



Common Frameworks Scrutiny Committee

Corrected oral evidence: Post-Brexit common frameworks

Tuesday 17 November 2020

10.45 am

Watch the meeting

Members present: Baroness Andrews (The Chair); Lord Bruce of Bennachie; Lord Caine; Baroness Crawley; Lord Foulkes of Cumnock; Lord Garnier; Lord Hope of Craighead; Lord Murphy of Torfaen; Baroness Randerson; Baroness Redfern; Baroness Ritchie of Downpatrick; Lord Thomas of Cwmgiedd.

Evidence Session No. 2

Heard in Public

Questions 15 - 26

Witnesses

[I](#): Professor Katy Hayward, Professor of Political Sociology, Queen's University Belfast; Professor Nicola McEwen, Professor of Territorial Politics and Co-Director, Centre on Constitutional Change, University of Edinburgh; Professor Jo Hunt, Professor in Law, Cardiff University.

Examination of witnesses

Professor Katy Hayward, Professor Nicola McEwen and Professor Jo Hunt.

Q15 **The Chair:** Good morning, everybody. Welcome to the Common Frameworks Scrutiny Committee. I am particularly pleased that we have three very distinguished witnesses today: Professor Katy Hayward, Professor of Political Sociology, Queen's University Belfast; Professor Nicola McEwen, Professor of Territorial Politics, University of Edinburgh; and Professor Jo Hunt, Professor of Law, Cardiff University. May I say how extremely welcome you are and how grateful we are for your time? I know that you have already given evidence to our Constitution Committee, but time has gone on since then and we have many different things to ask you. We very much look forward to hearing what you have to say this morning, which will be very helpful for us.

The Committee is being broadcast this morning and it is on parliamentlive.tv. We will also take a full transcript, to have a full record, and we can make that available to our witnesses shortly after the meeting.

To give you a little background, we have had five private sessions of the Committee. We had our first public session last week, when we talked to Jeremy Miles and Mike Russell, from the Welsh Government and the Scottish Government. We have seen about five frameworks, either in summary form or in provisional form, so we are becoming familiar with the issues and are corresponding with the departments as to how progress is being made and so on. We understand a lot more about the purpose, the function and the principles they were based on.

We are also keeping a watchful eye on, and as individuals playing an active part in, the internal market Bill. Much of our questioning this morning will be about how you see the relationship between the frameworks and the internal market Bill, and the future of the frameworks in the context of the present dialogue. It is a particularly timely opportunity for us to hear from you this morning.

We have some apologies. Unfortunately, Lord McInnes is not with us this morning. Lady Randerson and Lord Caine will be leaving us a little early. Apart from that, we are all here.

I can kick off with what, for you, will be a very predictable question, but it lays the framework for us to probe in more detail. The three of you have been working on the frameworks for some time and you are genuinely expert in this field. Could you tell me how important the common frameworks are as a way forward for the internal market and for the harmony of the UK, not least? What would a successful common framework programme have to encompass? What are its strengths and weaknesses, basically?

Professor Nicola McEwen: All the Administrations of the UK acknowledged that Brexit and the repatriation of competences created some challenges for our system of devolution. We are used to a system that appears to have a relatively clear separation between reserved areas

and devolved areas. Personally, I think that was always somewhat exaggerated and there have always been interdependencies, but Brexit and the repatriation of competences certainly increase that. There was recognition of the need to have an ability to co-ordinate, to communicate, to co-operate and perhaps to replace the regulatory frameworks at the EU level with some form of framework at the UK or GB level. I will come to Northern Ireland later.

Probably the most important aspect of the frameworks programme has been the process of bringing the different Administrations around the table and of recognising the complexities that devolution and multilevel government present to the way the UK is governed. The process has revealed what is possible in joint working, even when you have parties with very different ideological and constitutional outlooks. These things have not prevented them working collaboratively to set up a system that could offer a way of joint working in the future, based on more collaboration than we have had of late.

I say it could do that, but it is not guaranteed, not even within the frameworks themselves, because it would require a change of culture at ministerial level to permit that kind of collaborative working on an ongoing basis. It is also clearly threatened by the internal market legislation.

What would a successful programme look like? A successful programme would be given an opportunity to work. It would be given the space to see whether this approach, which has been in the works for some time now and has involved an awful lot of effort on all sides, could work without the need for the rather more heavy-handed and broad-brush legislative approach that we are seeing. The frameworks are very specific, targeted and focused, but it is ultimately about a process that is co-owned and based principally on consent.

Professor Katy Hayward: Thank you very much for allowing me to give evidence before you this morning. In terms of the importance of the common frameworks, building on what Nicola says, there is the importance of the task and the challenge that they are trying to meet, as well as the importance of the principles and the process by which they are operating.

In terms of the task, there was a mapping exercise that recognised how significant the EU had been for the operation of the UK internal market, as we have come to know it, and the allowance of the divergence that exists within the UK. Policies that recognised the unique interests of the territories of the UK, within the basket of the EU, were perfectly manageable. We have had that 2017 mapping exercise, recognising the significance of leaving the EU for devolution and for the UK itself.

The specific nature of the common frameworks shows that there is no need to legislate in every single area. In some areas, we are dealing with very significant regulatory issues, such as organ transplantation and food safety. In others, it is quite clear that things can continue to operate as

they do at the moment and there is no need for intervention. We have a very serious task in many ways. I am very conscious that this task is becoming increasingly complicated and is affected by the development of the UK's relationships with the EU and with other countries in the future. The task that the common frameworks seek to address is very significant.

In terms of the principles, in many ways the common frameworks build on the experience of EU integration and the learning that we have from that. Devolution, as I say, occurred in the context of European integration. Similarly, the common frameworks are based on the principle, which we saw in the EU, of subsidiarity: acting only where necessary and at the lowest level necessary. Those are really important principles.

A civil servant said to me that the fact that people are now interested in this is a concern. This kind of process is the grimy work of civil servants, which very few people are generally interested in, and the fact that it is getting a lot of attention makes them feel a little uncomfortable. There is a certain wisdom to that, in many ways. A successful common frameworks process is one that does not generate many headlines, is properly scrutinised, of course, and is not rushed. I would underline Nicola's point about allowing time for this process to find its feet, become embedded and become habit.

I am conscious that the process for developing these common frameworks is somewhat rushed. There is a pressure now on to have the priority ones done by the end of this year. In the context in which we are operating, not least with Covid-19, it seems an unnecessary pressure and risks inadequate fulfilment of the tasks that these common frameworks are trying to address.

Professor Jo Hunt: As has been said, the common frameworks are important in various ways: the purpose they serve as well as the process and what it reflects. We needed to find a way to transition out of EU membership and engage in shared governance. What we have with the common frameworks are not outputs in themselves but governance mechanisms. They are systems of good governance. We will no doubt come back to that when we talk about scrutiny and the problems that that creates. We are not looking at finished products but vehicles by which decisions are made.

They are an essential segue out of the processes of being part of the European Union and its shared governance structures—we have heard reference to the principles, such as subsidiarity, that play through those structures—to find new ways of undertaking governance in the UK. As has also been said, they are critically important in what they say about how devolution is understood and the respect they show to the devolution settlements and to the devolved legislatures and Governments.

It is important not to forget what these represent an alternative to. The initial form of the withdrawal Act in 2018 had seen a whole

recentralisation of powers held at EU level, and then there was the approach of there being powers to reserve, if there was any concern that there might be divergence. The common frameworks then come through as a more collaborative, co-operative approach. It reflects an approach to devolution that is respectful of those settlements.

In terms of what a successful system would look like, we have seen how things can work incredibly positively. They are demonstrations of effective intergovernmental relations. Should they be constrained and limited to the specific pieces of retained EU legislation that have been rolled over, or should these principles be able to apply to new areas and have a more dynamic, forward-looking future? Of course, a successful frameworks programme would not be coming up against this internal market Bill in this form, at this time, given the impact that the Bill might have on those frameworks.

The Chair: Thank you very much indeed. Each of you has touched on aspects of what we have picked up on ourselves. You have done so in a very clear and resonant way. You have all said, in different ways, that these frameworks have to be allowed to work. That takes us nicely to Lord Bruce's question, where he is now going to pursue that idea.

Q16 Lord Bruce of Bennachie: Thank you, all three, both for your submissions and for being here. The common frameworks approach has been going for three years. Most people who have been involved in it seem to think it is working in a positive way. Suddenly, we have the UK internal market Bill, which seems to cut right across. Is the Bill necessary or could the common frameworks, suitably adapted, deal with whatever issues there are, including a possible need for ad hoc legislation rather than a catch-all Bill?

In the context of the way the Bill has been going and the reaction of committees and the devolved Administrations, what is your take on how the Government are reacting to this? The Prime Minister has just been reported as saying that devolution was a disaster and Tony Blair's biggest mistake, which is a wonderful way to launch the Conservative campaign for the Scottish elections next May. Do the Government have any real understanding of, frankly, the anger at the reaction? At the moment, they do not seem to have persuaded people that we need this and that the common frameworks are not strong enough to carry the burden.

Professor Nicola McEwen: On the necessity or otherwise of the UK internal market Bill, the Bill and the frameworks process are trying to do different things for a similar problem. The frameworks are very specific and focused on particular issues and areas of regulation, so they are tailored to them. They have extensive engagement between the Governments. They have joint consultation with stakeholders, which, in itself, is quite interesting. It is a worked-through process for a specific area of policy, whereas the UK internal market Bill is a much more sweeping approach.

I am not convinced of the need for this UK internal market legislation. There might be a case for a general rules-based system, although not this one, to underpin the frameworks process, but we do not know yet. The more effective option, which I would have preferred to see, would be one that allowed the frameworks to work or not work, to explore them and to see where and whether there are any gaps that need to be filled.

There is not an awful lot of evidence that the perceived problem that the UK internal market Bill is intended to address exists. We already have a very tightly integrated market. There is not a whole lot of evidence of barriers to trade that would emerge in the absence of this legislation, so it is not clear to me that a case has been made for this Bill. After the frameworks have been allowed to work, there may be some gaps, but do you fill those with an all-encompassing constraint on what devolution can achieve, and the reach of the devolved institutions within their own territories, or with other frameworks? They may be legislative frameworks that are equally focused and tailor-made to address the specific problem, or non-legislative frameworks, for that matter.

I go back to the process point. Something that builds in pre-legislative negotiation, consultation and co-operation between the Administrations is vital. There is nothing like that in the UK internal market Bill approach. Indeed, it looks set to be passed, if that is the end result of this process, in the face of opposition from the devolved institutions. That is the first time that that would have happened in a piece of legislation that is specifically designed to alter the reach of the devolved institutions.

Professor Jo Hunt: From a general perspective, I just want to draw parallels. The point is made that we already have a very integrated market in the United Kingdom, which has worked through the decades of devolution that have taken place within EU membership. EU law has had a significant role to play in ensuring that there is that free movement.

Do we need the Bill? As Nicola says, we do not need this Bill in this form at this time. At most, we could make a case for a continuation of some form of horizontal free movement principle, as we have experienced as part of the European Union, but the common frameworks themselves are in areas where we have had harmonising legislation from the EU. That does not cover everything. It has increased over the decades in what it does cover, but there are some areas where, rather than those pieces of legislation applying, the horizontal principle of free movement applies.

That is missing in the UK system, but the Bill imposes a supercharged version of it. It has not made the case for why the principle that we are used to experiencing in the EU context, with the various grounds for justification, anchored in ideals of subsidiarity, is not a starting point. If that is seen to be, in some way, insufficient, we can move from there, but, in remaking things in this very radical, top-down way that the Bill does, that case has not been made.

Professor Katy Hayward: From the Northern Ireland perspective, the update on the frameworks process that the Cabinet Office issued in July

2019 talked about principles of increasing transparency and setting out the engagement strategy, also noting that the internal market was a cross-cutting issue that required a shared approach. We have seen a very different conception of it this year. Also in 2019, we had the possibility of the backstop, although it was gone by July: the idea of recognising that Northern Ireland would be aligned with the EU for certain areas of regulation, and it would follow that GB would be aligned too, avoiding any frictions and fissures in the UK as a result.

We have had something very different in 2020. The protocol puts Northern Ireland in a distinct position. Without going into the detail, there are concerns in Northern Ireland regarding market access and other aspects that the UK internal market Bill tries to develop, which are not covered by the common frameworks process and arise as a result of the protocol.

There are two concerns. One is Northern Ireland goods being sold in GB and having unfettered access to GB. The other is GB goods entering Northern Ireland. The UK internal market Bill does not address goods moving from GB into NI, but it addresses goods moving the other way. We do not have the unfettered access clause in the current version of the Bill, following the removal of Part V. With regard to market access, this is a general concern from Northern Ireland business and it goes beyond that which is covered by the common frameworks.

Is this a way to go about it? The UK internal market Bill, as Nicola and Jo have said, deals with it in a completely different way to the common frameworks principles. You heard that in the evidence you received last week. That, in and of itself, places great pressure on the assumptions behind devolution and its functioning. It is worth noting how important devolution is for the operation of the Good Friday/Belfast Agreement. Any statements being made by the Government in relation to devolution should always bear that in mind. It is not just about the SNP, for example; it is about the peace process here as well.

Q17 Lord Caine: Some colleagues will have heard me raise this subject before, but I have never really had a satisfactory answer. Northern Ireland, as you made clear, is part of the UK customs territory, part of the UK internal market and part of the common frameworks process. But, for a lot of the issues covered by the frameworks, it remains, to all intents and purposes, part of the European Union, with its rules made not in Westminster or Stormont but in Brussels. That opens up the potential for significant divergence, so we end up with common frameworks for Great Britain, but Northern Ireland operating separate regimes.

What I have not got my head round or had a satisfactory answer to is what happens in circumstances where the Commission proposes changes to the rules of the single market. Who speaks for Northern Ireland, given that the UK is outside the EU? There might be some who would step forward and say that perhaps Mr Coveney could intervene on Northern Ireland's behalf. Not looking at Margaret in particular, while some might find that reasonably satisfactory, others in Northern Ireland would

vehemently oppose such a move. Who represents the interests of Northern Ireland in shaping EU rules to which it will be subject?

Professor Katy Hayward: I wrote a report with Professor David Phinnemore and Dr Milena Komarova on post-Brexit governance challenges for Northern Ireland. This is a fundamental point. There is dynamic alignment in the protocol, and this is relevant to the common frameworks process as well, for Northern Ireland to EU rules. This means that, if the technical regulations that Northern Ireland has to follow, as included in the annexes in the protocol, are amended or replaced, those automatically apply in Northern Ireland. The question of scrutiny of that is a valid and live one. We do not know how that would happen.

If the EU expands regulation in areas that are also relevant to the protocol, and we do not know how relevance to the protocol will be interpreted, it will raise this with the joint consultative working group, which has not been established yet. Then it will go to the joint committee for a decision. They are points where you have UK input.

How will the UK's input be affected by concerns, issues and realities in Northern Ireland? That is a live issue that has not been addressed yet. If, at the joint committee level, the UK and the EU cannot agree about the expansion of the protocol, there is a possibility of the EU taking action to fill the gaps. The Lords EU Select Committee has covered in some detail the dynamic, expanding nature of the protocol and the inability of legislation and scrutiny in the UK system, as it is, to keep up with and respond to that challenge.

Lord Caine: I take it from that that we are right to be concerned about this issue. The internal market Bill has been characterised by some, although not all, as a threat to the Belfast/Good Friday Agreement. Professor Hayward, would you agree with that assessment and, if so, why?

Professor Katy Hayward: It is important to recognise that the internal market Bill does not meet the concerns of Northern Ireland. I mentioned market access and unfettered access. The internal market Bill does not address those, partly because we do not have any minimum standards—we do not have a commitment from GB to follow those standards as they relate to Northern Ireland—and partly because, as I mentioned before, it does not address the question of GB goods moving into NI. More fundamentally, there is a concern that the explicit statement on the capacity to break international law undermines the Good Friday/Belfast Agreement, as do the elements of that Bill.

Lord Caine: Could you be quite specific on that? Which bit of the Belfast Agreement is threatened by what Brandon Lewis said in the House of Commons about international law?

Professor Katy Hayward: The Good Friday/Belfast Agreement is an international agreement. The situation in which the Secretary of State for Northern Ireland says that the UK Government are legislating to break

international law poses grave dangers to the fundamental principles of the UK's standing as a guarantor of the Good Friday/Belfast Agreement. It goes right to the heart of questions of responsibility and trust. More than that, the government amendments to the internal market Bill double down on that, setting aside the possibility of human rights legislation as being of any relevance to that or hindering that capacity to break international law.

If the internal market Bill had done anything to address concerns about where the protocol leaves Northern Ireland in relation to the matters that I was responding to your question on, it would be different, but it does not. There are areas of democratic accountability, transparency, scrutiny, a voice for Northern Ireland and representation. All these things can be addressed, but the UK internal market Bill does not address them.

Lord Caine: I could probably pursue this for at least the next half hour, but I had better let others have a go. Thanks very much.

Q18 Baroness Ritchie of Downpatrick: Could I declare my interest according to the Register of Members' Interests? I am a member of the board of Co-operation Ireland. In dealing with the Northern Ireland protocol, where is the interaction between the Northern Ireland protocol and the common frameworks?

Professor Katy Hayward: As you are well aware, the areas that intersect with Northern Ireland devolved competence are more than for any other region or nation of the UK. This means that categories 2 and 3 of the common frameworks have more effect in Northern Ireland than elsewhere in the UK. It is also true that the protocol covers areas that have been identified in the frameworks process as not requiring further action. These are quite significant areas, for example covering PPE, tobacco advertising and clinical trials. It is not as if the areas that were assessed before as not requiring further action are not affected too by the protocol, with the potential for dynamic alignment.

This relates to Professor Hunt's and Professor McEwen's point about the importance of the common frameworks being constantly reviewed and the flexibility that is present in them. Northern Ireland civil servants have an awfully large task on their plate in being involved in the development of these frameworks that cover 40 areas of important regulation in Northern Ireland. Bear in mind that a lot of that will be affected by negotiations at the UK-EU level, not least relating to the protocol and its implementation.

Baroness Ritchie of Downpatrick: In your opinion, Professor Hayward, are Ministers, particularly in the Office of the First Minister and deputy First Minister, charged with the import of the Northern Ireland protocol and the common frameworks? Has enough work been done on them?

Professor Katy Hayward: The Northern Ireland Executive have approved the principles of the common frameworks, but bear in mind that we are behind the curve somewhat. We have a double-whammy of

not having had an Executive during the early years of the development of the common frameworks, although civil servants were attending, and the existence of the protocol, which means we are very directly affected by the UK-EU relationship, the decisions of the joint committee and the ongoing implementation of the protocol.

We have all of that going on. Plus we have some lack of clarity still about the areas of competence that are affected by the protocol. In some ways, they are clearly reserved, and I should have mentioned that. Areas that are identified as being reserved competence under the common frameworks process, such as state aid, are now covered by the protocol as well. We still have a lack of clarity about who is responsible for implementing different parts of the withdrawal agreement and the protocol. That then has a knock-on effect for the common frameworks process itself.

Professor Nicola McEwen: I just wanted to return to the founding principles of the common frameworks. The specific needs and circumstances of Northern Ireland are incorporated into the frameworks programme, but the principle of divergence is also perceived, certainly by the Scottish and Welsh Governments, as a very important part of the frameworks approach. I just wanted to reinforce that common frameworks do not mean uniform frameworks.

There is a deliberate intention, certainly on the part of the devolved Governments but, given that it is a joint programme, recognised by all, that they should allow for sufficient flexibility and elasticity to enable and facilitate divergence within them. That is required in the case of Northern Ireland, because of the conditions of the protocol, but the Scottish Government, through political choice, are currently going through a legislative process of their own to institutionalise a provision to enable them to keep pace with EU law where they choose to do so. There is an expectation that the frameworks would be sufficiently broad to allow for that kind of divergence. I just wanted to reinforce that point.

The Chair: That is very useful, because our next group of questions touch on divergence in different ways.

Q19 **Baroness Randerson:** I must declare an interest. I am very proud to say that I am Chancellor of Cardiff University, where, of course, Jo Hunt works. I have been listening with great care to what is being said about the potential for gaps in common frameworks. They are not a whole solution, and there might well be a need for an internal market Bill, but just not expressed as it is here. I would be very grateful if our witnesses could please address what potential gaps there are. Could they say more about the aspects of maintaining an internal market that the common frameworks will not address?

Professor Jo Hunt: We recognise that the common frameworks are, as we said, a means of managing policy divergence. If we take them as that, we recognise that we will have a situation where regulations may be different across different parts of the UK. If we allow that to operate, that

means that we might have hindrances to free movement, using the EU terminology, since we have different regulatory regimes. In an EU context, if space for that has been allowed in the legislation, that space for divergence is there. We have to accept that, if we allow this divergence and understand that it is part and parcel of devolution, those differences may exist and we are not to expect uniformity, so there is that to bear in mind with this process.

The limitations of the common frameworks, as has been mentioned, are in areas where there is existing retained EU law. If new areas emerge, because some of that harmonising law is only partially harmonising, there will be areas within that that are not fully harmonised. Even with nutritional labelling, there are specific elements that are not fully covered under EU legislation. Article 34 on free movement still needs to operate over the top of that within an EU context. We do not yet know whether and where those gaps are going to emerge, and whether they are going to be a concern and have an impact on the market.

At some point, we need to understand a bit better how the internal market Bill works alongside what we have in the common frameworks. We went into this process perhaps expecting that, where there was an agreement to diverge, that would then be respected across the UK, and the consequences that came from that for trade within the UK were accepted. One part of the UK would not have to accept products from another part of the UK, if there had been agreement to diverge under the current frameworks.

It looks like the internal market Bill cuts across any agreed divergence. Differences on nutritional compositional standards or on labelling might be accepted and agreed under the frameworks, but those rules will apply only to producers within the local market, and the market access principles may still apply to achieve the internal market objectives. We are not yet clear on that. It is suggested that that is how this is potentially going to work, and that is very concerning from the common framework perspective.

Q20 Lord Garnier: I have learned from the conversation we have been having this morning that the United Kingdom Internal Market Bill is probably designed to answer a political question, not a legal or a constitutional question. What that question is, I do not know, but the instruments we are looking at are divergent. The common framework system and the internal market Bill seem to be pulling in different directions. I suppose that is a function of our constitutional history and we just have to get used to that. As academics, I guess you are looking for something closer to precision and exactitude, whereas politicians tend to fudge things and are untidy and messy. Here we have this in spades. We have the most wonderful constitutional mess-up and there does not seem to be a legal instrument to help us.

Do you agree with me that the Bill and the common framework system are pulling in different directions and, therefore, the Bill limits the ability of the framework system to promote or facilitate sensible divergence? We

have the obvious case of Northern Ireland straddling the United Kingdom and the European Union. How do we solve this constitutionally or legally? Forget the politics, because you are not politicians. How do we design instruments to cope with this? Can you think of any specific examples where this problem is highlighted in a particularly stark form?

Professor Nicola McEwen: I agree with Lord Garnier that these are pulling in very different directions, absolutely, without question. It probably speaks to a bigger issue, which is the recognition and acknowledgement that devolution changed not just Scotland, Wales and Northern Ireland; devolution changed the United Kingdom. The frameworks programme, and indeed what we have seen with Covid, had begun to move us to a way of working that recognises the distinctive roles of each of the Administrations within their areas of competence.

It talks to one of the weaknesses that have been a hallmark of the system of devolution in the UK from the outset: the weakness of the intergovernmental infrastructure and the processes for facilitating co-ordination, co-operation and, where appropriate, co-decision between the different institutions. That has really been a major problem for the UK and it is made more apparent by the challenges of Brexit and, in the current context, by the challenges of the pandemic. It does really matter that that is addressed.

The frameworks programme was a way to do that and, in addition to the specific details and content of the individual frameworks, it was part of a broader process that suggested a different way of working and a different practice, which is not necessarily constitutional—you might have constitutional underpinning for intergovernmental relations in the future, but we do not have that at the moment—but it suggests a different working culture.

In other countries that have federal systems, or multilevel systems of a non-federal kind, you tend to see a recognition that you need to work at it on an ongoing basis. You need to have the institutionalised relationships between the equally legitimate Governments from the different constituent parts. The internal market Bill seems to want to counteract the effect of devolution. It does not necessarily limit the ability, at least not directly, of the devolved institutions to pass laws as they see fit, but it limits the ability of those laws to make a difference, because it limits their reach and scope. They are no longer laws that they can apply throughout the territory; they are only laws, in this case, in the areas that are covered by the Bill that would apply to local producers or service providers. It is a very different approach between the two and, yes, they are pulling in very different directions.

The Chair: That is a very clear explanation of the differences in how we see devolved power working.

Q21 **Lord Hope of Craighead:** You made it clear at the very beginning how uneasy you all are about the Bill, but the fact is that we have the Bill. It has been passed through the Commons and has received its Second

Reading in the House of Lords. My concern has been to see how we can amend it to try to make the two systems work side by side. I was particularly interested in Jo's point that the Bill cuts across any agreed divergence. That is precisely the point that I picked up in an amendment, which will be debated and probably voted on tomorrow. It says that the market access principles "shall not apply to any statutory provision or requirement that gives effect to a decision to diverge from harmonised rules that has been agreed through the common frameworks process".

That touches on Jo's point. Will that help the common frameworks process to continue as we would all like it to do? Could you give examples of divergence, so that I can have in mind the kinds of things where this provision would be really useful?

Professor Jo Hunt: There is the necessity to take the common frameworks process out of scope of the internal market Bill. Just to go back, of those common frameworks that we have seen in some sort of incipient state, such as the one on food and feed safety, there was a report to the FSA that clearly suggests that the outcomes of the process are going to be within scope. The document said, "It should be noted that the application of mutual recognition could result in Ministers having to accept food and feed products on the market within their remit that the FSA had advised as being unsafe if Ministers in other parts of the UK had taken different decisions".

It recognises that, even if there is an achieved outcome, unless that is coming together and creating a common outcome, the Bill will cut in. We need to make sure that the outcomes of that process are protected to make it worth while to engage in this process. Stepping back, perhaps we need to protect more than the outcomes and give that space for the process more generally, and the opportunity to work through those processes. If they are identified as common framework areas, they should be held back from action in those fields.

Looking to the future, there may be a case to bring things prospectively within the common frameworks process and to protect them. At some point, there is a decision to be made about whether the common frameworks process is limited to how we deal with retained EU law or whether it is more forward looking and dynamic. In the latter case, we need to decide when the provisions of the Bill kick in and what else has the opportunity to happen first, whether intergovernmental or inter-parliamentary, before the operation of the Bill.

Professor Nicola McEwen: I read the amendment and would absolutely support it. The only concern I have, which is not specific to the amendment but is about the broader unrolling of the frameworks programme, is whether it is seen as a finite exercise linked specifically to what started as a very long list of EU regulations. The conclusion of the frameworks programme has been that most of them do not require any common framework at all and 22 are deemed to be suitable for a non-legislative framework. I am not sure if the amendment would apply to those as well. Then you have the specific ones that are targeted for some

sort of legislative underpinning, which does not appear, for the most part, to be about primary legislation. None the less, those would be within scope.

We are trying to encourage a longer-term process that captures the way of working of the frameworks programme, beyond the exercise of that particular list. The frameworks that are agreed will, in any case, be living, breathing frameworks. They have to be. They are as much about progress as they are about the content of anything that is agreed, but they will have to be responsive to other developments, to experiences and to things that unfold.

If that could be protected in the legislation, it would also be a positive. As Jo said, if there is space for other issues that may arise and that we have not yet foreseen, which can be brought within the scope of a broader frameworks programme, beyond that initial exercise, that would be a way to protect frameworks within the content of the Bill itself.

The three of us were part of a co-authored report, which we would be happy to send to the Committee, that was specific to the Bill. In that report, we recommended a number of changes that could help to improve the Bill, including some form of pre-legislative negotiation and something that embeds the joint working that has been the positive of the frameworks programme in the process of maintaining and supporting the UK internal market. That is what is missing from the Bill as it stands, but certainly the amendment is an improvement, for sure.

Professor Katy Hayward: We are struggling with the fact that common frameworks are quite an innovative process. When we think about what they look like, they will be different, depending on the departments involved and the particular subject. I am conscious that this is the difficulty that you have in trying to legislate to address and accommodate this in the internal market Bill.

As we have often repeated, the internal market Bill claims that it is trying to give certainty and to avoid nuance in many ways. It is a heavy-handed approach to a challenge, whereas the common frameworks are a much more nuanced and innovative approach. Therefore, trying to bring them together is extremely difficult. If we have a legislative outcome, it is still about the process by which you have continual negotiation between the four. Even where Northern Ireland is following EU rules, you still need to have that relationship formalised.

Q22 Lord Murphy of Torfaen: You touched a little, over the last half hour or so, on the relationship between the common frameworks generally, which in many ways are highly technical, and the devolution settlement. I would like to be specific, though, in the sense of how they affect the spirit of the devolution settlement. Lord Caine, for example, mentioned the Good Friday Agreement and the common frameworks. It is not just the letter of the law but the spirit, in this case, of the Good Friday Agreement and of the devolution settlement.

To illustrate that, in terms of redistributing what would have been European structural funding to Wales to build a relief road around Newport and the M4—it is highly controversial; I personally support it—if the UK Government decided to do that, using money that generally would have gone to the devolved Administration, that would go against the spirit of the devolution settlement. Despite my personal view that the relief road should be built, I believe it is important that the Welsh Government, because they are devolved, take the decision on that.

Regarding the process, at the moment the devolved Governments relate to the specific Secretary of State and department. Is there a role for the territorial Secretaries of State and their departments in trying to ease the problems and tensions that will inevitably emerge from implementing this policy?

Professor Jo Hunt: Picking up on the first of those points about the impact that the common frameworks have on the devolution settlements, particularly the distribution and exercise of competence, they do not recentralise any of that competence. They give a space for the exercise of those competences, recognising the shared interests of the UK as a whole to have a system where they can be exercised collaboratively and co-operatively.

To pick up Lord Murphy's idea about the spirit and the technical impact on legislation, the common frameworks do not touch competence, whereas the internal market Bill does. It explicitly takes some things into reserved competence, or it has the potential to cut across the effectiveness of how competence operates. As you say, it is very much in keeping with a spirit of respect for the devolution settlements and for the devolved legislatures and Governments. The internal market Bill starts from a different place.

Professor Nicola McEwen: I agree. If you go back to the founding principles of the frameworks, they explicitly respect the spirit of the devolution settlements; the UK internal market Bill does not.

I will pick up on the question of the role of the territorial offices. We are some way away from those offices being able to play a mediating role. If, as I have seen suggested, the successor to structural funds is managed through the territorial offices instead of through the devolved Governments, as was the case before, and I do not know if that will be the case, it would be seen as quite a provocative move.

The territorial offices tend to be in the role of representing the UK Government in the devolved territories rather than facilitating communication between the devolved institutions and the UK Government. I am not saying that there is anything wrong with that; it is a perfectly reasonable role, but it has to be seen in that context with proposals about the use of financial powers.

It is not entirely clear how the financial powers aspect of the UK internal market Bill will interact with the system of territorial finance that we have, but it seems at least to be possibly a way to get around some of

the decisions that have been taken by the devolved institutions. In the example that you gave about the M4 relief road, that would appear to be the case.

However, it will come upon limits because other aspects of the devolution settlement would come into play in spending decisions about some big infrastructure project of that kind. Planning or other areas of environmental control that are within the devolution settlements would have to be part of any big infrastructure decision. It pushes us towards the need to have more effective systems and processes that facilitate Governments working together, rather than trying to find routes to bypass the need to do so.

Q23 Lord Foulkes of Cumnock: Can I thank the witnesses for explaining so well the difficulties and complications of the unbalanced devolution system that we have at the moment? Picking up on what Lord Garnier said, would they agree that a major part of this is because the UK Government have to speak for England and for the United Kingdom? That creates some conflict. I hope—there is a move in this direction—that we will see the completion of our devolution settlement and some form of devolution in England. In the meantime, how might it be possible, through the review of the intergovernmental relations structures, to cope with this difficulty that the UK Government have? It would be helpful if you could spell out exactly how that might work.

The Chair: Could I ask Nicola to have a go at that, as there is a slightly more complex relationship with Northern Ireland?

Professor Nicola McEwen: We fed in some proposals to the review along these lines. Even if you had devolution in England, there is no way to get around some of the asymmetries involved when one of the nations of the UK is so much larger and more influential economically than the others. That would be a feature of the UK anyway, regardless.

I am also slightly wary of a policy approach that would push devolution for England because of the effects that its absence has for Scotland, Wales and Northern Ireland. There is a need to explore more deeply precisely how the people of England would like to be governed. That has to be at the fore of addressing that particular question.

In relation to intergovernmental relations, it has been very interesting listening to the frustrations of Andy Burnham, for example, in relation to Covid, which are so very familiar to anyone who has observed intergovernmental relations between the devolved institutions and the UK Government. It speaks to the need to consult, communicate and bring people into the conversations early enough, so that they feel there is an opportunity to genuinely be part of the decision-making process and influence the policies at the development stage, rather than having to constantly react at the last minute.

I do not know what the intergovernmental relations review will do in this area, if, indeed, we see an outcome of it at all. There are a number of

different things that you might do, including setting up a different forum to enable English regional voices to feed into the process, which would then be represented in the joint ministerial committee or whatever replaces it. It could be that you have a Minister for England within the UK Government. There are various options, none of which will be perfect but all of which would be better than what we currently have.

Professor Katy Hayward: It is a pity that we have not seen the results of that review. I noticed yesterday the policy statements released by BEIS on the internal market. Some of us have been led to believe that the office for the internal market would be quite a substantial and significant body with input from the devolved regions and nations. Yet we see, in that policy statement, that it would just involve an annual ministerial consultation, which seems such a contrast with the approach taken by common frameworks and what the relationship should ideally be between the Governments. We are expecting this review at the end of year and it is a pity that we have not seen it before now.

Lord Foulkes of Cumnock: I wonder if our witnesses had any indication, when they gave evidence to the Constitution Committee, of Lord Dunlop's thinking and whether that will feed into or influence the review in any positive way.

Professor Nicola McEwen: Lord Dunlop's review, as I understand it, was specifically a review for the Prime Minister. It was not reported directly to the joint review, as far as I am aware. The two are quite distinctive. The review is another one of those examples of co-operative working. Given that we have not seen anything come out of it, we cannot say whether it is successful, but it is a co-owned process, just like the frameworks programme has been a co-owned process. Lord Dunlop's review was completed a long time ago and we have not seen the outcomes of it yet, so I am not sure.

Q24 **Baroness Redfern:** Good morning and thank you for coming and speaking with us. I have found your responses very interesting. I do take note of your comments, Nicola, regarding process, joint working and how it should look to introduce a more collaborative culture, possibly. Katy highlighted that a successful common frameworks process should not be rushed. Jo commented on respectful processes building a dynamic forward future. That leads me to my question. How do you see the role of Parliament and the devolved legislatures in scrutinising the common frameworks?

Professor Katy Hayward: We are a little behind in Northern Ireland. At the moment, we do not have a process of Standing Orders, as they do in Scotland and in Wales, for scrutinising secondary legislation that arises from the EU withdrawal Acts 2018 and 2020. That is worth noting. What we have for Northern Ireland with regard to scrutinising the common frameworks seems to be a process of learning by doing. It is yet to happen, but there is a sense that the committees in the Northern Ireland Assembly will give feedback on the process, which is not a bad thing, but, to go back to an earlier point, it requires clarity on the timetable for it.

More broadly, the relationship between the Northern Ireland Assembly and the process in the Houses of Parliament is also a live issue.

The Chair: Thanks for that. It is important for us to know.

Professor Jo Hunt: As we have identified already, the common frameworks themselves are a process, not an outcome, so it is in terms of having that continual engagement with that process. As has been identified, a lot of this will be through secondary legislation, even the category 3 areas that require legislative underpinning. I was just looking at what we have seen so far from the summaries. For example, the emissions trading scheme is identified as a category 3 area, so we might expect to see some primary legislation.

The indication we have had so far is that that is what we will see, so there is at least the opportunity for parliamentary scrutiny of a different order. It says that the ETS will be adopted using secondary legislation under existing legislation such as the Climate Change Act and the Finance Act, so it is taking powers in there rather than new primary legislation. We need, at each point, to reset our understanding of what these things are, what they are going to look like, and the points at which Parliament can engage. We need to keep on our toes with that.

Professor Nicola McEwen: I agree with all that. We have been talking a lot about the need for more co-operation and co-decision, and treating that as a positive thing. It has a downside, which is that it muddies the waters somewhat about who is taking decisions over what. Parliamentary scrutiny is crucial to ensure that individual Governments are held to account for their decisions and their actions in making or breaking common frameworks and the other aspects of intergovernmental relations that may accompany this process.

That is a challenge for all the committees on an ongoing basis and it cannot be dealt with purely by a single committee that has oversight of the whole thing. There may well be a place for that, but also for the individual subject area committees to be mindful of the role of frameworks within their particular policy field. It is definitely a challenge.

Q25 **Baroness Crawley:** It has been an absolutely fascinating session. Thank you to our guests this morning. Moving a little further with this whole idea of the process being as important in common frameworks as the technical outcome, how do you see parliamentary scrutiny of frameworks in the future, once they have been agreed? To what extent should this be underpinned by greater interparliamentary co-operation?

You talked, in answer to Liz's question, about ideas you have for future interparliamentary co-operation, but perhaps we can go into, for instance, the recommendations you have made in your research paper, which all three of you have contributed to. You say that, from the start of devolution, the UK's approach has been underdeveloped and fragile, and that new institutions and practices are urgently needed. It was Nicola who raised that point again a few minutes ago about new practices. Is

this a cue for common frameworks, as they exist in front of us today, to come centre stage, or do common frameworks have to evolve into something else for that to work?

Professor Nicola McEwen: It is an issue that goes beyond the specific common frameworks. There is a role for subject area specialists and specialist committees to examine individual frameworks within their spheres, but they are often very technical and very detailed. I wonder whether committees would enthusiastically engage with each individual framework on that basis. It is part of a broader approach. It is about having oversight of the kinds of things that are discussed and agreed in an intergovernmental sphere.

I noted last week that the UK Government made a commitment about increasing transparency in intergovernmental relations following on from commitments that have already been made by the Scottish and Welsh Governments. That is a little improvement in that they are now at least publishing and making it easier for us to see the reports from various intergovernmental meetings. The content of those reports is still extraordinarily limited. It is very difficult to get a real sense of what has been agreed by whom and where the obstacles, barriers and difficulties are, because so much of that is still behind closed doors. It is about oversight of a process at least as much as it is about oversight of the detail of individual frameworks, if that makes sense.

Professor Jo Hunt: From a governance perspective, we have identified how the common frameworks can be seen in a positive light, while layering into that the need for effective parliamentary engagement. If we take one individual common framework, which is technical and limited, it may not seem to have much of a consequence for devolved competence and the involvement of the Parliaments in that. Suddenly, if we stand back, we see the number of them and what might be happening in what are seen as quite technical areas. There might be significant policy evolution taking place in those, but we do not yet know the sorts of things we are going to be seeing under them.

We need to ensure proper parliamentary engagement in the oversight of that process, because we could end up with a lot of what falls within devolved competence operating and taking place within these common frameworks, with a very limited role for the devolved legislatures to engage in that.

Q26 Lord Thomas of Cwmgiedd: May I declare a relevant interest? I serve on the Welsh First Minister's advisory committee on the EU, on which Professor Jo Hunt also assists. It is relevant in the sense that I am very grateful to her for, more than a year and a half ago, raising the problems of these common frameworks and the need to deal with them urgently. Regretfully, this was not a matter that the Government in England and of the UK were prepared to move on or discuss.

This question is a narrow one. It relates to the relationship between common frameworks and international agreements. How do you see

them working and what problems do you envisage?

Professor Nicola McEwen: There ought to be a symbiotic relationship between the two. Frameworks are there because of a new relationship between the UK and the EU, and they will be affected by whatever is agreed in trade negotiations. If we see frameworks governance as an ongoing process, which is implied in the framework documents that we have seen, that could be a way for the devolved Governments to feed into trade negotiations. I note that, in the Counsel-General's evidence to you last week, he suggested that the negotiations on trade were more positive and fruitful than had been the case with the internal market.

There is definitely a need to have a dynamic relationship between the two, because whatever is agreed in frameworks will potentially be affected by whatever is agreed in trade. Trade is a reserved competence, but it is one of several areas that highlight the intersection between a reserved matter and devolved matters. It highlights again the need to institutionalise co-ordination and systems of shared rule, in academic terms, to build co-operation into the system.

Professor Jo Hunt: If we go back to the founding principles of the common frameworks and the reasons for having them, the ability to undertake international trade and create international trade agreements is part of the context for these frameworks. It is not just the internal market; there are close connections between those things. A range of reasons is given, including common shared resources and how we cope with that. That is made explicit. It puts in place an understanding that that will be undertaken collaboratively and co-operatively.

The internal market Bill is a different way of getting us to the position of being able to enter into international trade deals without having to be concerned about policy divergence because it can be overtaken by what is in the Bill, rather than going through the common frameworks and reaching a position of having negotiations and collaborative engagement on these matters.

Professor Katy Hayward: Very specifically, Northern Ireland is in a very distinct position vis-à-vis all this, applying the Union customs code and yet being in the UK customs territory. This relates to international agreements, for example the common framework that is meant to be non-legislative and that relates only to Northern Ireland on specified quantities and packaged goods. This is potentially affected by international trade agreements, for example the FTA with Japan, in that the UK could allow certain quantities of certain products in, which would not be allowed into the EU. I hope that, in a common frameworks process, we could deal with this, but it just highlights the intersection of intra-UK and UK-EU, the complexity of all this, and just how dynamic a process it is.

The Chair: Thank you very much indeed, each of you, for your time, your expertise and your thoughtfulness generally. You have taken us into very deep and detailed aspects, as Katy just put it, of the particular

dynamic we are dealing with in terms of process and policy, international, domestic and cross-border. You have just reminded us that it is, indeed, a very complex process and one that needs the most rigorous parliamentary scrutiny that we can offer. We are all learning as we go along, in every respect.

Thank you very much indeed. We look forward to reading the text and to following up with you, if we need to. It was very good to meet you, and thank you again.