

## CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE

7<sup>th</sup> Meeting, 2023, Session 6

2 March 2023

**How is Devolution Changing Post-EU?**

1. The Committee concluded in its report on [The Impact of Brexit on Devolution](#) that there are fundamental concerns which need to be addressed in relation to how devolution works outside the EU.
2. The operation of the Sewel Convention, which the Committee views as being 'under strain', and the use of delegated powers in devolved areas are two significant areas in which the Committee believes devolution has begun to evolve following Brexit.
3. The Committee's recent scrutiny of Legislative Consent Memorandums (LCMs) for the [Northern Ireland Protocol Bill](#) and [Retained EU Law \(Revocation and Reform\) Bill](#) has highlighted the need to re-set the constitutional arrangements within the UK following EU withdrawal, both in respect of relations between the UK Government and the devolved governments and between the four legislatures and governments across the UK. The Committee's view is these relations are clearly not working as well as they should and this needs to be addressed.
4. Furthermore, the Committee's report on [The UK Internal Market](#) concluded that while the UK Internal Market Act has sought to address the tension between open trade and regulatory divergence within the UK that has arisen from the UK leaving the EU, it has led to tensions within the devolution settlement.
5. The Committee recognises that Common Frameworks have the potential to resolve the tensions within the devolved settlement through managing regulatory divergence on a consensual basis while facilitating open trade within the UK internal market. But the Committee believes there is a risk that the emphasis on managing regulatory divergence at an inter-governmental level may lead to less transparency and Ministerial accountability and tension in the balance of relations between the Executive and the Legislature. The Committee is concerned that this may result in reduced democratic oversight of the Executive and a less consultative policy-making process.
6. Through its inquiry [How is Devolution Changing Post-EU?](#) the Committee is now looking to explore how devolution is changing, and, importantly, how devolution should now evolve to meet the challenges and opportunities of the new constitutional landscape.

7. The [call for views](#) on this inquiry closed on 30 November 2022. It focused on the following questions, which the Committee will explore through the course of its inquiry:
  - How is devolution now working following the UK's departure from the EU, including the policy-making and legislative processes?
  - How should devolution evolve post EU exit, to meet the challenges and opportunities of the new constitutional landscape?
  - How much scope there is for regulatory divergence in areas such as environmental standards, food standards and animal welfare between each of the four parts of the UK;
  - Are there sufficient safeguards to allow regulatory divergence across the four parts of the UK in areas where there are disagreements between governments?
  - Are there sufficient safeguards to ensure an open and transparent policy-making and legislative process in determining the post-EU exit regulatory environment within Scotland and how it relates to the rest of the UK?
8. At this meeting, the Committee will take evidence from—
  - Huw Irranca-Davies MS, Chair of the Legislation, Justice and Constitution Committee, Senedd Cymru;
  - William Wragg MP, Chair of the Public Administration and Constitutional Affairs Committee, House of Commons;
  - The Baroness Drake CBE, Chair of the Constitution Committee, House of Lords.
9. This will give the Committee an opportunity to consider the views of fellow constitution committees across the UK on how devolution is operating in a post-EU context (including the operation of the UK Internal Market and Common Frameworks), whether similar challenges have been identified, how devolution should evolve to meet the challenges and opportunities of the new constitutional landscape, and the role of interparliamentary working.
10. The following papers are attached—
  - **Annexe A:** Briefing from SPICe
  - **Annexe B:** Written submission from the Senedd Cymru Legislation, Justice and Constitution Committee.
11. At its next meeting, the Committee will take evidence on the inquiry from former officials across the UK and devolved Governments.

**SPICe**

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An t-Ionad Fiosrachaidh

# **Constitution, Europe, External Affairs and Culture Committee**

## **7<sup>th</sup> Meeting, 2023 (Session 6)**

**Thursday, 2<sup>nd</sup> March 2023**

### **How is devolution changing post EU exit?**

#### **Background**

The Committee concluded in its report on [The Impact of Brexit on Devolution](#) that there are fundamental concerns which need to be addressed in relation to how devolution works outside the European Union (EU).

Having identified those challenges, this inquiry aims to explore further how devolution is changing with a view to considering how it should evolve to meet the challenges and opportunities of the new constitutional landscape.

At last week's meeting, the Committee explored with its advisers Professor Michael Keating and Dr Christopher McCorkindale some of the ways in which devolution is changing. The Committee also discussed with its advisers some of the issues which the Committee may wish to look at through the course of its inquiry in order to reach a view on how devolution should evolve.

In particular, the Committee discussed two linked matters:

- Consent mechanisms (legislative consent for primary legislation through the Sewel Convention and other consent mechanisms now being seen in secondary legislation)
- Intergovernmental relations and processes

This paper provides some information on consent mechanisms and intergovernmental relations ("IGR") and processes which may be helpful in discussing the issues with witnesses at its session today.

The Committee is joined remotely by three witnesses:

- Baroness Drake CBE, Chair of the Constitution Committee, House of Lords

- Huw Irranca-Davies MS, Chair of the Legislation, Justice and Constitution Committee, Senedd Cymru
- William Wragg MP, Chair of the Public Administration and Constitutional Affairs Committee, House of Commons

At future sessions, the Committee will have the opportunity to explore the same matters with other witnesses, including former officials and academics. These groups have considerable expertise in issues such as consent and IGR as well as practical experience of working in government and/or legislature.

## Consent mechanisms

In his oral briefing to the Committee, Dr Christopher McCorkindale stated that “*consent is the safeguard for devolved autonomy.*” Dr McCorkindale’s written briefing identified three matters common across the issue of consent, and the challenges identified in the Committee’s Impact of Brexit on Devolution report:

1. The proliferation of consent mechanisms without a shared understanding of their meaning and of the appropriateness of their use.
2. The ad hoc and inconsistent application of consent mechanisms and the effect of this on the balance of powers between executive and legislature, both at the UK and devolved level.
3. The effect of the uncodified constitution in understanding what may be deemed to be ‘constitutional’ and ‘unconstitutional’ action.

The Committee may wish to keep these commonalities in mind as it takes evidence.

The remainder of this section of the paper is split into two sub-sections. The first considers legislative consent for primary legislation under the Sewel Convention; the second provides information on other consent mechanisms which have been observed in relation to secondary legislation in the post EU era.

## Sewel Convention

The Sewel Convention is the mechanism for obtaining the consent of the devolved legislature where the UK Parliament intends to pass primary legislation in a devolved area.

The principle of legislative consent was developed almost entirely at governmental level. It took formal shape in the 2001 Memorandum of Understanding (MoU) between the UK Government and the devolved administrations (the then Scottish Executive, the Welsh Assembly Cabinet and the Northern Ireland Executive).

The Sewel Convention was written into statute by Section 2 of the Scotland Act 2016. This amended [section 28 of the Scotland Act 1998](#), which contains the power for the Scottish Parliament to make laws and states that this power does not affect the power of the UK Parliament to make laws for Scotland. It inserted a new Section 28(8) of the Scotland Act 1998, which states:

*“(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.”*

In 2017, the UK Supreme Court considered the Sewel Convention in its deliberations in the [Miller case](#)<sup>1</sup>. The UK Supreme Court examined the effect of the Sewel Convention as set out in section 28(8) of the Scotland Act 1998. The Supreme Court ruled that the Sewel Convention was a political convention which could not be enforced legally through the courts. Therefore, the courts have no role in determining how the convention is to be applied to any particular Bill or circumstances.

Since 2018 the Scottish Parliament has withheld consent in relation to the following Bills which were subsequently enacted. These are noted in the Committee’s report on the [Impact of Brexit on Devolution](#):

- The European Union (Withdrawal) Act 2018;
- The European Union (Withdrawal Agreement) Act 2020;
- The European Union (Future Relationship) Act 2020;
- The UK Internal Market Act 2020;
- The Professional Qualifications Act 2022; and
- The Subsidy Control Act 2022.

There have been other Bills where the UK Government and the Scottish Government disagreed on whether consent was required for certain provisions, but the provisions have been enacted. The Elections Act 2022 provision on digital imprints is an example of this.

The Committee concluded in its report that *“the Sewel Convention is under strain”*.

The Committee’s advisers have identified the following challenges with the Sewel Convention at present:

- a lack of shared understanding of what constitutes ‘not normally’
- increased disagreement about the scope of reserved matters and whether (and if so, to what extent) UK Parliament legislation engages the Sewel convention
- power imbalance given that the power of initiative lies with the UK Government, with no mechanism for dispute resolution or judicial oversight
- the two interpretations of Sewel – in the words of Professor Keating “a) a convenient procedure whereby governments can provide for common, agreed, policies; [or] b) as a device to protect the devolved legislatures against encroachment on their competences.”

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<sup>1</sup> This case concerned whether the UK Government could trigger the process of the UK leaving the EU without an Act of Parliament, and without the consent of the devolved legislatures.

Dr McCorkindale explained to the Committee that the best solution would be the one which all constitutional actors can agree to. Dr McCorkindale suggested *“If the desire is to give the Convention greater teeth”*, the Scotland Act could be amended to remove *“it is recognised that”* and *“will not normally”*; if the desire is to strengthen Sewel in the political arena then three central approaches could be considered:

- a dispute resolution process linked to legislative consent
- that formal disagreement could be pre-empted by *“early engagement at the pre-legislative stage...to identify and to resolve or manage potential issues”*
- the adoption of ministerial and parliamentary statements about the devolution implications of UK legislation upon the introduction of all UK bills.

Professor Keating also highlighted suggestions which have previously been made to make the Sewel convention more binding:

- a) the word ‘normally’ be removed from the wording in the Scotland Act (as above)
- b) the conditions under which Westminster can over-ride refusal of consent could be specified clearly
- c) there could be a body to consider and report on the justification for over-ride which, although non-binding, would force governments to provide a justification
- d) there could be a requirement for affirmative support in both Houses of Parliament (Commons and Lords).

It may be helpful for the Committee to explore these areas with witnesses to gauge if there are shared frustrations in the operation of the convention at present and to gather views on what could change for the convention to be more effective.

### **Other consent mechanisms**

In its report ‘The Impact of Brexit on Devolution’, the Committee noted the *“increase in the number of powers taken by UK Ministers to act in devolved areas and the significance of those powers”*.

There is no general legislative consent mechanism for delegated (secondary) legislation made at the UK Parliament which is in devolved areas. For some UK secondary legislation in devolved areas the UK Parliament has specified that devolved consent is required, but the practice varies. Dr Christopher McCorkindale has previously told the Committee that *“There seems to be no guiding constitutional principle as to when it is appropriate for UK Ministers to take such powers and as to the consent mechanisms (if any) that should attach to the exercise of those powers.”*

As Dr McCorkindale noted in his briefing, this had led to *“an ad hoc and inconsistent approach to the consent mechanisms that attach to those powers”*. Dr McCorkindale

highlighted the following different consent mechanisms seen in post EU exit legislation:

- UK Ministers are prohibited from legislating in devolved areas (e.g., sections 36, 38 and 39 of the Fisheries Act 2020)
- UK Ministers must seek (but not necessarily obtain) consent from devolved counterparts before exercising powers in devolved areas (e.g., sections 6, 8, 10, 18, 21 and Sch 3 para 2(3) of the UK Internal Market Act 2020)
- UK Ministers must consult with devolved counterparts before exercising powers in devolved areas (e.g., section 17 of the Professional Qualifications Act 2022)
- no statutory requirement to seek consent from, nor to consult, devolved counterparts before exercising powers in devolved areas (e.g., section 50 [making provision for direct UK Government spending in devolved areas] of the United Kingdom Internal Market Act 2020, section 8 of the European Union (Withdrawal) Act 2018 – albeit in the case of the latter a political commitment to seek consent was made and honoured in practice).

Dr McCorkindale highlighted “*the tension between competing constitutional visions*” in relation to new executive powers. That is to say, as Dr McCorkindale stated in his paper, that there are three ways of looking at it:

- “no change at all.... the UK Parliament has always held the power to legislate in devolved areas and... legislation to create powers for UK Ministers in devolved areas... is merely a manifestation of that power.”
- “Unconstitutional – that they run contrary to the devolution settlement, where the hierarchy of legislatures by virtue of parliamentary sovereignty is not matched by a hierarchy of governments – and therefore that the powers should be repealed or discontinued and the status quo ante restored.”
- “For better or for worse – these powers, which have not been limited to post-Brexit legislation but have been applied into other devolved policy areas, are now part of the devolution settlement and therefore require new constitutional thinking to match that new political reality.”

In relation to scrutiny of secondary legislation made at the UK Parliament in devolved areas, Statutory Instrument Protocol 2 provides the Scottish Parliament with a role in deciding whether it is content with the Scottish Ministers’ proposal that particular regulations are made by UK Ministers rather than by Scottish Ministers themselves.

There are, however, limitations to the scrutiny role that Protocol 2 can provide. First, it applies only to powers in policy areas that were formerly governed by the EU. This is because Protocol 2 was agreed at a time when the new powers that were being created were only in former EU areas. Increasingly, however, new powers for UK Government Ministers are now being conferred in devolved areas that were not formerly EU areas.

Second, the Protocol is only effective if the Scottish Government has a legal entitlement to withhold its consent for a UK SI to be made, that is, where a requirement for such consent is written into the power. Such a statutory consent requirement does not always exist as noted above.

In terms of solutions to some of the challenges around consent mechanisms, Dr McCorkindale suggested the following could be considered as possibilities:

- mechanisms to call UK Ministers and their departments directly to account to the devolved legislatures for the powers that they exercise in devolved areas.
- new IGR mechanisms to allow for the meaningful dispute resolution where the exercise of powers undermines policy decisions taken, or policy priorities set, in devolved areas by devolved institutions.

Professor Keating noted in his paper that *“The question of the powers of UK Ministers to make statutory instruments in devolved areas could be restricted, subject to clear rules and/ or subject to consent by devolved Ministers.”*

## **Intergovernmental relations and processes**

The Committee has previously identified other constitutional arrangements in the post EU era which are intergovernmental in nature, including<sup>2</sup>:

- common frameworks
- the exclusions process linked to the UK Internal Market Act 2020
- the operation of the Trade and Cooperation Agreement, including the EU-UK Partnership Council and the Specialised Committees.

The Committee also recognised the intergovernmental nature of the Sewel convention in its Impact of Brexit on Devolution report.

The formal system of IGR changed in the UK following the Dunlop report<sup>3</sup> and the joint review of IGR undertaken by the UK Government and devolved administrations. The formal IGR mechanism structure is explained in the graphic below<sup>4</sup>.

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<sup>2</sup> [CEEAC Committee report on UK Internal Market Enquiry](#), 22 February 2022

<sup>3</sup> [Report of the Review of UK Government Union Capability, Lord Dunlop, November 2019](#)

<sup>4</sup> [SPICe spotlight, Intergovernmental relations in the UK: new structure, new approach?](#), 18 January 2022

## Top tier:

The Council

This is made up of the Prime Minister and heads of devolved governments.

## Middle tier:

### Standing committees

The Interministerial Standing Committee (IMSC)

Ministers responsible for IGR consider issues that cut across different policy areas, and facilitate collaborative working between groups in the lowest tier.

The Finance Interministerial Standing Committee (F:ISC)

Will comprise Finance Ministers and consider finance and funding matters.

Additional interministerial committees

These committees might be formed temporarily to consider issues that would otherwise be in the remit of IMSC, but which require special consideration.

## Lowest tier:

A number of interministerial groups (IMG) will be formed to discuss specific policy areas, such as on transport, Net Zero, and the Trade and Cooperation Agreement with the EU.

The new formal IGR structure has been operational since [the publication of the findings of the joint review](#) (undertaken by UK Government and the devolved administrations) in January 2022. Quarterly reports on IGR are now published. The [latest report Q3 2022 \(1<sup>st</sup> July – 30<sup>th</sup> September\) was published in December 2022](#). The report notes that 50 intergovernmental meetings took place in quarter 3, with four inter-ministerial group meetings (UK-EU Relations; Environment, Food, and Rural Affairs; Sport Cabinet and the IMG for Trade).

The lowest and middle tiers of the IGR structure have specific responsibilities for common frameworks. At the lowest tier, interministerial groups (IMGs) are responsible for particular policy areas, including common frameworks falling within them. At the middle-tier, the Interministerial Standing Committee (IMSC) is intended to provide oversight of the common frameworks programme.

The dispute resolution processes for IGR are also used in relation to common frameworks. If a dispute cannot be resolved at the official level as set out in individual frameworks, it is escalated to the Ministerial level (first through IMGs and then to IMSCs).

The middle-tier Financial Interministerial Standing Committee, differs from the rest of the new structure in its dispute resolution process. The dispute resolution process for this committee states that disagreements on funding may only legitimately be escalated where there is reason to believe “*a principle of the Statement of Funding Policy may have been breached*” and further, that “*policy decisions on funding are strictly reserved to Treasury ministers, with engagement with the devolved administrations as appropriate*”.

This is significant given that most intergovernmental disputes in the past have been about funding. These provisions appear to afford the UK Government, through the Treasury, a continued, more central, role in the new IGR machinery with regards to financial matters than the rest of the document would suggest.

IMGs are also engaged through common frameworks and the exclusions process attached to the UK Internal Market Act 2020.

The Committee has previously noted in its report on the Internal Market *“that there is very little detail in the public domain”* about how the exclusions process works and has called for clarity on the following:

- whether the process intended as a means of managing policy divergence before regulations are adopted
- what criteria will be used in assessing exclusions and how will this balance the priority within devolution for regulatory autonomy with open trade
- if an exclusion cannot be agreed whether the matter may then be resolved through the IGR dispute resolution process
- how the process will provide certainty and clarity for businesses and consumers

The Committee also noted that there is no requirement for public consultation or parliamentary scrutiny of the process for seeking an exclusion and called for the common frameworks process to build *“in formal structures which allow for public consultation where an exclusion from the market access principles is sought on significant policy areas.”*

Intergovernmental working in the UK has long been criticised for its lack of transparency. Under the old regime, there were some limited reporting requirements, for example an annual report on activities of the JMC. The IGR structure now in operation includes a requirement for the independent secretariat to produce yearly reports on intergovernmental engagement and produce additional information on disputes. The dispute process itself also requires governments to make statements to legislatures if they are unable to resolve disagreements at higher levels of engagement.

Given the increased importance of intergovernmental work post EU-exit the Committee has raised its concerns about transparency and accountability. Last week the Committee heard from its adviser Professor Michael Keating that:

*“The original Scottish devolution settlement followed the ‘coordinate’ powers model in which each level of government would largely make and implement policies in its own field, while recognising that there might be overlaps. If there is to be a move towards a more ‘cooperative’ model in which the two levels make policy jointly, this needs to be recognised more systematically.*

*There are risks in such a model as it could lead to Westminster predominance, given the imbalance of capacity and resources. It could also result less transparency and accountability as policy-making is done within intergovernmental networks, often managed by officials. On the other hand, a recognised set of mechanisms for joint policy making could serve to restrain unilateral UK action in devolved matters and help to focus resources rather than duplicating effort.”*

The Committee may wish to discuss with witnesses the extent to which transparency around IGR remains a concern and explore how any such concerns may be addressed on an interparliamentary basis.

**Sarah McKay**  
**SPICe research**  
**24 February 2023**

# **Submission to the Constitution, Europe, External Affairs and Culture Committee:** How Devolution is Changing post EU

The Senedd's Legislation, Justice and Constitution Committee considers matters relating to legislation, devolution, the constitution, justice, and external affairs.

This submission to the Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee outlines the key issues we as a Committee have identified during our scrutiny of how devolution is changing post-EU exit.



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## 1. Devolution post-EU Exit

How devolution is now working following the UK's departure from the EU including your experience of the policy-making and legislative processes;

How should devolution evolve post EU exit, to meet the challenges and opportunities of the new constitutional landscape;

### Intergovernmental Relations

- 2.** The Legislation, Justice and Constitution Committee (LJC) **welcomed** the **new intergovernmental agreement** as a “positive step forward” in relations between the governments of the UK. **The Committee has also welcomed** renewed engagement from the current UK Government at Prime Minister and Heads of Devolved Governments Council level.
  - 3.** However, the Committee has also raised questions over how the new agreement is working in practice. **In July 2022**, the Committee wrote to the UK Government expressing concerns about a lack of transparency over UK Bills that impact Wales. In some cases, no information was shared with the Welsh Government prior to the introduction of a bill. In his **response**, the former Secretary of State for Levelling Up, Housing and Communities committed to strengthening ways of working and improving engagement on legislation. **Further correspondence** was exchanged between the Committee and the current Secretary of State.
  - 4.** The extent of implementation of the structures within the new agreement is mixed. Some groups, such as the Interministerial Group (IMG) on Environment, Food and Rural Affairs, have a regular meeting schedule and comparatively detailed communiques issued from meetings. Other IMGs have met more infrequently, while some groups cited in the initial agreement **are yet to be established**.
  - 5.** The Committee has had some success in engaging with the Welsh Government on the new structures where it has had sufficient advanced warning of meetings and could suggest that certain issues were discussed on the agenda. In other circumstances the Committee has expressed concern about how little information has been provided on the content and outcome of meetings.
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**6. The Committee has questioned** the Welsh Government on the new dispute resolution procedure contained within the intergovernmental review, in particular around what circumstances would lead to its use. **The Committee has also raised** the importance of the independent secretariat for intergovernmental relations, as detailed in the review, being established.

## **Interparliamentary Relations**

**7.** Interparliamentary relations has become increasingly important in the post-Brexit context and increased interparliamentary relations have been a positive example of how relationships have changed. The Committee has engaged both directly with counterpart committees and through more formal and semi-formal structures that have emerged post-Brexit.

**8.** The Chair of the LJC Committee has attended both meetings of the new Interparliamentary Forum: **the inaugural meeting at the House of Lords in February 2022**, and the **latest meeting at the Senedd in October**. The Chairs of the LJC Committee and the Economy, Trade and Rural Affairs (ETRA) Committee represented the Senedd at the first and **second meetings of the UK-EU Parliamentary Partnership Assembly in November 2022**. Whilst there remains work to develop the role and purpose of both forums, there has already been some welcome progress.

**9.** With the emergence of the new intergovernmental structures, further development of the interparliamentary structures to ensure proper transparency and scrutiny of intergovernmental decision making is something to which the minds of all legislatures in the UK should turn.

## **Legislative Consent**

**10.** Legislative Consent Memorandums (LCMs) have now been laid in the Senedd for 13 new UK Bills since the Queen's Speech in May 2022. This takes the total number of LCMs and SLCMs in the Sixth Senedd to 74 across 32 UK Bills<sup>1</sup>.

**11. In the first year of the Fifth Senedd** (May 2016 to May 2017), the Welsh Government laid consent memoranda covering around **80 clauses and schedules**. In the first year of the Sixth Senedd (May 2021 to May 2022), consent was sought for around **360 clauses and schedules**.

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<sup>1</sup> The Schools Bill LCM was withdrawn by the Welsh Government after the Bill was dropped by the UK Government, but it is included in these figures.

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**12.** Another issue that has come to the fore since 2016 is the UK Parliament legislating in devolved areas without the Senedd's consent. This has happened in relation to seven Bills since 2016, including key legislation that implemented the UK's departure from the European Union and established some of the post-Brexit arrangements, such as the UK Internal Market Act 2020 and the Subsidy Control Act 2022.

**13.** The Welsh Government is recommending that the Senedd withhold consent from all or part of five Bills currently being considering, including the **Retained EU Law (Revocation and Reform Bill)** and the **Northern Ireland Protocol Bill**.

### **UK-EU relations / International agreements**

**14.** The Senedd and the Welsh Government are responsible for the implementation of UK-EU obligations in devolved areas, and must comply with them. However, there is no single Welsh Government Minister responsible for EU-related matters (**see this Senedd Research Article** for more information).

**15.** Post-Brexit governance structures create **over 30 new UK-EU joint forums** where implementation is discussed and related decisions are made. The UK and EU each have delegations to these meetings. The Welsh Government and Senedd have observer status at meetings.

**16.** The LJC Committee has **noted** the challenge of navigating the new system and has requested more transparency from the Welsh Government on its involvement in UK-EU meetings and in structures around the **Trade and Cooperation Agreement**.

**17.** The Committee has sought advice from expert stakeholders, including **from Professor Catherine Barnard** on the impact of alignment and divergence under the TCA.

**18.** The Committee is also responsible for the scrutiny of **non-trade international agreements** in the Sixth Senedd. More information about the Committee's work is available in this **Senedd Research article**.

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## 2. Regulatory Divergence

How much scope there is for regulatory divergence in areas such as environmental standards, food standards and animal welfare between each of the four parts of the UK;

Are there sufficient safeguards to allow regulatory divergence across the four parts of the UK in areas where there are disagreements between governments?

### Common Frameworks

**19.** The Legislation, Justice and Constitution Committee provides oversight scrutiny of the common frameworks programme as a whole and has **secured commitments on the transparency of the programme** from the Welsh Government.

**20.** As part of the Committee's oversight work, it has been considering issues including:

- The openness and transparency of the development and operation of common frameworks;
- The quality and clarity of common framework documents;
- The impact of common frameworks on how law and policy for Wales can be made and the exercise of devolved competence;
- The implications of UK legislation (such as the UK Internal Market Act 2020 and the Subsidy Control Act 2022) for common frameworks;
- How common frameworks provide for Welsh Government engagement in the negotiation and implementation of UK-EU obligations.

### UK Internal Market Act

**21.** The impact that the UK Internal Market Act has on the practical effect of Welsh law has been contested between Senedd Committees and the Welsh Government. The Senedd's **Legislation, Justice and Constitution** and **Economy, Trade and Rural Affairs** committees have both argued that the UK Internal Market Act (UKIMA) has a practical effect on two recent pieces of Senedd

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legislation: **the Environmental Protection (Single-use Plastic Products) (Wales) Bill** and the **Agriculture (Wales) Bill**.

**22.** The Welsh Government has taken a different view to Senedd Committees about the impact of the on these Bills. For example, they say that the Environmental Protection (Single-use Plastic Products) (Wales) Bill is “**fully effective and enforceable**”. In its view, the UK Internal Market Act 2020 “**cannot and does not cut across Senedd competence to legislate in relation to non-reserved matters**” and it cannot “**reserve matters by the back door**”.

**23.** The LJC Committee has **reported** that this position appears to be different to how the Welsh Government has interpreted the effect that new law for England will have in Wales.

**24.** The Welsh Government has said that the UK Parliament’s **Genetic Technology (Precision Breeding) Bill** would have “**significant implications**” for Wales because of the UK Internal Market Act 2020. The Welsh Government’s Minister for Rural Affairs and North Wales has argued that their approach is consistent because primary Senedd legislation in a devolved area “**can be made free from the requirements of UKIMA**”, despite the 2020 Act stating that only requirements in place before the Act came into force that aren’t substantially changed can be exempt in this way.

### **Retained EU Law (Revocation and Reform) Bill**

**25.** The Retained EU Law (Revocation and Reform) Bill has the potential to impact on the ability of the Senedd to pursue effective regulatory divergence across a number of policy areas.

**26.** Changes made outside of Wales, to both reserved and devolved retained EU Law (REUL), could have an impact on Wales. The Legislation, Justice and Constitution Committee **remains unclear** about what role the Welsh Government has, or will have, in monitoring or influencing any changes.

**27.** The Bill will also operate alongside common frameworks and the UK Internal Market Act 2020. The Welsh Government’s Counsel General has **indicated** that changes and disputes around retained EU law could be discussed in intergovernmental forums, including common frameworks, but not all REUL is covered by a common framework.

**28.** The Welsh Government has **specified** that it does not wish to see a diminution of standards in Wales but decisions taken by other governments in the

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UK could impact on the effectiveness of any regulatory changes in Wales due to the market access principles of the UK Internal Market Act.

**29.** This [Senedd Research article](#) provides further information about rulemaking outside the EU.

### 3. Law making post-EU

Are there sufficient safeguards to ensure an open and transparent policy-making and legislative process in determining the post-EU exit regulatory environment?

Is there sufficient clarity regarding the post-EU exit regulatory environment within Scotland and how it relates to the rest of the UK?

#### Delegated Powers

**30.** The LJC Committee consistently raises concerns about the granting of broad delegated powers in primary legislation, particularly when these are so-called ‘Henry VIII’ powers.

**31.** Through its scrutiny of legislative consent memoranda for UK Bills, the Committee has [raised concerns](#) about the use of concurrent delegated powers that could lead to an impact on devolved competence, the granting of delegated powers in devolved areas to UK Ministers ([Subsidy Control Act 2022](#)) and Henry VII powers to amend the Government of Wales Act 2006.

**32.** The Committee’s scrutiny of the [Legislative Consent Memorandum](#) on the Retained EU Law (Revocation and Reform) Bill has concluded that the Bill “enables an unacceptable power imbalance between executive and legislature”. The Committee’s [report](#) supports the calls by the House of Lords’ Delegated Powers and Regulatory Reform Committee and others to remove from the Bill the “unlimited and unnecessary” Ministerial powers.

#### Complexity of making law

**33.** Making and scrutinising laws in the Sixth Senedd is complex. The introduction of the reserved powers model and the UK’s departure from the EU have redrawn the scope of devolved powers in Wales. Meanwhile, the UK Government has legislated extensively in devolved areas and has entered into new international obligations with which the Welsh Government must comply.

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**34.** To inform the Committee's work on this issue, it invited a number of experts to an event on 13 June 2022 to discuss:

- the impact of the UK's withdrawal from the EU on the complexity of the legal landscape in Wales, and in the UK more broadly, and
- the impact of the UK Government legislating in devolved areas on the accessibility of law in Wales.

**35.** Some of the key conclusions from this work include:

- Wales is no longer subject to the more stable, rules-based system of the EU; instead, the Committee is concerned principally by matters of legislative competence and there is a greater reliance on non-legislative intergovernmental agreements and processes.
  - There needs to be a change in approach to scrutiny in response to this increasing complexity. Participants suggested that this period of change offered an opportunity to reframe scrutiny processes, but recognised that this would be challenging in the context of limited parliamentary resources.
  - Participants recognised that the complexity of the devolution settlement and the constitutional landscape outside the EU posed problems for the accessibility of the law. Although complexity is to an extent inevitable, participants generally felt that the situation had worsened.
-