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Submission to the Scottish Affairs Committee, UK Parliament inquiry into 'Intergovernmental relations: 25 years since the Scotland Act 1998'

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### **Context**

This submission on intergovernmental relations (IGR) with respect to Scotland draws on our existing research on IGR that focuses on the IGR dimensions as it impacts upon Scotland's engagement with the EU spanning the pre-1999 administrative devolution arrangements to the latest arrangements for UK-EU governance post-Brexit.<sup>1</sup> This research has been conducted examining Scotland and Wales and we therefore draw attention to some of the contrasts or information from the Wales case also applicable to Scotland where relevant. Our current research is investigating intergovernmental structures associated with coordinating the UK's relationship with the EU post-Brexit and we draw on some of the emerging findings of that work for responding to questions on the current operation of IGR.<sup>2</sup>

### **1.0 How did the 1998 Scotland Act and subsequent intergovernmental bodies envisage the operational relationship between the UK Government and the Scottish Executive?**

1.1 Regarding the EU, though foreign relations were reserved to the UK, the legislative powers devolved to Scotland in the Scotland Act 1998 included policy areas associated with the European Union including agriculture, fisheries and the environment.

1.2. The practical arrangements for IGR and involvement on EU issues between the UK Government and the Scottish Executive were outlined in a Memorandum of Understanding (MOU) that included a 'Concordat on Co-ordination of European Policy Issues'. This acknowledged a legitimate role for devolved administrations in developing the UK's negotiating positions particularly given the overlap between devolved and EU areas of competence.

1.3. The concordat outlined processes of sharing information and committed to involve devolved government ministers as 'directly and as fully as possible' on EU matters affecting devolved issues. The documents established UK-wide IGR arrangements; including the Joint Ministerial Committee (Europe) (JMC(E)), with provisions for devolved ministers to form part of UK EU Council of Ministers delegations (contingent on adherence to a single UK position); involving devolved government officials in UK-EU relations; including extending diplomatic status to Brussels officials; and establishing representative offices in Brussels with the expectation of close working with the UK's Permanent Representation.

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<sup>1</sup> Minto, R., Rowe, C., Royles E. 'Sub-states in transition: changing patterns of EU paradiplomacy in Scotland and Wales, 1992–2021', *Territory, Politics, Governance* (2023) <https://doi.org/10.1080/21622671.2023.2203176>.

<sup>2</sup> Current research in this area, 'Assessing the UK's new intergovernmental relations architecture post-Brexit' Carolyn Rowe, Rachel Minto and Elin Royles, supported by the James Madison Trust.

1.4 In essence, these soft governance tools provided a framework of expectations of conduct on both sides. However, they did not establish legally enforceable arrangements as in other decentralised and multinational states where IGR are more formalised, including in constitutional documents.

## **2.0 How effectively have processes for managing intergovernmental relations evolved to respond to various political developments since 1999?**

2.1 In general, since 1999, processes for managing IGR have found responding to various political developments challenging. The quality of relations has tended to vary between different policy areas, often influenced by UK ministerial and civil servants' awareness of and attitudes towards devolution. They have at times ultimately depended on official-level relations between different levels of government to ensure the functioning of IGR, particularly when party political tensions have been more intense. For Scotland, the initially relatively smooth operation of IGR in relation to coordination on EU matters occurred due to the continuity of the civil service arrangements from 1999 and party congruence arising from Labour Party leadership of governments in London and in Edinburgh. We respond to this question with reference to the two political developments, the context of the 2014 independence referendum and the UK's exit from the EU.

### **2.2 The 2014 independence referendum**

Weaknesses in the IGR machinery became particularly evident in the context of the 2014 independence referendum, and in many respects from 2007 when the SNP came into government. Whilst the SNP Government post-2007 agreed to operate within the existing UK structures for formulating EU policy and accepted the need to work within the confines of the current constitutional framework, this was also accompanied by expressing a desire for Scotland's independent role on the world stage, and a higher status in certain UK-EU policy negotiations. In this context, due to interpersonal and inter-ministerial distrust, Scottish representatives were often not invited to significant UK Cabinet Office discussions in London on EU issues. In practice, given the lack of formal, legally challengeable rules on IGR, ministerial level access to UK-wide policy discussions or relevant EU meetings was largely on an ad hoc, individual basis. The revised 2013 Memorandum of Understanding provided devolved Ministers with a right of attendance in UK European Council delegations as a partial remedy.

2.3 Our research also revealed that in the run up to the 2014 Scottish independence referendum, there was a temporary information blockage from UKREP to the devolved government offices in Brussels. More regularised weekly meetings were established in this period between UKREP officials and the devolved governments' Brussels office officials to try to develop closer relationships, to potentially manage relationships and ensure exchange of information during a period of more tense relations between the two governments.

2.4 The extent of hostility in Scottish and UK governmental relations in this period was not reflected in Wales - UK Government relations with respect to the EU, which included a period of Labour remaining in power in Wales and in Westminster until 2010 and then different political parties in power post-2010, though the situation has been more complex post-Brexit. This suggests that the intergovernmental arrangements have found it challenging to manage the implications of different political parties in government in circumstances of party incongruence. The complexity of relations between governments in Scotland and in Westminster have been further compounded by the ideological tensions arising from having a nationalist party in government in Scotland.

### **2.5 The UK's exit from the EU**

The UK's exit from the EU had a significant impact on the organisation of IGR and there is extensive coverage of the breakdown of domestic IGR regarding the European Union in this period. The Scottish Government disagreed with the UK Government's interpretation of Brexit and the JMC (EU Negotiations) established as a forum to secure an all-UK approach to the Article 50 withdrawal negotiations failed to deliver. One of our interviewees, a senior official within the Scottish Government at the time, described the negotiation process as one where 'it was felt in Scotland that there was no meaningful conversation or exchange of positions between the UK Government and Scotland.'<sup>3</sup>

2.6 Turning to the framework established by the main agreements in the context of the UK-EU withdrawal which can be considered as part of IGR post-Brexit, the UK's withdrawal from the EU has had a fundamental impact on the devolved governments' ability to influence the UK Government's position in relation to the EU. The EU Withdrawal Agreement and the Trade and Cooperation Agreement (TCA), the two main agreements establishing UK-EU relations, are associated with devolved matters in a whole host of policy areas. In practice, they have implications for every Scottish Government department. For instance, these departments are responsible for the implementation of and compliance with significant parts of the TCA in devolved areas and the arrangements clearly influence policy-making and regulatory frameworks in Scotland.

2.7 With regards to Scottish Government and Welsh Government representation, there is no representation on the 8 UK-EU forums established with respect to the Withdrawal Agreement nor are the Scottish or Welsh Governments invited to attend the Withdrawal Agreement Joint Committee (WAJC). With regards to the Trade and Cooperation Agreement arrangements, the Scottish Government's role on the UK-EU Partnership Council (PC), the main TCA oversight body, is limited to observer status for devolved government ministers.

2.8 Their degree of representation seems to have been directly impacted by the approach to devolved government involvement in these TCA arrangements outlined in a letter by Lord Frost in May 2021. It stated 'where items of devolved competence are on the agenda for the Partnership Council or the Specialised Committees, we expect to facilitate attendance by Devolved Administrations [sic] at the appropriate level... However, final discretion in any specific instance as regards attendance would be held by the UK co-chair of the body concerned, depending on the nature of the discussion.'<sup>4</sup> This is more limited than the approach to the involvement of devolved governments outlined in the Memorandum of Understanding and Concordat as detailed under 1.2 and 1.3.

2.9 Whereas ministerial engagement with these fora has been more limited than the pre-Brexit arrangements, some evidence suggests that Scottish Government official level involvement within these arrangements is working relatively well. For instance, it was reported in May 2022 that 'Scottish Government representatives have been present at all specialised committee meetings that have taken place so far with the exception of meetings of the Committees on Intellectual Property and on Public Procurement. The involvement of the Scottish Government appears to have happened irrespective of whether the remit of the specialised committee overlapped with devolved competence.'<sup>5</sup>

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<sup>3</sup> Minto, Rowe, Royles (2023: 13)

<sup>4</sup> Lord Frost, 'Letter from Lord Frost on engagement regarding EU matters' (UK Government, Cabinet Office, 2021).

<sup>5</sup> Scottish Parliament (2022) 'Constitution, Europe, External Affairs and Culture Committee, 14th meeting 2022, Session 6, 26 May 2022, Implementation of the Trade and Co-Operation Agreement' available at: <https://www.parliament.scot/~media/committ/3432>,

### **3.0 How effectively has the new intergovernmental relations framework operated since January 2022?**

3.1 The Review of Intergovernmental Relations (2022) establishes five principles to guide relations between the UK and devolved governments. Our emerging findings suggest that the framework is considered to be qualitatively better than that which preceded it. It provides for more structured arrangements, particularly as a dispute resolution mechanism is now in place.

3.2 However, in practice, it is difficult to be conclusive regarding the effectiveness of the arrangements as they have not had sufficient time to bed in. This is partly as a result of slow progress in implementing these structures. There are three key emerging points regarding the operation of the new framework. First, the quality of IGR still seems to vary considerably, leading to some areas working relatively better and not working as effectively in other areas. Secondly, our emerging findings suggest that the UK Government's main approach to the current IGR framework is often to consider it as a vehicle to share information and inform devolved governments of decisions already taken. There are some suggestions that the structures in some cases operate as a space for dialogue and to feed in devolved government perspectives on issues. However, to date, they are generally less likely to be considered as providing an opportunity for meaningful interaction. Third, positive official working relationships continue to be very important.

3.3 Turning to the focus of our research on UK IGR in relation to the UK-EU relationship, the main intergovernmental forum is the UK-EU Inter-Ministerial Group meetings. This forum has the potential to provide devolved governments with an input into the UK position, for instance preparing the UK position prior to EU-UK meetings, such as the Withdrawal Agreement Joint Committee (WAJC) and UK-EU Partnership Council (PC) meetings. In practice, the arrangements do not seem to have been working effectively to date, though there have been some recent improvements.

3.4 In terms of the organisation of these meetings, there were examples of the UK-EU Inter-Ministerial Group (IMG) being postponed, or meetings being held at very short notice, making it difficult for devolved government ministers to attend. The meetings were not always well planned in advance with little opportunity for the devolved governments to inform the agenda. When they were held, they were organised very close to key UK-EU meetings but with little opportunity to input into the UK's position in those discussions and were largely an information sharing exercise on the part of the UK Government

3.5 From our emerging findings, there are suggestions that the latest UK-EU IMG meeting (held on 11 September 2023) showed signs of improvement. There was effective communication regarding the practical details of the meeting beforehand and greater prior discussion of the agenda between the different governments. The more forward-looking content of the discussion focused on forthcoming UK-EU meetings provided greater opportunity for devolved governments to share their points for those discussions and for there to be a two-way dialogue prior to the UK-EU meetings and exploration of different positions.

### **4.0 To what extent has the new intergovernmental relations framework been fully implemented?**

4.1 In practice, it is difficult to answer this question given our particular focus on IGR regarding the UK's relationship with the EU.

## **5.0 To what extent has the new intergovernmental framework succeeded in developing an effective dispute resolution mechanism to resolve or mitigate conflict between the UK and Scottish governments?**

5.1 As outlined above, our emerging findings suggest that the new IGR framework is considered to be qualitatively better, particularly due to providing more structure to arrangements, including a dispute resolution mechanism which is seen as a particularly welcome improvement on the previous system. Based on the information publicly available, the extent to which the dispute resolution mechanism is effective has yet to be tested.

## **6.0 How far does the new intergovernmental relations framework provide sufficient transparency and opportunity for parliamentary scrutiny, and how does this compare to previous arrangements?**

6.1 Limited transparency has characterised IGR relations in the UK since 1999. The new IGR framework has led to the UK Government publishing quarterly and annual transparency reports and communiqués associated with a number of IMGs also available online. These developments are positive, are an improvement on previous arrangements and are in line with the UK Government commitment to greater transparency regarding IGR relations. They provide some basis therefore to support parliamentary scrutiny of the IGR framework.

6.2 However, there are two key limitations. First, there seems to be some inconsistency amongst the IMGs with regards to producing communiqués and when these are released. For instance, with regards to IGR in relation to UK-EU relations, the IMG on UK-EU Relations is not included as an IMG on the list available on the UK Government website. No communiqués are currently being issued from the UK Government on this IMG.<sup>6</sup> This limits parliamentary scrutiny of this forum.

6.3 A second point is that the UK Government website states that part of the purpose of reports on IGR is to 'ensure that they are working for all parts of the United Kingdom'<sup>7</sup> an evaluative task that requires a sufficient amount of information. The relevant issue emerging here from our research to date is that the communiqués and transparency reports are largely considered as a brief, descriptive account of issues discussed. They do not provide information in order to be able to assess the effectiveness of the structures and whether or not they are leading to meaningful deliberations across different governments within the UK, endeavours that would reflect the intention outlined on the UK Government website of ensuring that they work for all parts of the UK. Therefore, the suggestion is that the information made available limits the potential for parliamentary scrutiny of IGR relations.

*September 2023*

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<sup>6</sup> UK Government, 'Collection: Intergovernmental relations. Documents relating to engagement between the UK Government and the devolved administrations' (2023).

<sup>7</sup> UK Government (2022) 'Intergovernmental Relations Review Annual Report for 2022 'Details' section on web page' available at: <https://www.gov.uk/government/publications/intergovernmental-relations-review-annual-report-for-2022>.