1. Context

There is considerable uncertainty about the Brexit process and the progress of the EU (Withdrawal) Bill in the UK Parliament. Of particular controversy is clause 11 of the Bill, which in effect seeks to re-define the post-Brexit legislative competence of the Scottish Parliament by reference to a new category of “retained” EU law (i.e. rather than EU law, as is the case at the moment). Importantly, the Bill seeks to transfer very wide powers over retained EU law to UK Government ministers, pending decisions on whether common policy and legal approaches on particular issues require to be taken at a UK-wide basis: while control over some retained EU law may subsequently be devolved to Holyrood, Cardiff and Stormont, this is, on the face of the Bill, to be at the discretion of the UK Government.

Scotland has 111 policy areas (many of them relating to environment, climate change, agriculture and fisheries) where EU law currently intersects with devolved powers¹: in formal, legal terms, these would become retained EU law and subject to the control of the UK Government if clause 11 is passed unamended by the UK Parliament, irrespective of the views of Holyrood.

The Scottish Government is strongly opposed to clause 11 as it stands. It believes that the 111 policy areas are already devolved under the Scotland Act 1998 and that control over them should therefore pass immediately to Holyrood at the point of Brexit. It has combined forces with the Welsh Government, which has adopted a similar position. The Scottish and Welsh Governments both argue that decisions on any necessary UK-wide policy and legal approaches can then be negotiated and agreed thereafter by the four governments of the UK (although Northern Ireland is, of course, currently without a devolved administration).

As matters currently stand, it seems unlikely that either the Scottish Parliament or the Welsh Assembly will grant legislative consent motions to the Bill unless clause 11 is amended. This would not affect the legal validity of the Bill once passed by Westminster, but politically and constitutionally it would be very contentious if the UK Parliament was to impose the terms of clause 11 on the devolved administrations. The Secretary of State for Scotland has, in any case, indicated that amendments to

clause 11 will be tabled, although (controversially) it now appears this will be in the House of Lords because of unexpected delays in Whitehall. It remains to be seen whether these amendments will enable the Scottish Parliament and National Assembly for Wales to grant legislative consent to the Bill. The Scottish Government has just announced that it will be drafting its own Continuity Bill in case it is not possible to grant legislative consent to the EU (Withdrawal) Bill.

In this politically combustible context, the UK Government, Scottish Government and Welsh Government have nonetheless been able to agree that common frameworks are required to:

“... establish common approaches in some areas that are currently governed by EU law, but that are otherwise within areas of competence of the devolved administrations or legislatures. 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."\(^2\)

They have also agreed that common frameworks will be established where necessary to:

- “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.”\(^3\)

Importantly for the Scottish Parliament, it has been agreed that frameworks will “respect the devolution settlements and the democratic accountability of the devolved legislatures”.\(^4\) Accordingly, they will:

---


\(^3\) Ibid.

\(^4\) Ibid.
“be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent;
• maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules;
• lead to a significant increase in decision-making powers for the devolved administrations.”

Clearly, the eventual form of common frameworks will depend to a considerable extent on the type of Brexit which emerges from the ongoing negotiations at UK/EU level. If the UK was to opt to remain compliant with particular areas of EU law as part of a new trading relationship with the EU, a UK-wide framework to govern those areas of law would be concerned with coordinating and standardising legal implementation, rather than policy. In those areas where the post-Brexit UK is no longer subject to EU law but where, for example, it is felt that there is a need for a UK-wide legal/policy framework to “enable the functioning of the UK internal market, while acknowledging policy divergence”, it seems clear that there will need to be political consensus on structures and processes between the UK government and devolved administrations to enable the framework to operate effectively, and to develop over time. There will also be other areas where no formal framework will be required and powers can be devolved with relative ease: depending on their nature, however, it may still be in the public interest to have effective political lines of communication between the devolved administrations and the UK government to share knowledge, expertise and, if appropriate, costs.

Given the uncertainties and controversies outlined above, and assuming that establishing political trust and consensus is possible, what can be identified as the main issues relating to possible common/shared UK-wide frameworks?

2. Framing common frameworks: identifying key institutional requirements
Making the frameworks operate effectively will not be straightforward. The UK is comprised of England, Scotland, Wales and Northern Ireland, but is a state without a formal written constitution. In response to political pressure for increased autonomy, it has, since 1998 (and while eschewing federalism) provided significant but asymmetric devolution of power to the Scottish Parliament and the legislative Assemblies in Wales and Northern Ireland. In legal terms, however, these remain subject to the overall legislative supremacy of the UK Parliament - which is also, of course, the legislature for England, by far the most populous and politically dominant nation in the UK.

Notwithstanding the complexities of this political, constitutional and cultural Gordian knot, thinking about the basic structures and functions of EU institutions can perhaps provide a short-cut to identifying the key issues involved in developing common frameworks. Rather than beginning with a blank sheet, a practical starting point might be to recognise that the common frameworks will need, to some extent at

---

5 Ibid.
6 Ibid.
least, to mirror what EU institutions currently do in relation to member states, but scaled down and tailored for the post-Brexit UK context. There are, of course, other models from around the world which can be drawn on, but given that the frameworks will be concerned with retained EU law, EU structures and processes provide a useful initial “base camp”.

Approaching the issue from this perspective suggests that new UK frameworks will prima facie need to:

- Be set up and governed under an Act of the UK Parliament which the devolved legislatures have granted legislative consent to. This would provide legal authority and a high degree of political consensus throughout the UK. Such a “governing statute” could perform a quasi-constitutional function for framework areas analogous to that of the EU treaties. It could, for example, provide strategically for concepts such as subsidiarity in decision-taking; the governance of the UK internal market; and enforcement procedures. In the specifically environmental context, it could set out binding principles for the preservation, protection and improvement of environmental quality; protecting human health; the responsible utilisation of natural resources; the precautionary principle; sustainability; the preventative principle; the proximity principle and the polluter pays principle, etc. Provision could also be made for the establishment of the inter-governmental institutions and processes which will be necessary for the frameworks to operate effectively and sustainably into the medium and long term.

- Have a new, statutorily-based inter-governmental decision-taking council for framework areas analogous (in terms of function) to the EU Council of Ministers. The existing Joint Ministerial Committee system would almost certainly not be appropriate for the task, as meetings are chaired and called by UK government ministers, irregular, consultative only and lacking a statutory underpinning.

There would, of course, be a number of difficult issues to content with, not least the fact that England accounts for 55 million of the UK’s total population of 65 million, and that, under current arrangements, government ministers at Westminster with responsibility for English affairs are also ministers of the UK Government. In addition, as indicated above, Northern Ireland, which voted to remain within the EU – and which is the only part of the UK which has a land border with it - currently does not have a devolved government. Nonetheless, provided political consensus can be arrived at in due course between the devolved and UK governments, it should be possible to develop statutory provision for weighted voting systems and transparent, fair procedures which

---

7 I.e. mirroring Articles 114 and 191-193 of the Treaty on the Functioning of the European Union (“TFEU”).
balance the interests and disparities of the constituent parts of the UK, while taking into account the particular concerns of their governments.\(^9\)

- Ensure appropriate parliamentary involvement in scrutiny and legislative consent.\(^{10}\) Again, this would require political consensus, but should not be impossible. It would, of course, be neither appropriate nor necessary to have a special elected body on the lines of the European Parliament. Instead, for example, a Grand Committee of English MPs could be convened at Westminster to scrutinise and grant consent for framework area instruments agreed by UK Government ministers with responsibility for English affairs, while the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly (when it reconvenes) could do the same thing for framework area instruments agreed by their own governments.

- Have a new civil service secretariat, which is statutorily independent of both the UK government and the devolved administrations,\(^{11}\) and which performs framework-related functions that are in some respects analogous to those of the European Commission in EU structures and processes (e.g., legal responsibility for supporting and developing framework area policy, laws and institutions and, where necessary, initiating enforcement action under the governing statute).

- Have statutory enforcement procedures and penalties to deal with breaches of the governing statute.\(^{12}\) While there would be no need for a new, specialist domestic court in the mould of the Court of Justice of the European Union, the governing statute would need to create meaningful legal consequences for breach in framework areas, which could ultimately be enforced by the UK Supreme Court (as in, for example, the Scotland Act 1998 in relation to breaches of legislative and devolved competencies). Without effective sanctions, the frameworks may prove to be flawed, and in this context it is worth bearing in mind that weak enforcement has been recognised widely as the Achilles heel of EU environmental law.

---

Prof Gavin Little

10/01/2018

\(^9\) Ibid.
\(^{10}\) Ibid, p.18.
\(^{11}\) Ibid.
\(^{12}\) Ibid.