

# **United Kingdom Constitution Monitoring Group – Written evidence (PBC0001)**

## **Introduction**

1. The United Kingdom Constitution Monitoring Group (UKCMG) comprises experts and practitioners covering a range of areas of the UK constitution. It was formed in mid-2020 in the light of recent controversy around arrangements for the governance of the UK. The principal purpose of the initiative is to assess developments – actual and proposed – in the UK constitution. Areas of interest include – but are not confined to – government accountability; arrangements for the upholding of the rule of law and individual rights; and the territorial governance of the UK. In evaluating proposals and initiatives, we consider the analysis in which they are grounded, and how far they are likely to deliver the objectives claimed for them. The UKCMG is impartial and has no party affiliation.
2. We do not in this submission attempt to address all the questions presented by the Committee – in particular, we do not feel able to comment on the issues around the Northern Ireland Protocol as they relate to the common frameworks programme – but we hope nevertheless that our observations will be of assistance to the Committee. We base our comments on the UK Internal Market Bill as it stood before the commencement of Report Stage in the House of Lords.

## **What would a successful common frameworks programme look like? How should common frameworks fit within the broader devolution settlement?**

### **How can common frameworks relate to the Internal Market Bill, in particular the Market Access Commitment?**

3. We take these questions together, as they go in many ways to the heart of the constitutional issues presented by the common frameworks programme and the Internal Markets Bill.
4. We think that, broadly speaking, the devolution settlement can be analysed from two competing perspectives. (In passing, we note with regret the UK Government’s continuing failure to fulfil the commitment it gave to the House of Commons Public Administration and Constitutional Affairs Committee, PACAC, in 2018 “to publish a statement on the Union in due course”; such a statement would surely assist in clarifying the Government’s views on this fundamental constitutional question). One – and this probably was the original thinking of the Blair Government when devolution was introduced – is that devolution is intended to provide special governance arrangements in the devolved territories, so that “national” policy can be flexed to meet local circumstances. One consequence of this perspective is that devolution is to be seen as having very limited significance for the conduct by central government of its business.

5. An alternative to this would be to view devolution, in addition to its “self-rule” aspects, as concerned not only with how the devolved territories are administered but with how the UK as a whole should be governed, with proper account being taken of the interests of all of its parts. From this standpoint, devolution establishes a joint collaborative project between England, Wales, Scotland and Northern Ireland, based on a recognition of mutual inter-dependence on particular matters of public policy, which requires a significant degree of shared governance.
6. We believe that the common frameworks programme reflects that second perspective. (To use the language frequently deployed in the context of Covid 19, it assumes a “Four Nations” approach to UK governance). The programme seems to us to depend on two unstated propositions:
  - I. Whereas the UK’s constitutional arrangements clearly envisage a hierarchy of Parliaments – the UK Parliament creates the devolved legislatures and defines the scope of their powers, while retaining its own continuing ability to legislate on any matter for the devolved territories – there is no equivalent formal hierarchy of governments within the UK. Within their territories the devolved governments (and the UK Government in respect of England) generally have exclusive responsibility for the exercise of their statutory functions. While, by virtue of size and disparity in scale of resources, one of the four administrations will usually de facto be in a leading role, its relations with the other administrations must proceed on the basis of mutual respect and parity of esteem, given those administrations’ responsibilities and accountabilities within their territories.
  - II. The exercise of any governmental responsibilities in any part of the United Kingdom may well have significant implications for the administrations and people in other parts of the UK; there is potentially a high degree of inter-dependence, which needs to be recognised in decision-making processes (frequently to be based on inter-administration negotiation), and in well-founded dispute-resolution mechanisms available for use as necessary. This applies particularly, but by no means exclusively, to the set of powers which will become available for exercise in an unconstrained manner following the United Kingdom’s withdrawal from the European Union.
7. On this basis, a successful common frameworks process would be one in which the four administrations, in exercise of their separate competences, jointly agree, through a process of mutually-respectful negotiation, rules for the regulation of various aspects of economic and social activity; maintain continuing joint oversight of the operation of those rules, agreeing to modify them as necessary in the light of experience; and have recourse as necessary to disputes-resolution machinery (perhaps on occasion with the benefit of third-party assistance) in which all interested parties can have confidence. If this is accepted, the Committee will note the relevance to its successful implementation of the long-running review of Inter-Governmental Relations (and perhaps of Lord Dunlop’s

Government-commissioned but unpublished examination of associated matters).

8. Notwithstanding UK Government Ministers' repeated public commitment to the common frameworks programme, the Internal Market Bill does not reflect the collaborative approach to the shared governance of the United Kingdom implicit in the programme. (It is notable that the Bill as drafted makes no mention at all of the existence of the programme, let alone attempts to integrate its provisions with it). Indeed, the Bill largely rejects even that narrower conception of devolution which allows for that flexing of "national" policy to meet local circumstances and which was, for its original proponents, devolution's particular merit and rationale. The possibility afforded by devolution of local variation is now seen as a potential threat rather than a strength, and therefore the devolved institutions' powers in this regard must be subject to control (or, in the case of the subsidy regime to replace state aid, removal). To achieve this, the UK Government's de facto leadership role is replaced in the Bill as drafted by one of directive authority, in which for example the Secretary of State will be empowered by the exercise of delegated legislative powers (without needing through negotiation to secure the prior consent of the devolved authorities) to amend key features of the internal market regime, and the public agency to be given responsibility for aspects of the policy is a creation of the UK Government, without scope for devolved administrations' involvement.
9. If this analysis is right, we think that it is not possible to answer the Committee's question "How can common frameworks relate to the Internal Market Bill" unless we first decide what we think is the constitutional purpose of devolution and what are the governance implications for the UK of that. If the original view of devolution, as (merely) permitting the flexing of "national" policy, is adopted, this implies a limited role for the devolved institutions in internal market matters, and a recognition that the common frameworks programme will necessarily be subordinated to the directive authority of the Westminster and Whitehall institutions, as manifested in the Bill. (It might then become an open question as to whether the programme could survive or serve any useful purpose). Conversely, if devolution is concerned in part with the collaborative shared governance of the United Kingdom, the Committee's question is perhaps put the wrong way around. The issue would not so much be "how can common frameworks relate to the Internal Market Bill?" as "how can the Internal Market Bill relate to common frameworks?". The solution would, we think, have to be one in which the Bill's Market Access provisions are amended so that they give way to regulation agreed in a common framework, or only operate in territory where no common frameworks are in being.

**What should the process be for reviewing common frameworks after their implementation? What role should there be for parliamentary scrutiny and to what extent should this be underpinned by greater cooperation between the UK and devolved legislatures?**

10. We suggested above that continuing joint oversight by the governments themselves of the operation of framework-inspired regulation would need to be an important feature of a successful common frameworks programme; on that basis, the process for reviewing common frameworks on an ongoing basis would fall to the governments themselves. But this of course should not preclude parliamentary scrutiny, both at Westminster and elsewhere.
11. The scrutiny of the operation and impact of particular agreed frameworks would seem naturally to fall within the remits of the various committees in each legislature which have responsibility for oversight of executive action in particular areas of public policy. The common frameworks programme as a whole, however (assuming it can survive the Internal Market Bill in final form), should also be scrutinised holistically from a UK-wide perspective, and in this respect, greater cooperation between the UK and devolved legislatures would seem to be essential.
12. A model for this can perhaps be found in the example of the Inter-Parliamentary Forum on Brexit (IPF). This consists of the chairs of Committees scrutinising Brexit-related issues in both Houses of Parliament, the Scottish Parliament and Senedd Cymru. (Officials from the Northern Ireland Assembly attended as observers during the period when the work of the Assembly was suspended). It is intended to provide a forum to discuss the process of the UK's withdrawal from the European Union, and collective scrutiny of that process in legislatures across the UK. During the period October 2017-September 2019, the Forum met every 2-3 months, rotating its meetings between London, Cardiff and Edinburgh.
13. According to a letter of 5 September 2019 to the Chancellor of the Duchy of Lancaster from the then chair of PACAC on behalf of the Forum:
- "The IPF provides a means for structured dialogue between parliamentarians in the devolved legislatures and Westminster on Brexit and other matters of common interest (such as the Common Frameworks being developed on matters such as food standards and air quality)...the IPF has fostered an environment where parliamentarians have been able to share their thoughts on key issues...the IPF also provides a valuable opportunity for ministers to hear the views of senior parliamentarians engaged in scrutiny of Brexit...The Forum has established effective dialogues with ministers in the UK and devolved governments, with ministers attending Forum meetings to discuss developments in their areas of responsibility (under the Chatham House rules)".*
14. As described, this does not of course amount to formal scrutiny, and the processes would have to be developed (not least to allow for public transparency), but the Forum experience perhaps provides a starting point for establishing UK-wide structures for holistic review of any future common frameworks programme. That said, the published papers suggest that, notwithstanding the major developments in Brexit policy during 2020, the Forum has not met, even virtually, for over a year since that letter was issued in September 2019. The Committee might therefore want to make enquiries as to whether this is a result of logistical or other

Covid-related factors, or whether, notwithstanding the terms of the letter, the arrangements were found not sufficiently beneficial that parliamentarians wished them to be maintained.

## **Conclusion**

15. Government Ministers have occasionally asserted that the UK Internal Market Bill is not a constitutional measure at all, that it is concerned only with economic policy. Perhaps it would be better to characterise the Bill as a key building block in an emerging “economic constitution” for the UK post-Brexit. However that may be, we believe that the Bill does raise fundamental questions about the governance of the UK following withdrawal from the European Union, in particular whether it will be possible to establish a common understanding of the future role and importance of the devolved institutions in UK governance. Failing that, and in particular if the Bill proceeds to Royal Assent largely unamended, it is not clear to us that the devolved administrations will wish in the future again to devote considerable time and resources to develop programmes of joint action with the UK Government if these can all too easily be overthrown, through the deployment of parliamentary sovereignty, by new legislation. And we would also doubt whether the common frameworks programme, based as we believe it to be on a particular understanding of devolution, has a viable future.

UKCMG

Membership as of November 2020

Prof. Linda Colley  
Prof. Michael Kenny  
Sir Tom Legg  
Sir Richard Mottram  
Dr. Hugh Rawlings  
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***13 November 2020***