

Intergovernmental Relations in the Post-EU Context

Briefing paper for the Scottish Parliament Constitution, Europe, External Affairs and Culture Committee

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Intergovernmental Relations (IGR) are integral to all devolved/federal systems. In such multilevel systems, interdependencies across policy jurisdictions become increasingly inescapable, necessitating interaction between different levels of government at state, national, regional, and local levels. IGR can take different forms (formal/informal, bilateral/multilateral, vertical/horizontal, and legal/political) and are crucial to manage the intergovernmental conflicts that arise in multilevel states.

Intergovernmental Relations in the UK

IGR in the UK have been significantly reformed in light of the Review undertaken by the UK and devolved governments. The Review addressed various criticisms that were regularly levelled at the Joint Ministerial Committee (JMC) structures and has made IGR in the UK much more formalised. The reforms present an opportunity to forge closer, more stable and effective intergovernmental interaction between the governments.

One of the strengths of the new arrangements is the envisaged regular interaction. While the top tier Council will meet annually, both the middle and lower tiers will meet much more frequently. The latter forums will also benefit from rotating chairs and locations. This rotation is important and a welcome development as it serves as a check on the dominance of one government in intergovernmental forums and enables engagement in a non-hierarchical manner, while also cementing a sense of joint ownership in the new arrangements. This is not the case for the Council which will be chaired by the Prime Minister and thus maintains the hierarchy that has characterised devolution since its inception in the late 1990s.

The creation of a standing secretariat to provide support to all governments is also a significant development that will help with the organisation of meetings. This will facilitate more effective institutionalisation of intergovernmental mechanisms, providing structure to meetings/processes and fostering opportunities for meaningful engagement.

The Secretariat will also play a role in facilitating dispute resolution, able to appoint a third-party to provide advice or mediation. The reform of the dispute resolution procedure warrants particular mention as this addresses one of the principal criticisms of the former JMC in which the UK Government acted as both judge and jury even in cases in which it was a party to a dispute. Grounds for raising a dispute regarding financial issues, however, are more restricted. This, therefore, will require greater effort on the part of the Treasury to meaningfully engage with the devolved governments prior to, for example, changes to the Statement of Funding Policy.

Despite being essential in multilevel states, IGR can be opaque, presenting a challenge in terms of transparency. This was certainly the case in the UK under the JMC in which meetings were rarely publicised and the substance of discussions limited to a brief communique. Details in

the Review on enhancing transparency are rather limited. The very process of formalising the new structures will already be much better for transparency, aided by predetermined rules of operation and clear remits for the various structures, and a commitment to reporting information on intergovernmental meetings to the respective legislatures. The secretariat will also enhance transparency through reporting on the outcomes of meetings, publishing draft minutes, joint communiques and preparing an annual report on intergovernmental activity. These are notable advancements in increasing transparency on intergovernmental activities, albeit more detailed reporting on the substance of meetings (e.g., actions agreed/decisions taken and objectives set) and ensuring information is published in a timely manner would be better.

Transparency is enhanced, and hence expectations around the importance of reporting on IGR heightened, through the regular sharing of details of scheduled intergovernmental meetings (agendas, dates, venues) with committees tasked with scrutinising IGR. Further, while an annual report on IGR will be produced by the Secretariat (separate to any other report commitments by the individual governments), transparency could be enhanced through more regular detailed reports which should be then subject to committee scrutiny.

Both the Scottish and Welsh Governments have existing written agreements with their respective Parliaments on IGR which are certainly models of good practice. The Scottish Government-Parliament agreement commits the Government to produce an annual report on IGR, but given the increased intergovernmental interaction provided for by the new arrangements, more regular reporting such as a quarterly report would enable more effective scrutiny. It is also worth considering what role for Parliament/committees regarding intergovernmental agreements resulting from such increased interaction and whether these should be subject to parliamentary consent, as is the case for legislative consent motions.

To facilitate further scrutiny, not least public scrutiny, the establishment of a permanent, searchable and regularly updated website to collate and publish intergovernmental agreements, minutes from meetings and other relevant data/documents would be a welcome development.

Enhancing Scrutiny

The increased powers of the Scottish Parliament as a result of the 2012 and 2016 Scotland Acts significantly increased the interdependence between devolved and reserved powers. This has further intensified in light of EU withdrawal, necessitating more intergovernmental interaction between the UK and devolved governments.

The set-up of new IGR arrangements will facilitate interaction between the different governments in managing the post-EU exit context and the commitment to reach joint decisions by consensus bodes well. Given party political incongruence (i.e., different parties in power in Belfast, Cardiff, Edinburgh and London) and the distinct constitutional visions of the governments involved, achieving consensus may be no easy task, but it is an important principle nonetheless. Using IGR in this way certainly brings the UK in line with other federal/devolved systems in which intergovernmental mechanisms play important roles in seeking consensus/agreement when policy jurisdictions overlap. A key lesson for the UK here is to ensure this is done in the early stages of policy development, with all governments entering negotiations in good-faith and undergirded by mutual respect. On paper, the new IGR arrangements signal a move in this direction, but the proof of the pudding will be in the eating.

Interparliamentary relations (IPR) have hitherto been a neglected dimension in the UK's territorial structures. The experience so far has been largely ad hoc and informal, but developments such as the Interparliamentary Forum on Brexit and its successor the Interparliamentary Forum demonstrate the political willingness to institutionalise more IPR arrangements.

IPR can serve as an important avenue to further enhance relations between the different constituent units of a state, such as between the national parliament and the parliaments of the constituent units. Further, in using IPR as a tool of scrutiny, the transparency of IGR can be enhanced. This is certainly an area in the UK that deserves much more attention, particularly given the executive dominated nature of IGR.

As discussed above, parliamentary committees can play an effective role in scrutinising the intergovernmental work of their respective governments, making governments more accountable to parliament and adding a further impetus for governments to meaningfully engage in IGR. IPR at committee-committee level has increased in recent years, a necessary development in some areas because of concurrent policy responsibilities. This regular interaction between various committees in different legislatures should continue with joint meetings/reports and invitations for different members to attend various sessions. Attention, nonetheless, should also be paid to how legislatures enhance the transparency of IPR such as publicising meetings and regular reporting.

In the absence of a territorially representative second chamber, which in many federal systems serves as an intergovernmental chamber, the various committees in the respective legislatures in Westminster, Holyrood, Cardiff and Belfast should play a more active role in scrutinising IGR. Enhancing IPR and building further links between committees and the legislatures would be a welcome development, facilitating opportunities for knowledge exchange, the sharing of best practice and giving voice to parliamentary issues.

Learning from Elsewhere

Statutory footing: Placing IGR on a statutory footing has been suggested and supported by various parliamentary committees and parliamentarians.¹ The argument here is that this would improve IGR through more regular meetings and enhanced parliamentary scrutiny. Few IGR forums in other multilevel systems are constitutionally mandated (India's Inter-State Council is an exception), but others are legally grounded in various statutes. The Spanish case is an interesting example as it has sought to make use of legal frameworks in order to improve the accountability and transparency of IGR, including requiring some intergovernmental bodies to publish and promote their work. The effectiveness of this, however, has been rather limited. Statutory underpinning is no doubt an important mechanism to enshrine expectations around IGR and can carry important symbolic weight in underlining the importance of IGR. As the Spanish case demonstrates, however, a detailed legal framework does not guarantee effective interaction.

¹ <https://publications.parliament.uk/pa/ld201415/ldselect/ldconst/146/146.pdf>;
<https://committees.parliament.uk/publications/8562/documents/86664/default/>

Horizontal relations: Horizontal IGR refer to intergovernmental interaction between governments at the same level without the participation of the central government. Horizontal IGR in the UK are largely informal, limited by the small number of constituent units and the absence of a devolved government for England. The devolved governments, nonetheless, could learn a lot from other federal/devolved systems in which horizontal interaction is a regular occurrence. Indeed, in some of these states (e.g., Canada/Switzerland), horizontal IGR predate vertical IGR. The objectives of horizontal interaction vary from state to state but they largely involve sharing information and best practice, opportunities for learning in terms of the ‘policy laboratory’ effects of federalism (that is, learning from each other’s policy innovations) and providing a forum for governments to forge a common position vis-à-vis the federal (central) government. Examples include, the Council of the Federation, which brings together Canada’s provincial premiers and Switzerland’s Conference of Cantonal Governments. Switzerland offers a laudatory example in terms of horizontal IGR which include policy-specific forums (e.g., agriculture, education, health and public transport) and macro-regional conferences (Central and Eastern, Western and North-Western).

It is worthwhile also considering whether horizontal interaction in the UK could extend beyond the devolved governments in Scotland, Wales and Northern Ireland to include the nine metro mayors of England. Much like the devolved governments, the powers of metro mayors vary but there are jurisdiction similarities such as public transport. In previous evidence to the House of Lords Constitution Committee, I argued in favour of including metro mayors as representatives of England in IGR structures.² One of the biggest weaknesses of the new arrangements is the exclusion of England separate to the UK Government, but perhaps horizontal IGR could partially redress this, while also enhancing good governance through opportunities to share best practice and support/encourage policy innovation.

Horizontal interaction can also take place on an interparliamentary level. In the USA, the National Conference of the State Legislatures brings together officials and staffers from the 50 US states, providing an arena for information sharing, knowledge exchange, cross-state cooperation and forging common positions vis-à-vis the federal government.

Local Government: Local government, seen as the third order of government, is recognised by some states in their constitutions. In debate on IGR, the place and status of local government, often conceived as a creature of the constituent unit, are typically neglected. In some states (e.g., South Africa) local authorities actively engage in intergovernmental relations (although the extent of engagement varies) and in other cases (e.g., Australia, Canada) federal governments have been known to directly engage with local authorities. The recently launched UK Shared Prosperity Fund will see the UK Government spend money in devolved areas and perhaps even bypass devolved government input in favour of liaising directly with local authorities. Internationally, direct engagement between central and local governments is rare and when it does occur regarding direct funding is subject to criticism by the constituent unit governments. In light of this, it would make sense that intergovernmental forums involving local authorities are used to develop investment plans. Spending money in devolved areas without devolved government input/consent is unwise and in the absence of these funds being

² <https://committees.parliament.uk/publications/8562/documents/86664/default/> (p. 77)
<https://committees.parliament.uk/writtenevidence/25987/pdf/>

devolved completely, meaningful engagement with the devolved governments and local authorities through IGR forums is at the very least necessary.

Political Culture: One of the principal challenges to effective and meaningful IGR in the UK relates to political culture. Despite the reality of political decentralisation for over two decades, very little has changed at the centre in both Westminster and Whitehall. A unitary attitude prevails, evident in, for instance, the repeated disregard for the Sewel Convention. A political culture, predicated on important principles and values such as, mutual respect, partnership, recognition and trust is all but absent. As well as a change in the structures of IGR, a change in mindset is also required.

It is a welcome development to see an agreed set of principles in the IGR review, but the mood music on the part of the devolved governments has been more cautious.³ While there is a responsibility on all governments to uphold the abovementioned principles, there is a particular onus on the UK Government which tends to demonstrate a unitary rather than devolved mindset as relates to the territorial constitution. Notwithstanding the absence of federation, governments in the UK would do well to learn from their counterparts in federal countries, specifically a commitment to thinking and acting in a more federal manner (i.e., based on the aforementioned principles and values). For governments in the UK, approaching IGR based on parity of esteem, in the spirit of cooperation and a willingness to compromise, as befits a multinational state, would go a long way in rebuilding trust. Institutions, structures, and processes matter, but so too does willingness to want to make them work.

³ <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-59981982>;
<https://www.irishnews.com/news/northernirelandnews/2022/01/15/news/stormont-minister-nichola-mallon-voices-scepticism-over-new-structures-designed-to-improve-relations-between-central-governm-2560818/>;

Evidence for the Constitution, Europe, External Affairs and Culture Committee

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Intergovernmental Relations

Overview

- 1.1 This submission draws on a report *Reforming Intergovernmental Relations in the United Kingdom* co-authored with N. McEwen, M. Kenny, and J. Sheldon. It draws on evidence about how intergovernmental relations (IGR) works in five broadly comparable multi-level political systems - Australia, Belgium, Canada, Italy and Spain and made recommendations for reforms of the UK's system of IGR, some of which were included in the 2022 Joint Review. This submission also draws upon more recent and ongoing ESRC-funded work, conducted by Professor Nicola McEwen (Edinburgh) and myself which examines the management of internal markets in Australia, Canada and the United Kingdom, with particular attention to the intergovernmental forums and mechanisms which underpin these economic unions.
- 1.2 The UK's intergovernmental machinery is characterised by its largely ad hoc nature. In some respects, this has allowed for a flexible response to new challenges as they emerge. However, the absence of more routine and formalised intergovernmental machinery, especially when compared with other states, has had repercussions for the administration, operation and transparency of IGR. Over time, a consensus has emerged which suggests that existing arrangements for intergovernmental relations are not fit for purpose. Specific criticisms include the ad hoc nature of JMC meetings, held on the terms of the UK government, the lack of institutional support, low levels of transparency which inhibits scrutiny by devolved legislatures, and the absence of mechanisms for joint decision-making and dispute resolution.
- 1.3 The vote to leave the European Union and the protracted and contentious negotiation process shone further light on the weaknesses of the system, at a time when more coordination was likely to be necessary. The Covid-19 pandemic cut across the competences of the devolved and UK governments, necessitating coordination on the response to the public health crisis, and subsequent economic impacts. Coordination initially took place under the auspices of COBRA and the Ministerial Implementation Groups, but this regular communication ceased in summer 2020.
- 1.4 In the face of concern about the quality of IGR, a joint review was commenced in early 2018. The *Review of Intergovernmental Relations*, published in January 2022 and agreed by the devolved and UK governments, outlined core principles, including: mutual respect; effective communication; sharing information; accountability; and an agreed process for dispute resolution. The principles are not statutory. It is still too early to evaluate the efficacy of these reforms but they mark a positive step towards a more institutionalised, and hopefully, more cooperative system of IGR.

Brexit and IGR

- 2.1 Despite initial commitments to collaboration following the 2016 vote, the Withdrawal Act and the Internal Market Act were passed in the face of opposition from the

devolved governments and legislatures, placing further strain on relations between the devolved and UK governments. The realities of a post-Brexit economic system, outside of the structure of the European Union single market, are likely to necessitate a greater degree of coordination.

- 2.2 Increased intergovernmental working is necessary in the negotiation and agreement of Common Frameworks to cover policy areas repatriated post-Brexit. These policy areas are those which intersect with devolved competences. Coordination is also necessary to ensure the functioning of the internal market – balancing competing needs of ensuring a functional market with certainty for business, respecting the competences set out in the devolution settlements, and ensuring compliance with international obligations.
- 2.3 Internal markets require active management and coordination between levels of government. We can look to federal states to understand this process of coordination. In Australia, the emphasis has been on mutual recognition of standards, underpinned by the Trans-Tasman Mutual Recognition Agreement (which includes New Zealand), agreed by the Commonwealth and state governments in the 1990s. In this arrangement, goods eligible for sale in one state are eligible for sale in the others. Opt-outs can and have been secured on the basis of public health and environmental considerations, including allowing for requirements for the labelling and recycling of beverage containers and single-use plastics. In Canada, reforms to the internal market have taken place in multiple rounds, the most recent of which was the Canadian Free Trade Agreement (2017), which sought to lower barriers to trade. There are two modes of thinking about the internal market in these two states – in Australia, there is comparatively minimal state level resistance to processes of harmonisation, whilst in Canada, barriers to trade are, to a degree, considered an acceptable cost to maintain provincial autonomy.
- 2.4 In Australia and Canada, the role of the state/province-level parliaments in scrutinising agreements is limited. However, there is a greater level of transparency in both. Intergovernmental activities are supported by a secretariat, meetings take place on a regular basis, and the agendas and outcomes of meetings are published and publicly available.

Transparency and Scrutiny

- 3.1 Intergovernmental relations are typically dominated by executives, negotiating in private, away from the media and wider political scrutiny. This secrecy can be necessary – particularly when the subject matter is sensitive – and can allow for greater candour but it must be balanced with the public interest in transparency. Issues of transparency are evident in other countries, but nowhere is the problem more pronounced than in the UK. Concerns about this have been raised frequently by parliamentary committees and academic observers.
- 3.2 Scrutiny is shaped by the timing of, and access to, relevant information relating to intergovernmental decision-making, the tools and procedures available to the legislature to engage in scrutiny, and the transparency and publicity associated with intergovernmental processes.

- 3.3 In comparative work carried out with N. McEwen and colleagues, we noted the contrast between the United Kingdom and federal and quasi-federal states in the domains of scrutiny and transparency. In Belgium, the Concertation Committee, which brings together federal, regional, and community ministers, take place at a set time each month, and following the meeting, a report is filed with each parliament. These meetings gained more significance and media attention during the Covid-19 pandemic, where decisions about restrictions were taken. In Canada, each provincial legislature has a parliamentary committee which includes within its remit scrutiny of IGR. Government departments charged with IGR are often required to submit a report to parliament, although it is difficult to judge the degree of scrutiny that occurs. In Quebec, the intergovernmental affairs minister endorses cross-border and intergovernmental agreements, and ministers embark upon intergovernmental negotiations, the National Assembly can support and reinforce their negotiating position by publishing unanimous resolutions which provide a more formal expression of Quebec's positions.
- 3.3 In Scotland, arrangements for reporting on intergovernmental activity have been in place since 2016, underpinned by a Memorandum of Understanding between the Scottish Government and Parliament which sets out the process and timings by which the Government will provide notice of meetings and report back as to the outcome of those meetings. In addition, the Scottish Government agreed to prepare an annual report on IGR. A similar agreement was adopted between the Welsh Government and the Senedd in 2019.
- 3.4 MOUs have successfully enhanced transparency, providing information about the meetings taking place and any outcomes, but are often quite brief, lacking the detail necessary to facilitate a deeper understanding of the negotiation process. Ministers can be called, but time constraints may make this difficult. In addition, there is no mechanism by which committees can input on the negotiations, either in advance, as is the case in Quebec, where committees provide the minister a “mandate” ahead of negotiations or after the fact.
- 3.5 The joint review published in 2022 outlines the commitment of each government to “increased transparency of intergovernmental relations through enhanced reporting to their respective legislatures”, with each participant encouraged to prepare and publish reports from their meetings, in addition to an annual report. However, there is no statutory requirement to do so, and again, there may be limited opportunities for committees to exercise influence.
- 3.6 Inter-parliamentary cooperation has taken place through the *Inter-Parliamentary Forum on Brexit* but more general cooperation has not yet been agreed and changes might be required to the Standing Orders of individual parliaments. Our research on interparliamentary coordination on the scrutiny of IGR suggests this is more limited – a result of the nature of IGR, lower levels of transparency, limited interest and attention, as well as demanding workloads. Some interparliamentary cooperation has taken place between EU member state parliaments, particularly in the domain of security and defence.