EU exit, common frameworks and wider implications on parliamentary scrutiny

Background

1. The Brexit process has revealed weaknesses in the devolution settlement in relation to arrangements for collaboration and dispute resolution between the administrations within the UK. These arise from the fact that at the time the settlement was being designed membership of the EU provided a “shared envelope” within which the devolved administrations could diverge, but only so far. The retention of powers over reserved matters ensured that there would be a single UK position on matters where that was considered necessary. Beyond that, the shared constraint of EU law ensured a level of consistency, but not necessarily uniformity, in further areas where there may be some room for national choice but excessive divergence might be undesirable. EU law itself imposes frameworks which vary in terms of requiring uniformity or leaving some room for manoeuvre, requiring merely minimum standards or broad convergence.

2. On leaving the EU, the commonality brought by EU law will disappear, risking fragmentation of policy and law across the UK if each administration were to go its own way. Such fragmentation can be prevented by the exercise of the constitutional supremacy of the UK Parliament under the Scotland Act 1998 (and the other devolution settlements), asserting the overriding power that remains in London. One manifestation of this has been the provisions of the European Union (Withdrawal) Act 2018 that initially retain at UK level powers previously exercised at EU level, even within areas of devolved responsibility. Ultimately, any strengthening of the position of the Scottish and other devolved administrations in relation to the creation of common frameworks depends on the willingness of the UK authorities to accept these arrangements rather than insist on their own ultimate supremacy.

3. There is general acceptance that in areas beyond those of reserved matters there is a need for a degree of collaboration across the UK. The Joint Ministerial Committee in October 2017 identified the grounds on which common frameworks to this end might be justified:

- to enable the functioning of the UK internal market, while acknowledging policy divergence;
- to ensure compliance with international obligations;
- to ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
- to enable the management of common resources;
• to administer and provide access to justice in cases with a cross-border element;
• to safeguard the security of the UK.

It also noted that frameworks can take different forms:

• common goals
• minimum or maximum standards
• harmonisation (i.e. uniformity)
• limits on action
• mutual recognition.

4. The decision of whether a common framework, and of what sort, is required is an inherently political one. Views can reasonably differ on the substantive issue of whether any common standard is required and what it should be. This is not an area for simple “all or nothing decisions” and reaching a view in each case will require specialist information and analysis of the likely impact in economic, environmental, health and even ethical terms. Moreover, if all parties are happy simply to work together collaboratively and constructively there may be no need for any formal frameworks at all, except to the extent that they provide reassurance to those affected by the relevant policies and rules. Each case will be different, but what can be done is to identify fundamental choices to be made. These are discussed below before some possible scenarios.

5. In practice, the room for manoeuvre (for UK and devolved administrations) may be largely determined by the international position, a matter exclusively in the hands of the UK Government. If the eventual Brexit settlement involves the UK remaining within the EU’s Single Market, or a more bespoke deal requires continuing alignment with elements of this, this will establish the common rules and standards that must be applied. Similarly, any other international trade deal may have provisions which require the UK as a whole to apply certain standards (higher or lower than currently exist) or limit the extent to which changes can be made that might (dis)advantage home or overseas producers. Even without formal constraints, alignment with external standards may be seen to bring advantages in some cases (e.g. market access, ease of acquiring equipment that matches widely recognised standards).

6. What follows is consciously starting from a blank sheet, rather than reflecting any current proposals or discussions that are taking place. Current progress is detailed in the Revised Frameworks Analysis produced by the UK Government in April 2019. Other inquiries, such as the Finance and Constitution Committee’s Report on Common Frameworks, or the House of Commons Environmental Audit Committee’s Scrutiny of the Draft Environment (Principles and Governance) Bill give more insights into thinking on potential collaboration at sectoral or structural level. Yet whatever ideas are being taken forward, certain underlying design issues must be addressed:

• What sort of framework?
• Who determines the content of the framework?
• Who implements the framework?
• How is the framework scrutinised?
• How is compliance monitored and enforced?
What sort of framework?

7. As noted in para. 4 above, there are different sorts of framework which require different degrees of uniformity. A uniform standard across all nations makes life easier for producers and traders doing business across the whole UK and ensures that no advantage can be gained or disadvantage suffered by those in one nation facing different rules. Variations in standards are likely to have economic impacts; lower standards are conventionally seen as creating an economic distortion by enabling a reduction in production costs (e.g. by avoiding costs in pollution prevention), but higher standards may enable the promotion of a premium national “brand” (e.g. stricter standards on pesticide residues). Uniformity in standards, both substantive and in labelling and documentation and recognition of certificates issued in other nations (e.g. safety certificates), makes any cross-border trade simpler – at the extreme a large-scale producer may not find it worthwhile to produce goods meeting different local rules if the reward is access to what is only a small market. Minimum standards provide a guarantee of protection for health or the environment, whilst enabling any nation that wishes to do so (and to bear any associated costs or reap any benefits) to adopt higher levels.

8. Some guidance on the sort of framework (if any) appropriate for a topic is provided by the existing categorisation into reserved and devolved matters and the choice of technique at EU level (harmonisation or shared objectives). There is, though, no inherently correct answer and the different interests across the different nations may point towards different solutions, requiring either negotiation and agreement or a clear deciding voice. A framework that operates at just the policy or administrative level is simpler to achieve and more flexible, but legal rules may be necessary to provide the legal authority for action necessary to implement the framework, e.g. levies, spending or regulatory action. There may also be a desire to embed aspects of a framework in legislation to offer greater certainty to those who may be relying on it in determining their future investment decisions etc.; embedding a framework in law does not guarantee its future but by making it harder to change does increase the likelihood of stability.

Who determines the content of the framework?

9. In developing common frameworks, the question of who is to develop common standards or rules (whether these emerge as matters of policy or of law) is fundamental and there are several possible models that can be envisaged. As several parliamentary inquiries have shown, it is widely accepted that the current arrangements for intra-UK governance (Joint Ministerial Council etc.) are not working well. However, there seems little prospect of immediate substantial reform. It is through such reform, though, that a long-term solution truly lies, as noted by the Finance and Constitution Committee in its report on Common Frameworks. New mechanisms should bring together the various administrations (with England represented separately from the UK) and provide a forum for discussion and agreement, with a dispute-resolution process that all parties have confidence in and the transparency and accountability to provide legitimacy.
10. In the absence of such structural reform, several models for adopting a common framework can be envisaged:

- Joint working and agreement: The UK and devolved authorities could work together to produce standards/rules which would be adopted only when all parties agree.
- Joint recommendations: The UK and devolved authorities could work together towards producing standards/rules, but these would have the status of recommendations only and need not be accepted (or implemented) by all nations, although it would be expected that they are followed.
- Lead authority acting with the consent of others: One authority could take the lead in developing standards/rules (either the UK body by default or responsibility for different topics could be allocated to different nations), but the outcomes would be adopted only when all parties agree.
- Lead authority acting with consultation: The UK authorities could be responsible for developing standards/rules, consulting the other countries but without them having a veto on the final outcome. This is what the European Union (Withdrawal) Act 2018 provides as the position for at least some areas where common frameworks are desired.
- New authorities: Power to establish standards/rules could be conferred by the UK and devolved authorities on new official bodies established for this purpose, operating across the UK.
- Specialist advisory bodies: The task of developing standards/rules could be given to new or existing bodies, but the outputs would take the form of recommendations only, with each administration responsible for deciding when and how to implement these.

The handling of any topic may involve a combination of these.

**Who implements the framework?**

11. Although much co-ordination can be achieved without legal intervention, some issues will require legislation to implement common solutions and to underpin regulatory action. Quite distinct from the question of how the content of any common framework is developed, the question arises of how the detailed standards and rules that emerge are to be translated into legal form so as to take full effect. There needs to be a clearly identified legislative body with the constitutional authority to make the law that is required. Where legislative power is exercised will have a significant bearing on the scrutiny arrangements.

12. Again, there are several potential options:

- Exclusive power for the UK authorities: Regardless of the underlying devolved or reserved nature of the topic, power to legislate to implement common frameworks could be conferred on the UK authorities (Parliament and/or Ministers), subject to scrutiny only at the UK level. This would clearly assert the UK authorities' supremacy, rather than reflecting the distribution of power inherent in the devolution settlements.
- Exclusive power for the UK authorities, subject to constraints: In this option, although it would be only the UK authorities that could legislate,
they could exercise this power lawfully only if certain prior procedural requirements were met. These could require having the explicit consent of the devolved Parliaments or governments (akin to legislative consent motions but with a veto power), having consulted the devolved authorities and proceeding so long as no explicit objection is made, or simply having consulted them. This final option (consultation but no veto) is what the European Union (Withdrawal) Act 2018 adopts for areas where the UK government considers that centralised action is appropriate.

- **Exclusive power for the devolved authorities**: The responsibility to legislate could rest exclusively with the devolved authorities in areas of their competence, with or without any procedural constraints involving the other jurisdictions. This approach would require careful separation between devolved matters (which could be handled only by the devolved administrations) and reserved matters (only by UK authorities).

- **Shared powers**: As is the case at present in relation to implementing EU measures (Scotland Act 1998, s.57), power to legislate outwith matters reserved to the UK could be shared between the UK and devolved authorities, with either being able to take action as appropriate. This may allow for flexibility and convenience (especially where matters may straddle the devolved/ reserved boundary), but raises particular questions over scrutiny at the different levels over the decision about who is to legislate and the content of such legislation.

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

**How is the framework scrutinised?**

13. The opportunities for scrutiny obviously depend on the mechanisms chosen for determining and legislating for frameworks. One general point is that (as with EU law at present) the powers held by the UK or Scottish Parliament in terms of examining any legislation implementing a framework in no way offers adequate scrutiny of the process as a whole. By the final legislative stage all the substantive decisions have been taken and hence the focus must lie earlier in the procedure.

14. Looking at the present position, common frameworks within the EU in the form of directives are jointly agreed by the European Parliament and the Council of the European Union. Historically, the increasing significance of the parliamentary role within EU decision-making has been important in terms of scrutiny and openness. Replacing such a system by one where frameworks are determined simply by agreement within the Joint Ministerial Council, or between governments acting bilaterally, would severely reduce transparency,
access for stakeholders and parliamentary oversight, and raise questions as to the legitimacy of these future frameworks.

15. There are perhaps three dimensions to the scrutiny question: between Scotland and the UK, between Parliament and Government, and the role of stakeholders and the wider public.

16. Where the process for determining any common framework requires agreement between the various administrations, then each can be reassured that no decision will be taken without their consent. By contrast, where power is held by the UK authorities, there may technically be no requirement to involve or even inform the devolved administrations, as with the handling of international affairs at present. There is no formal scrutiny other than that exercised by the UK Parliament. A requirement for consultation with the devolved authorities will offer a means of exercising some influence and (weak) scrutiny. Where power lies solely in the hands of the UK authorities it is difficult for the devolved parliaments to exercise any effective scrutiny.

17. Where there is a substantial role for the devolved administrations, the relationship between Government and Parliament must be considered. The Scottish Parliament should have a means to comment (at least) on the approach that the Scottish Ministers are going to take in any negotiations over a common framework and to hold them accountable for what has been agreed. A fruitful way forward may be provided by the model of the Protocol for proposals for UK Statutory Instruments under the European Union (Withdrawal) Act 2018. This ensures that the Parliament is kept informed of what is being discussed and has an opportunity to scrutinise the Government’s intentions. Developing similar protocols for when the Government is involved in discussions on common frameworks would provide a means of keeping an eye on and supporting what the Government is doing with its fellow executives.

18. The making of EU common frameworks has been marked by a lengthy preparatory period during which there have been clear opportunities for stakeholders, interest groups and (to a lesser extent) the public to inform and influence the law-making process. Some means for such participation should be included for new frameworks, ensuring transparency. The absence of such opportunities for wider participation is a significant criticism of how preparations for post-Brexit structures have been made so far (as evidenced by the witnesses before this Committee on 23 April). The involvement of parliamentary committees, with the potential to take evidence, offers one way of ensuring engagement with stakeholders, but the process of developing frameworks should incorporate early and full consultation with a wide range of parties. Not only does this provide the transparency which is an essential of legitimacy, opening the way to more effective scrutiny, but it also provides early warning of likely practical or political difficulties and alerts interested parties, giving them time to adjust to changing rules.

How is compliance monitored and enforced?

19. Whatever frameworks are established, there is a question of what happens if these are not followed (whether by one administration not taking the requisite action, by it taking incompatible action or by it acting in a way that does not wholly implement the common position). There are two stages to consider: how
non-compliance is monitored and detected and then the response to that. In both cases much depends on the nature of the framework and whether it operates at a political or legal level.

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

21. In the event of non-compliance the remedy could be mere publicity, which would rely on wider political processes to achieve results, or some form of intervention sparking negotiation or other dispute resolution mechanisms between the authorities, ultimately including arbitration or adjudication. Where there is legal backing for a framework, then a judicial remedy might be available (Scottish legislation incompatible with UK measures may be beyond legislative competence, as shown in the Supreme Court’s decision on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill). The potential of litigation raises questions over the forum for adjudication, time-limits, remedies and who has the standing to raise actions.

Examples

These examples try to show how some of the options discussed above might operate in practice. They are developed as a “thought experiment”, not on the basis of any actual proposals or discussions that are taking place in relation to specific frameworks.

Air Quality

One area where common frameworks might be desired is in relation to air quality. Obviously air pollution in one part of the UK can spread to others, whilst there is also a common desire to protect health and to avoid industry in one nation being undercut by the fact that rivals elsewhere do not have to bear the costs of meeting the anti-pollution standards applied at home. This seems a topic where a minimum standard rather than uniformity might be appropriate, enabling each nation to reach its target in its own way and allowing any nation wishing to insist on higher standards for the benefit of its residents (and perhaps to promote a cleaner image) to do so. Although requiring advice from health and scientific experts, as well as information on the likely impacts of any decision from industry, the decision on the level at which to set the minimum standard would be a political one, balancing the health and other benefits of high standards against the cost and practicality of meeting these.

On related topics, though, a different approach might be appropriate. In terms of the measuring and monitoring that would underpin any minimum standard, there is a stronger case for uniformity. This is both to ensure consistency and
comparability and to create a wider market for the relevant testing equipment. Here the details might be largely left to a technical body to determine.

Part of achieving any air quality standards is the prohibition of excessively polluting equipment, and here significant issues might be product standards (most likely already covered as a reserved matter) and the mutual recognition of documents certifying that emission standards are being met, rather than each jurisdiction requiring its own distinct certification. Even if different standards were insisted on by each nation, there would still be advantages in a common framework for the testing process and its documentation, so that manufacturers and distributors would be faced simply with differences in the outcome to be achieved from a similar process, rather than wholly different processes.

Financial Support for Agriculture

This is an area where existing EU frameworks allow for some diversity and where the differences between the conditions faced in different parts of the UK and the social and economic objectives sought by each administration are different and therefore uniformity may well not be appropriate. But the potential for financial support to distort the market is so great that a degree of collaboration may be desired. A political agreement between nations on certain key elements may be enough to achieve that, without any formal framework, with each nations free to legislate as much or as little as required to implement its chosen policy in its own territory.

Waste

Dealing with waste offers opportunities for many different levels of collaboration and differentiation. The different nations have different ambitions so that a wholly uniform position seems inappropriate, but there are levels of variation. The forthcoming ban on sending biodegradable waste to landfill is a clear regulatory difference that will have consequences in terms of costs for the public and private sectors, the scale of cross-border transport and the risks of criminal activity as attempts are made to escape burdens. It is, however, a comparatively clear-cut issue that is probably easier for all concerned to deal with than minor variations in the classification of certain material as “waste” or in the permitted composition of packaging materials with a view to easier recycling. In relation to the development of deposit-and-return schemes, exploring the scope for commonality makes sense given the volume of cross-border travel by people and products and the need to acquire the necessary equipment. If the different national schemes cover different types of “plastic” bottles, require different labelling and different handling at the point of return, then it will be much harder to bring about the change in consumer behaviour required – a confused message will not produce good results. On the other hand, progress should not be held up waiting for the slowest party to agree and examples such as the introduction of charges for plastic bags show the value of individual nations being able to lead the way. Political decisions may quite properly lead to differences, but these should only be where necessary, not on the incidental points where there is no good reason for difference and where inconsistency only makes life harder for everyone (e.g. the regular complaints over the lack of consistency in the colours of recycling bins).