parliament, Culture, Tourism, Europe and External Relations Committee written by Michael Keating, Professor of Politics, University of Aberdeen and Director of Centre on Constitutional Change; Nicola McEwen, Professor of Territorial Politics, University of Edinburgh and Co- Director of Centre on Constitutional Change and Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh.

Devolution Competences and and Brexit

A series of competences are currently both devolved and subject to European regulation. They include agriculture, fisheries, environmental policy and elements of Justice and Home Affairs, which are addressed in the second part of this paper.

After Brexit, if nothing else were done, these would revert to the devolved legislatures. At present, EU regulations provide both EU-wide and UK-wide rules and standards. After withdrawal, therefore, UK-wide frameworks would cease to exist.

The European Union (Withdrawal) Bill initially provided that all 'retained EU law' would come back to Westminster. This includes devolved powers. The UK Government could then decide which matters might be 'released' back to the devolved level.

The UK Government argued that this was necessary to ensure essential commonalities across the United Kingdom. It would not represent a loss of power as the devolved governments were only carrying out policies within frameworks decided in Brussels. Following Brexit, these EU frameworks would be replaced by UK- or GB-wide (the distinction is not always clear) policy frameworks.

The Scottish and Welsh governments argued, on the contrary, that they make policy within the EU frameworks and do not merely implement them. They argued there is an important difference between working within EU frameworks, which are decided after negotiation among the Commission and member states, and working within UK policy frameworks set by Westminster.

Following discussions between the UK and devolved governments, the differences between the two sides have narrowed. The UK Government no longer proposes an initial blanket reservation of all competences coming back from the EU and accepts that many can come back immediately to the devolved level. Amendments to the Withdrawal Bill reverse the assumption of reservation. So EU powers in devolved fields would come back directly to Scotland, Wales and Northern Ireland unless they were expressly brought back to Westminster. Ministers could create what would in effect be temporary reservations by statutory instrument. UK ministers would consult

the devolved governments before setting the restriction. Statutory instruments are not subject to consent from devolved legislatures under the Sewel Convention but the UK Government has proposed to introduce a similar provision in this case; the instruments would not 'normally' be put through without consent. Such restrictions are intended to last until frameworks are put in place but with a sunset clause of seven years.

For their part, the Scottish and Welsh Governments have accepted that there will need to be some UK-wide frameworks to replace European ones.

Differences remain, however, on the scope and form of these frameworks and how they will be negotiated. The Welsh Government has accepted the latest compromise. The Scottish Government still opposes the reservation of previously devolved competences. It has suggested instead that the two governments would not legislate in the relevant fields until frameworks have been agreed.

Framework laws are a feature of some federal and devolved system. The state level lays down general principles within policy fields and the devolved or federated governments make detailed provision within these parameters. This is also how the EU itself works, except in relation to its few exclusive competences, such as international trade agreements. Within the sphere of its own competences, EU law has supremacy over the law of member states and devolved legislatures within them. On the other hand, its actions are limited by the principles of subsidiarity and proportionality, so that they intrude no more than necessary on the national and regional level.

There is no such provision within the UK devolution settlement. Instead, under the 'reserved powers' model, each level of government has almost exclusive control within its own competences. There is no hierarchy of laws but devolved and Westminster laws have the same status. Westminster does reserve the right to overrule repeal or amend devolved law, but this is subject to the Sewel Convention, that it should only do so with consent. Only in relation to EU law is there a hierarchy of norms, with the devolved governments having the ability to make policies within European parameters. Frameworks are thus a constitutional innovation, whose implications deserve consideration. They would extend the range of shared competences and could create a hierarchy of norms within the United Kingdom.

The issue of frameworks also brings in the question of where England fits in and whether the UK Government in respect of England would also be subject to them and, if so, how.

The Scope of Frameworks

The principles now agreed between the UK and devolved governments are that common UK or GB frameworks should:

- enable the functioning of the UK internal market, while acknowledging policy divergence;
- ensure compliance with international obligations;
- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;

- enable the management of common resources;
- administer and provide access to justice in cases with a cross-border element;
- safeguard the security of the UK.

These principles might have been given effect in either of two ways.

- (a) They could provide general and broad guidelines indicating common concerns, which might arise in relation to a range of competences. So the need to secure the UK internal market would appear to be a general principle. It was at one time described as the UK single market, by analogy to the EU's Single Market, which is a broad programme providing for the removal of obstacles to market integration, and which is given effect by detailed directives and other instruments, and by court interpretations. EU competition policy in particular has been invoked in a number of fields that were not previously anticipated. Similarly, international trade agreements after Brexit might raise UK-wide concerns in various policy fields. Trade agreements these days include many matters apart from tariffs, including product standards, environmental regulations, public procurement, state aids and sometimes labour market and social provisions. These also could arise in unanticipated ways. These are not straightforward matters and often involve matters of political judgment. There are differences over the proper limits of market competition as compared with public provision in areas like health, education and public procurement. The scope of international trade agreements and their impact on domestic policy is similarly contested.
- (b) Alternatively, frameworks could take the form of detailed provision within specific sectors and in relation to specific competences, starting from the bottom. The UK Government has taken this second approach, working through individual EU competences and, in many cases, specific EU decisions. It initially produced a list of 111 competences that it considered were simultaneously devolved to Scotland and Europeanized. Following discussions between officials and in the JMC (EN), the list has been refined and on 9 March the Cabinet Office published a list of 155 areas where European competences intersect with devolved competences, 107 of which are devolved to Scotland. There is a danger that by proceeding according to these lists we may end up with a coverage of issues that is both too wide, by including items that are not strictly necessary, and too narrow, in not providing for unanticipated implications of the UK internal market or international trade agreements.

Form of Frameworks

The JMC of October 2017 agreed that:

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

The Cabinet Office paper of March 2018 expanded on this by dividing the competences where European and devolved authority overlapped into four categories. Of the 155 areas where EU law intersects with devolved powers, there are 49 areas where no further action was required, meaning that frameworks are deemed unnecessary. There are 82 areas – 59 in Scotland - in which non-legislative frameworks might be required. There are 24 policy fields in which the UK proposes detailed discussions as to whether legislative frameworks might be needed, implying disagreement between the governments. In a further 12 areas, including state aid, the UK argues that the domestic legal competence is uncertain.

<i>Cabinet Office proposals on frameworks, March 2018</i>				
	Total	No action	Non-legislative framework	Legislative framework?
N. Ireland	151	46	81	24
Scotland	107	24	59	24
Wales	54	21	19	24
Total	155	49	82	24

Legislative frameworks will be passed at Westminster but subject to legislative consent by the devolved legislatures, 'in so far as they are carried forward by primary legislation' (Lord Keen, Advocate General in the House of Lords). On the other hand, if the relevant powers are reserved (albeit temporarily) the Sewel Convention might not strictly be applicable.

Concordats and memorandums of understanding are a familiar and common tool to promote cooperation across governments, but they have operated on the basis of shared trust and goodwill. There is no mechanism to ensure their enforcement. There is a process of dispute avoidance and resolution within the JMC, but it has been used only rarely and is widely regarded as inadequate among the devolved governments and other observers.

Outstanding Issues

It is not clear how frameworks will be negotiated, agreed or governed. The machinery of intergovernmental relations in the UK is not designed for joint policy making. The Welsh Government has proposed a Council of the United Kingdom with a role similar to that of the EU Council of Ministers, to negotiate and implement frameworks. This, it suggests, should be supported by an independent secretariat, decision-making by consensus or by a vote where the support of the UK Government plus one other devolved government would be sufficient to carry the vote, and independent arbitration where necessary.

The role of frameworks in relation to England remains unclear, given the role of the UK Government as responsible both for the UK and England.

The content of frameworks could be contentious. They might lay down parameters within which governments would have to work, or contain specific policies. The Scottish Government seems inclined to the first interpretation while the Welsh Government leans to the second. There is much scope for political disagreement on

how much policy conformity is required and on the interpretation of exactly what the UK internal market means.

The future relationship between international trade policy, which is reserved, and devolved competences is a difficult one. UK ministers already have power to instruct devolved ministers to give effect to international obligations but this is considered a last-resort power and not part of normal procedure. As EU obligations (which are binding all the way down) are replaced by international agreements, it becomes more relevant. There are, as yet, no proposals on how programmes and projects presently funded by the EU - notably in agriculture, structural and research – will be funded in the future.

Agriculture

Agricultural Policy

Agricultural policy consists of three elements:

- Regulations, including food, sanitary and phytosanitary standards. These are largely devolved but mostly set at European level with some discretion as to the details of application.
- Support under Pillar 1 of the Common Agricultural Policy (CAP), which involves subsidies to farmers. The main one is the Basic Payment scheme, which provides payments to active farmers based on the extent of their land.
- Rural policy measures under Pillar 2 of the CAP, which provide support for economic and social development.

Recent reforms of the CAP have sought to:

- Reduce support based on production levels, to be replaced by direct payments to farmers based in future of the amount of land;
- Encourage environmental measures;
- Move the emphasis from agriculture to rural policy;
- Give member states more flexibility in applying the various policy instruments.

Policy Divergence

Within the United Kingdom, this flexibility has been extended to the devolved governments.

Agricultural conditions in Scotland differ from those in England. Only 17 per cent of land in England is in 'areas of natural constraint' (formerly 'less favoured'), compared with 70 per cent in Northern Ireland, 81 per cent in Wales and 85 per cent in Scotland. England is characterized by large, productive farms while small farms predominate in Wales and Northern Ireland. Scotland has large farms but with extensive rather than intensive agriculture. England has a larger presence in horticulture, which is profitable, while farmers in the devolved nations are more dependent on subsidy. It is estimated that between 50 and 60 per cent of farm income in the UK as a whole comes from CAP payments. In Northern Ireland, Wales and Scotland it is 87, 80 and 75 per cent respectively (Greer, 2017). The social and

cultural role of agriculture is more important in Scotland, Wales and Northern Ireland and there is an emphasis on keeping population in the remote rural areas.

Consequently, the devolved nations have a larger share of agricultural spending as shown below.

CAP Allocations across UK 2014-20

	% CAP Allocation	% UK Population	€ per capita
England	64	84.2	338
Scotland	17	8.3	863
Wales	9	4.7	866
Northern Ireland	9	2.8	1404

Scottish decisions on agriculture have differed significantly from those in England. Scotland has retained some production-linked support schemes. It has capped payments to the wealthier farmers, something which DEFRA has claimed it will do after Brexit, although there is nothing to stop it doing so now. There is a more stringent 'active farmer' test. Rural programmes have been organized differently and linked into other policy instruments. So Scotland does not merely implement European agriculture policy but does itself fashion its own programmes and priorities.

Fifteen of the 24 areas listed in the March 2018 Cabinet Office paper as requiring further discussion as to whether legislative frameworks are needed are in the area of agriculture and fisheries. These include agricultural support and a swathe of regulatory matters.

Need for Frameworks

The need for agricultural frameworks arises in relation both to consistency of regulation across the UK and support for farmers. The main considerations are maintaining the UK internal market and international trade agreements. It is not common for international free trade agreements to include agriculture, because it is so subsidized and protected. The UK Government, however, proposes to include it in trade deals both with the EU and third countries. This would entail agreement on standards and permissible subsidies and these would be binding on the devolved level.

There is agreement within the agricultural policy community on the need for consistent regulation across the UK. Most producers would like this to be based on European regulations, so as to keep open access to European markets. International trade agreements, however, might mean that lower standards are set. Were the devolved governments to insist on higher standards, because this was their own preference or because they wanted to keep access to European markets, this could be challenged by the third country partners. It is not clear where UK or GB standards would fit in here.

There is less agreement on the need for consistency in agricultural support payments. Differing levels of support might seem to upset the level playing field and some farmers in Wales and Northern Ireland have complained about the existing Scottish production-linked support. On the other hand, the present direct payment system does not count as market-distorting according to World Trade Organization rules, although at least one UK minister has suggested that it should be so classified. Trade deals with third countries, however, could make stricter provisions on allowable subsidies.

DEFRA has already set out its proposals for the future of farming in England. The main feature is that direct payments will be phased out completely in favour of payments for specific public goods, notably environmental improvement. Farmers in Scotland are more dependent on these payments than those in England. It is estimated that between 50 and 60 per cent of farm income in the UK as a whole comes from CAP payments. In Northern Ireland, Wales and Scotland it is 87, 80 and 75 per cent respectively. As direct support is reduced in England, there may be more pressure to reduce direct support in Scotland, coming from English farmers as well as government.

Climate and Low Carbon Energy

Environment and energy are shared competences in the EU Treaties. Both the EU and member states can legislate and adopt legally binding acts, but EU law has supremacy. The EU has developed an extensive policy portfolio relating to the environment, including areas that support climate change mitigation. Its competence in energy is more constrained and excludes measures that would limit the power of member states to determine their own energy mix, structure and exploitation of energy resources.

The Energy Union Strategy

As part of its ambition to develop an Energy Union, the EU has produced policy frameworks that incentivize low carbon transition. These include binding targets on reducing GHG emissions, reducing energy demand by improving energy efficiency, and sourcing energy from renewable sources. Specifically, they include:

- The EU Emissions Trading Scheme, a 'cap and trade' scheme designed to progressively reduce GHG emissions from large industrial units;
- The Effort Sharing Decision, which established binding targets for reducing GHG emissions on sectors not included in the ETS, such as transport, agriculture, buildings and waste
- Energy Performance and Buildings Directive, part of a broader strategy to promote energy efficiency;
- The Renewable Energy Directive which committed the EU collectively to ensure that at least 20% of its total energy needs were met by renewables, with varying national targets. All member states had to source at least 10% of transport fuel from renewables.

The binding nature of these targets means that member states who fail to comply may face infringement proceedings and ultimately heavy fines. The Energy Union

also promotes a fully integrated energy market, greater grid interconnection between member states and research and innovation.

EU Policy, Funding and Devolution

EU policy has been a backdrop for Scotland's ambitious climate and renewable energy goals. For example, reaching world-leading targets for reducing GHG emissions would be even more difficult without the requirements imposed by the ETS and ESD. By imposing binding targets on the UK, the Renewable Energy Directive incentivized the market interventions designed by the UK Government (the Renewables Obligation and the Feed-in-Tariff), which have benefited the industry in Scotland.

The EU has also been an important source of funding for Scottish climate and energy projects. The European Regional Development Fund (ERDF) is providing €476m in the current funding round (2014-2020), which the Scottish Government can distribute through 'strategic interventions' in line with EU policy objectives around environment, climate change and sustainable energy:

<i>ERDF for Environment, Energy and Climate Change</i>	
Green Infrastructure, Innovation, Low Carbon Infrastructure Transition Fund	£33 million
Low Carbon Travel and Transport	£13.9 million
Green Infrastructure	£8.2 million
Resource Efficiency and Circular Economy	£30.7 million

Source: Citizens' Summary: *European Regional Development Fund (ERDF) Implementation in Scotland*, 2015, p3.

There are at least 106 EU funds available for environmental protection alone.¹ The principal EU funding instrument dedicated to the environment is the LIFE (Financial Instrument for the Environment) programme. The Scottish Environment Protection Agency (SEPA) secured €2.35 million from this programme between 2011 and 2015. Scottish bids have been particularly successful in attracting funding for research and innovation, including around €300m from Horizon 2020, a significant proportion of which is dedicated climate and energy research. The European Investment Bank has also provided finance for low carbon energy projects, especially high cost, high-risk capital projects. In 2016, the EIB agreed a 19 year loan of £525m toward the construction of the Beatrice offshore wind farm 14km off the coast of Caithness - the largest single EIB loan for an offshore wind project.

Structural Funds including the ERDF will no longer be available after Brexit, though they may be replaced in whole or in part by additional UK funding. The availability and extent of research funding and EIB loan finance will be dependent on the nature of the UK-EU deal. The Prime Minister's Mansion House speech on 2 March included a commitment to '*a far-reaching science and innovation pact with the EU*' and she wants to explore options for the UK's continued participation in the EU's

¹ Welcome Europe, online source: www.welcomeeurope.com/european-subsidies-sector-Environment.html.

internal energy market. This would be subject to negotiation on the terms and conditions, but it might ensure that the UK's energy objectives remain strategically aligned with the EU's, which may facilitate continued access to EIB loan funding and other EU energy infrastructure funding (e.g. Connecting Europe).

Common Frameworks

Although successive Scottish Governments have exercised powers to promote renewable energy and energy efficiency, energy is primarily a reserved matter, especially energy markets and market intervention. The environment, by contrast, is indisputably devolved, except in relation to negotiating international climate agreements.

The Frameworks Analysis noted the intersection between EU and devolved competence in some areas, including the Energy Performance and Buildings Directive, the Renewable Energy Directive and onshore hydrocarbons licensing, but concluded that none of these required a common UK framework. Likewise, environmental regulations concerning flood risk, water quality and resources and Environmental Impact Assessments required no further action. In a range of other environmental measures, including air quality, the marine environment and waste management, as well as energy efficiency, non-legislative concordats were thought to be sufficient. Relatively few environmental areas were considered to require legislative frameworks. These included waste packaging and product regulations, and implementation of the EU Emissions Trading Scheme. It is not yet clear whether the UK intends to leave the ETS, nor what would replace it.

Justice and Home Affairs

Policy in this area has two dimensions: civil justice, and police and criminal justice (PCJ). The degree of policy overlap is complex given that Scotland retains its distinctive legal system within the UK, while there is also now extensive international cooperation not only within the EU but under the Council of Europe and by way of other free-standing international regimes.

Civil justice: key areas

The cross-border dimension of civil justice cooperation across the EU is extensive. The main areas include:

- **Jurisdiction:** rules on 'conflict of laws' and the jurisdiction of courts in civil matters, including commercial law. This seeks to streamline legal proceedings and prevent the same case being heard in more than one legal system.
- **Enforcement:** mutually agreed rules that allow for the reciprocal enforcement of court judgments across jurisdictions.
- **Family law** where it involves cross-border issues. This deals mainly with law relating to children: questions of custody, access, maintenance.
- **Other common approaches:** agreements on immigration and, for example, the 'Common European Asylum System'.

Police and criminal justice: key areas

- Eurojust and Europol: these agencies operate broadly in the delivery of law enforcement across the EU.
- Mutual recognition: as in the civil law area there is mutual recognition by Member States of one another's judicial decisions.
- European Arrest Warrant (EAW): a specific example of this mutual recognition is the shared commitment to enforcing judicial decisions across jurisdictions by way of the EAW. This allows for the arrest of suspects and fast track extradition from one Member State to another.
- Asset control: another area of shared enforcement concerns freezing or confiscating property related to criminal enterprises. This can involve asset control in one Member State while the suspect is prosecuted in another.
- Exchange of Information: law enforcement agencies benefit from rules allowing for exchange of information on criminal suspects, criminal investigations, criminal records and missing persons. Related areas include data protection and the complex relationship between exchange of personal information and its protection.
- Cross-jurisdictional offences: there are also agreements on substantive law where crimes are cross-jurisdictional, for example, rules on appropriate penalties for money laundering.
- Rights of the criminal suspect: agreements also cover the rights of the accused, setting standards on procedural rights which are more detailed than those provided for by, for example the European Convention on Human Rights.

Policy Divergence/Convergence

Scotland has 'policy divergence' based upon its different legal traditions. Northern Ireland's divergence is based upon the particular security considerations that apply. Wales has largely similar arrangements to England.

When it comes to relations with the EU however there is a high degree of congruence. Generally the UK has sought to exempt itself from systematic moves towards closer EU cooperation on JHA, preferring to select specific areas in which it seeks to build formal links with EU partners. Taking the Scottish Government as the key case study, it has tended to support this approach and to support the UK's opt-out/opt-in approach.

JHA: Brexit and Frameworks

It is not yet clear what impact Brexit will have upon the UK's relationship with the EU in the area of JHA.² It is therefore also not clear what the implications will be for the

² 'Brexit: future UK-EU security and police cooperation', House of Lords European Union Committee, 7th Report of Session 2016–17, HL Paper 77, 16 December 2016.

Scottish legal system or for the other devolved administrations. Two issues are in play: the nature of the UK's withdrawal, and the way in which returning competences will be reallocated across the UK's territorial constitution. The issue of hard or soft Brexit is to the fore. If an amicable future relationship is negotiated it is likely that JHA will be one of the areas in which neither side would like to see significant changes in levels of cooperation. Even in the event of a clean break, it is also likely that efforts will be made to maintain cooperation, particularly in areas that concern security across the EU.

In terms of reallocation of competences, at an internal, UK level, frameworks will be important to maintain internal UK cooperation in civil jurisdiction and also cooperation over policing and criminal law enforcement. Cooperation already works well and there is no reason to suppose this will change.

A second set of frameworks is likely to be needed in relation to international cooperation, both with the EU and beyond. On the civil side, there is a range of international agreements on jurisdiction; on cross-border cooperation, particularly concerning family law; and agreements on immigration and the 'Common European Asylum System'. On the policing and criminal justice side there will be questions about the UK's cooperation with Eurojust and Europol and the European Arrest Warrant system. There are also various other important regimes of cooperation on investigation and control of criminal suspects and their assets, as well as cross-jurisdictional law enforcement. To what extent will the different governments within the UK arrive at a common approach on these issues, many of which fall within devolved areas? Will there be room for divergence and if so how will the frameworks facilitate this? What instruments of intergovernmental relations will continue to support cooperation in this area? In all of these areas frameworks will be vital, and they are likely to be of considerable concern at EU as well as UK level.

Conclusion

There has been a lot of convergence on the idea of frameworks after Brexit and what these might cover in detail.

There remains, however, a difference of principle between the UK Government and the Scottish Government about the nature of the devolution settlement. For the latter, the relevant competences are theirs by right and cooperation can only be on a voluntary basis and without imposition or reservation.

There is also a question about the way in which frameworks have been approached, as lists of detailed competences rather than general principles that can be applied in specific circumstances. Changing conditions, shifting policy fields and future international obligations mean that any detailed list is likely to need amendment. The UK Government has conceded that any new reservations emerging from the Withdrawal Bill will be subject to sunset clauses, suggesting that the normal mode of dealing with common concerns will be the negotiated policy framework rather than reservation. The question of how the UK and its constituent parts manage common policy problems will remain and may have to be revisited as will be the way in which frameworks fit into the devolution settlement.