

## **The Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee – Written Evidence (GOU0005)**

### **Cooperation via the new intergovernmental relations arrangements in place since January 2022**

1. The Committee notes that despite the largely consensual nature of intergovernmental working prior to EU-exit, concerns about the effectiveness of IGR structures within the context of an increased shared space and an increasingly complex devolution settlement were commonly recognised.
2. Until 2022, the formal structures underpinning intergovernmental relations were set out in the MoU between the UK Government and the devolved administrations. Those structures have been superseded by the review of intergovernmental relations which sets out new structures and ways of working.
3. The review was limited to intergovernmental mechanisms and ways of working and does not entirely replace the MoU which remains operational. The new structures and ways of working also include provision for the oversight of the Common Frameworks programme including consideration of individual frameworks where necessary.
4. The Committee notes the view of our Adviser, Professor Michael Keating, that there is now “a complex landscape of intergovernmental mechanisms, which has grown incrementally rather than following from a clear constitutional design.” This complex landscape includes—
  - new intergovernmental structures and ways of working which replaces those in the MoU;
  - other elements of the MoU which have not been reviewed such as the Concordat on International Relations;
  - Common Frameworks: Definitions and Principles;
  - individual Common Frameworks;
  - a number of consent/consult mechanisms related to the use of delegated powers by UK Ministers in devolved areas.
5. The Committee's view is that there is a lack of clarity and consistency with regards to how each of these mechanisms work together.
6. The Committee recommends the need for a new Memorandum of Understanding and supplementary agreements between the UK Government and the Devolved Governments. This should specifically address how devolution now works outside of the EU and based on a clear constitutional design including consideration of the principles of subsidiarity and

proportionality. This should be accompanied by new Devolution Guidance notes and other operational guidance notes.

### *Dispute resolution*

7. The Committee also notes that the formal dispute resolution process within the IGR structures does not appear to have been used despite a number of inter-governmental disagreements.

### *Common Frameworks*

8. The Committee notes that there appears to be a consensus among the UK Government and the Devolved Governments that Common Frameworks provide the right mechanism to manage regulatory divergence within the UK internal market. However, that there are also a number of issues which need to be addressed in relation to how frameworks have been operating to date—

- There is a lack of clarity around purpose with little evidence that frameworks are delivering common goals, maximum or minimum standards or harmonisation as initially intended;
- Rather, as highlighted by the Office for the Internal Market, the majority of activity has been routine intergovernmental working;
- At the same time there have been some significant examples of regulatory divergence which raise questions around the role of frameworks in discussing exclusions from the market access principles and how these discussions feed into the process for considering exclusions;
- The role of business and other stakeholders in the process and the role of parliament(s) in holding Ministers to account must be part of the wider framework process;
- The low level of awareness of frameworks among business and other stakeholders.

9. The Committee's view is that there needs to be much greater clarity around how regulatory divergence will be managed through the Common Frameworks programme. In particular, there needs to be clarity around how the market access principles are intended to work in those circumstances.

10. The Committee also notes that since the *Common Frameworks: Definition and Principles* were published in 2017 there has been a significant shift in the constitutional landscape including the introduction of UK Internal Market Act 2020 and Retained EU Law (Revocation and Reform) Act 2023. The Committee's view is that there is, therefore, a need to rearticulate the definition and principles of frameworks both in the light of experience to date and the new constitutional landscape.

11. The Committee recommends that a new MoU between the UK Government and the devolved governments should include a supplementary agreement on Common Frameworks including clarity around—

- the extent to which this approach is based on a new culture of shared governance involving joint policy making or co-design or whether it is largely about managing routine intergovernmental activity;
- the purpose of frameworks;
- the relationship between discussion of market access principle considerations in frameworks and the decisions made in the process for considering exclusions to the market access principles;
- the role of business and other stakeholders in the frameworks process and in the process for considering exclusions from the market access principles and the role of parliament(s) in holding Ministers to account;
- the relationship between the dispute resolutions process in individual frameworks and the formal dispute resolution process available to governments through the IGR structure, including how these are intended to work given this has yet to be tested;
- reporting mechanisms both in relation to the operation of frameworks and the process for considering exclusions to the market access principles.

### **Respect for the Sewel convention**

#### **Has respect for the Sewel convention eroded or strengthened in recent years? If so, what has been the cause of any such development?**

12. The Committee has noted that whereas the Sewel convention worked well prior to the decision to leave the EU, there has subsequently been considerable and continuing disagreement between the UK Government and the devolved governments and parliaments regarding its effectiveness. Our view is that the Sewel convention is “under strain” following the UK’s departure from the EU.

13. The Committee notes that there is clearly a fundamental difference of viewpoint between the UK Government and all the devolved governments with regards to how the Sewel Convention has been operating since EU-exit. It is also clear that this has led to a deterioration in relations between the UK Government and all the devolved Governments.

14. The Committee’s view is that this level of disagreement on a fundamental constitutional matter is not sustainable particularly within the context of an increasing shared space at an intergovernmental level.

15. The Committee has noted the view of UK Ministers that “it is sometimes necessary for the UK Government to act in its role as the government for the

whole of the UK” and that “it is necessary that the UK Government can fulfil the role of the UK's national government”. The Committee is unclear what “necessary” means within this context and notes that this is not stated within either the MoU or the Devolution Guidance notes. It is also unclear how “necessary” relates to “not normally” and what the threshold is for necessity in justifying overriding devolved consent.

**Is there any scope to strengthen the Sewel convention. If so, how? Is there a case for updating the Devolution Guidance Notes? If so, which sections require updating and how?**

16. Although the Scotland Act 2016 gave statutory recognition to the convention, this did not alter its status and it did not become judicially enforceable. There continues to be considerable debate as to whether it should be strengthened in law and subject to judicial review or whether it can be strengthened on a non-statutory basis or whether no strengthening is required.

17. The Committee has heard that the former would primarily involve removing the reference to the UK Parliament not “normally” legislating without consent from section 28(8) of the Scotland Act 1998 and making it a binding legal rule. The latter would primarily involve the reform of parliamentary procedures at Westminster requiring greater Ministerial accountability and more detailed scrutiny of decisions to proceed without the consent of the devolved legislatures.

18. As noted above, the Committee has recommended the need for a new Memorandum of Understanding and supplementary agreements between the UK Government and the Devolved Governments to address how devolution now works outside of the EU, and that this should be accompanied by new Devolution Guidance notes and other operational guidance notes.

**The Sewel convention does not apply to delegated legislation. Within this context, what are the implications of the UK Government: a) using delegated legislation in areas of devolved competence, with or without consultation or consent? b) using Henry VIII powers to alter acts of the devolved legislatures?**

19. The Committee has noted that there has been a significant step change in the approach to the use of delegated powers during the preparations for EU-exit and after EU-exit. Prior to EU-exit, the UK Government rarely used delegated powers in devolved areas other than in relation to complying with EU law. The Committee notes the following with regards to how the shared space worked in relation to the Scottish Parliament’s legislative function in complying with EU obligations—

- EU law is subject to its own legislative processes including a role for the European Parliament, stakeholders and the public as well as a pre-legislative role for Member States;
- EU law obligations and their consistent effect applied across the UK;
- Implementing EU law was a legal requirement and, as such, it was less of an issue from a scrutiny perspective whether the domestic legislation that did so was enacted in Westminster or the Scottish Parliament;
- The decision on whether Scottish Ministers or UK Ministers should make the legislation was a matter for the Scottish Ministers;
- As such, there was no legislative consent process (the Sewel Convention applies only to primary legislation, and implementation was overwhelmingly done by secondary legislation);
- The Scottish Parliament, therefore, had a minimal scrutiny function where a GB or UK approach was adopted;
- However, there was a level of transparency and Ministerial accountability through regular reporting to the relevant parliamentary committee and the intergovernmental process, accompanied by guidance for officials, was clear and published.

20. The Committee notes that managing the regulatory environment while the UK was a Member State of the EU included enacting a huge amount of secondary legislation on a regular basis, much of which related to minor technical matters. Some of this was enacted on a UK-wide basis and some at a devolved level. One of the key constitutional issues arising from EU exit is how the management of the new regulatory environment outside of the EU should work while respecting the devolution settlement.

21. The Committee notes that it was routine practice for the Scottish Ministers to ask the UK Government to implement EU obligations through GB or UK wide legislation and, therefore, in relation to this power, UK Ministers are correct in saying that it is long-standing practice for the UK Government to legislate in devolved areas using delegated powers. However, this was on the basis of the devolved governments asking UK Ministers to do so and within the limitations of implementing EU law obligations. Other than the use of the section 2(2) power, the Committee notes that it was rare for the UK to legislate in devolved areas using delegated powers before the EU exit process.

22. The Committee notes that one of the most striking aspects of how devolution is changing outside of the EU is the extent of primary legislation enacted at Westminster which includes delegated powers exercisable within devolved legislative competence by UK Ministers. While this mostly relates to policy areas previously within the competence of the EU there is also a significant number of powers for UK Ministers conferred in subject areas that were not formerly governed by the EU.

23. Our view is that the extent of UK Ministers' new delegated powers in devolved areas amounts to a significant constitutional change. We have considerable concerns that this has happened and is continuing to happen on an ad hoc and iterative basis without any overarching consideration of the impact on how devolution works.
24. Given that EU law is subject to its own legislative processes and there was limited room for policy divergence, there was less of an issue whether domestic legislation was enacted in the UK Parliament or the Scottish Parliament. In contrast, without the obligation to comply with EU law, there is much more policy choice for Ministers including the possibility of increased intra-UK regulatory divergence (notwithstanding the practical effects of common frameworks and the UKIMA) and the likelihood of increased divergence from EU law.
25. Now that policy is being determined at a domestic level rather than simply implementing policy that has been pre-determined and already scrutinised at the EU level, the scrutiny that the domestic legislation receives within the UK is much more important, and accordingly it is much more of an issue whether the policy (and the secondary legislation which gives effect to it) is scrutinised in the UK Parliament or the Scottish Parliament.
26. Where previously the Scottish Ministers could ask the UK Government to implement EU law obligations on a case-by-case basis the emphasis is now on the extent to which UK Ministers are required to seek the consent or consult with the Scottish Ministers when exercising delegated powers in devolved areas.
27. The Committee's adviser, Dr Chris McCorkindale considers 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."
28. The Committee's findings show that there has been no attempt to design an intergovernmental agreement which would govern the use of delegated powers to manage the post-EU regulatory environment. Instead, the constitutional landscape is now much more complex with delegated powers for UK Ministers in devolved areas in numerous UK Acts and not solely in policy areas previously within EU competence. There is no generic process or overarching agreement as to how the use of these powers should work. Rather, there is a myriad of statutory and non-statutory requirements for UK Ministers to seek consent or consult with devolved Ministers or to do neither.

29. In the absence of any overarching intergovernmental agreement, it is therefore unclear what guidance UK civil servants are working to in handling secondary legislation in devolved areas. It is equally unclear which guidance Scottish Government officials are working to in relation to Ministerial consent to the use of UK delegated powers in devolved areas including which issues to consider. This is in contrast to the clearly defined guidance for the transposition of EU law obligations.

30. The Committee therefore recommends that, similar to the proposed supplementary agreement on Common Frameworks, there should also be a supplementary agreement on the use of delegated powers by UK Ministers in devolved areas including—

- A list of the delegated powers available (updated as appropriate) and reasoning for the level of consent/consultation being applied to each;
- The criteria for their use;
- The process for engagement between UK and devolved officials;
- The process for engagement at Ministerial level;
- How this works within the context of the Review of Intergovernmental Relations;
- A recognition of the constitutional principle that devolved Ministers are accountable to their respective legislatures for the use of powers within devolved competence; and
- The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.

*3 April 2024*