

FINANCE AND CONSTITUTION COMMITTEE

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Policy Frameworks after Brexit

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1. The UK Devolution Settlement

- 1.1 UK devolution operates on a 'reserved powers' model. Only competences reserved to Westminster are specified, with all other powers going to the devolved level. There is a 'coordinate' system in which each level legislates separately within its own sphere of competences. There are few areas of 'concurrent' competence, in which both levels legislate although there are overlaps across policy fields and some areas in which devolved ministers act with UK laws; this is administrative devolution.
- 1.2 There is no hierarchy of laws but a single statute book within each of the nations. It is true that Westminster retains the right to legislate in devolved spheres but such legislation prevails only when it is the most recent, repealing any contrary provision, not because it is a Westminster law. Westminster can also change the devolution statute to take back powers but has not regularly done so. Under the Sewel convention, Westminster will normally seek legislative consent to legislate in devolved fields or change the allocation of competences. Until the EU Withdrawal Bill, the convention had generally worked well.
- 1.3 The European Union operates in a very different way in relation to member states and sub-state jurisdictions. There is a hierarchy of laws. According to the supremacy principle, EU law prevails over the law of member states in fields where the EU is competent, irrespective of which law came last. Although that issue has never entirely been resolved in the UK, the supremacy principle has applied in practice.
- 1.4 EU policy is made intergovernmentally. The Commission (which is supposed to be above particular national interests) has the right of initiating legislation. It must then be approved in the Council of the European Union (sometimes known as Council of Ministers). This is mostly done under Qualified Majority Voting although there are some remaining provisions for unanimity. Most legislation also requires approval in the European Parliament.

- 1.5 In a few fields, the EU has exclusive competence. Most matters, however, are concurrent, with both levels having responsibility. Within these areas, the EU makes framework laws, within which member states have discretion. Some of these are sectoral, for example in agriculture. Others are broader in scope, such as rules of the Single Market or competition, which apply across all sectors.
- 1.6 EU law is subject to the principles of subsidiarity and proportionality. Subsidiarity provides that decisions should be taken at the lowest level possible. Proportionality provides that the EU rule be only as detailed as necessary.
- 1.7 The European Commission is the custodian of the broader Community interest. It has the sole right to initiate laws, albeit in consultation with member states. It oversees the application of laws and can apply its own remedies. In case of non-compliance, it has resort to the Court of Justice of the European Union. The Court has the last say on validity of laws.
- 1.8 The Commission and the Court also interpret broad principles of EU law, such as the Single Market. A range of regulatory agencies also ensure compliance with EU law and regulation, again with right of appeal to the Court.
- 1.9 Laws and regulations of the EU are applicable both to state and sub-state governments, either by direct effect or after transposition into domestic law.

2. UK Frameworks

- 2.1 It has been agreed that UK frameworks will be needed to replace EU frameworks in key fields so as to:
 - 2.1.1 Secure the UK 'internal market'. At one time, the UK Government referred to the 'UK single market' but that expression has been abandoned following criticism that the analogy with the EU Single Market was misleading.
 - 2.1.2 Secure international obligations.
 - 2.1.3 Negotiate agreements with the EU and third countries. Trade agreements nowadays typically include clauses about regulatory harmonization and recognition. This extends to matters that are devolved within the UK, such as agricultural standards. At this stage we do not know how closely UK will stick with EU regulations or whether and how the devolved territories may do so even in the absence of UK provision.
 - 2.1.4 Deal with the management of common resources.
 - 2.1.5 Deal with access to justice with cross-border elements.
 - 2.1.6 Ensure the security of the UK.
- 2.2 While there is agreement on the principle of frameworks there is as yet no agreement on their extent, format or how they will be made. Some frameworks will be legislative and some non-legislative, following the Memorandum of Understanding (MoU) model presently used to deal with matters of common concern.
- 2.3 UK and devolved administrations have been working at a technical level on the basis of a list produced in March 2018, to work out where frameworks might be appropriate and what form they should take. A series of issues remain outstanding.

3. Questions

- 3.1 How to define scope of frameworks? The concept of a 'UK internal market' reflects long-standing principles about economic union and internal free trade, going back to 1707, but is ill-defined in relation to a modern economy and welfare state. The EU Single

Market is a set of transversal principles applying across all sectors and policed by the European Commission and the Court of Justice. That is not easily transposed to the domestic setting, where similar institutions do not exist and are not going to be created. Experience in Europe and elsewhere illustrates that interpreting the principle involves matters of political judgement and values, notably about the balance between the market and public service or social and environmental principles. These have arisen in relation to state aid, contracting out of services and public procurement.

- 3.2 What issues will be covered? A list of matters potentially subject to frameworks has been produced following 'deep dives' by civil servants. This has meant starting with the detail, before the basic principles have been worked out. The list has been narrowed, with some issues being exempt from frameworks but the resulting list might be both too broad and too narrow to satisfy the general principles about the internal market or meeting obligations under trade agreements. These in turn may change in the future, so that a mechanism might be needed to update them. Discussions are under way about the meaning of the internal market but this does seem to be the wrong way around.
- 3.3 How will legislative frameworks be made? These will be UK laws. The UK Government has indicated that these will be subject to legislative consent, even if they fall within the competences that are (temporarily) to be reserved. This, however, leaves the UK with the final word, which takes us back to the issue of what legislative consent really means in practice. It has hitherto been understood that it would be exceptional for the UK to ignore a refusal of consent but this has never been spelled out in detail. The final version of the Withdrawal Bill contains a clause that indicates how the UK sees consent provisions as working. While stipulating a legislative consent procedure for the orders about the reservation of powers, it specifies that consent, refusal of consent and no decision on the part of the devolved legislatures will all have the same effect. If applied more generally, this effectively suggests legislative consent requirements are no more than a commitment to consult. This does not alter the legal position but does rather undermine the spirit embodied in the decision to put the convention into the Scotland Act (2016). An alternative approach would be to emulate the EU system of intergovernmental policy-making. The Welsh Government has suggested a UK Council of Ministers to manage common affairs. It might proceed by unanimity or some version of voting, which would mean that the UK Government would not always necessarily have the ability to dictate policy.
- 3.4 What is the place of England in negotiating frameworks? At present the UK Government represents England as well as a broader UK interest. This contrasts with the EU mode, where the Commission stands apart from particular national interests or with federal systems, where the federal government stands apart from the federated units.
- 3.5 How will legislative frameworks be preserved, renewed and updated? The Withdrawal Act provides that that some powers will be reserved until frameworks are made, but then all powers will be returned to the devolved bodies after a maximum of 7 years. We might assume that the legislative frameworks will continue but it is not clear how they will be enforced. There may also be a need for frameworks to be modified and new frameworks to be made. Presumably, these will be UK laws subject to legislative consent.
- 3.6 How will frameworks be monitored and enforced? At present, the courts and, ultimately, the Supreme Court, have responsibility for ruling on whether the devolved legislatures have exceeded their competences. This will become more complicated if

they have to rule on whether they have overstepped their scope for discretion within framework laws. In the case of non-legislative frameworks, there may have to be some arbitration procedure; otherwise the UK Government would be able to interpret them at will. Again, there is nothing in the UK devolution arrangements equivalent to the Commission and Court of Justice.

4. Experience of framework laws

Framework laws have proved difficult in other federal and devolved states. In Germany, they were abandoned after the last federal reform. In some fields, they have been replaced with horizontal coordination mechanisms across the Länder. The lack of devolution for England would make this impossible in the UK. When they existed in Germany, they were subject to approval by the Bundesrat, the second parliamentary chamber representing the Länder.

In Spain and Italy, framework laws have been subject to constant litigation in the courts as central governments are regularly accused of legislating in excessive detail. Again, the UK lacks any mechanism for ensuring that framework laws leave sufficient scope for variation.