Professor Kenneth Armstrong – Written evidence (PBC0012)

Written evidence submitted by Professor Kenneth Armstrong, Professor of European Law, University of Cambridge

About the Author

The author holds the Professorship of European Law at the University of Cambridge and is a Fellow of Sidney Sussex College. He holds a Leverhulme Trust Major Research Fellowship for a project called *The Brexit Effect – Convergence, Divergence and Variation in UK Regulatory Policy*. He is currently acting as an Adviser to the Finance and Constitution Committee of the Scottish Parliament in respect of its work on the UK Internal Market and other Brexit-related legislation. This written submission is provided in a personal capacity and does not represent the views of the Finance and Constitution Committee or its members.

Summary

- The success of the common frameworks programme should be judged by reference to two benchmarks: (1) the quality of decision-making (measured by its capacity to generate **consensus** in the representation and reconciliation of different interests); (2) its contribution to a **coherent** governance architecture.
- Work on common frameworks has been hampered not just by the effects of the coronavirus pandemic but uncertainties over a UK Internal Market and the future EU-UK economic relationship.
- Common frameworks build upon existing modes of intergovernmental cooperation and, while sector-specific, share common features that may disclose a stronger horizontality than might otherwise have been apparent. There may be an argument for amending the existing devolution Memorandum of Understanding to include a new Concordat that builds on the positive experiences of the programme.
- Parliamentary scrutiny of the common frameworks programme is challenging. There is a strong argument for enhanced inter-parliamentary cooperation to ensure effective oversight.

What would a successful common frameworks programme look like?

1. The success or otherwise of a Common Frameworks ('CF') programme has to be evaluated against two benchmarks: the quality of decision-making and the coherence of the overall governance framework for managing future changes in law following the end of the transition period.

The Quality of Decision-Making Processes

2. Common frameworks establish processes for decision-making and it is the quality of these decision-making processes that need to be evaluated in determining the success or otherwise of the CF programme. The quality of decision-making can be analysed with respect to three constituencies of interests:

    - UK and devolved governments,
    - Regulatory bodies with expertise acting at arm's length from government, and
    - Societal interests (via representatives or directly).

3. The success or failure of the CFs programme rests on its capacity to maximise **consensus** while facilitating the representation of interests which may be in conflict with one another.

    Intergovernmental interests

4. Considering the interests of UK and devolved governments, the metric of success is not whether the outcome of the process is policy convergence or divergence; both are legitimate outcomes. Instead, what matters is whether any given outcome is achieved with or without the consent of the other administrations. **Consent must be the animating principle of intergovernmental relations**. This extends beyond the Sewel Convention; something which is also recognised in the amendments accepted to the United Kingdom Internal Market Bill during its legislative passage. Seeking consent and searching for consensus is, therefore, the key constitutional metric in evaluating the success of the CF programme.

    Expertise in decision-making

5. Given that CFs concern regulatory frameworks that manage risks, it is also important to consider the calibration of the relationship between risk assessment and risk management within CFs. Indeed, the CFs that relate to food safety underline that future changes should be based on expert-led risk assessment. It is important that the CF mechanisms still leave risk management – and the ability of governments to come to different views on how to manage risks – in the hands of elected politicians. Accordingly, a successful CF programme **should not blur boundaries of responsibility and accountability** and it should be transparent whether outcomes are based on differences in view as to either the assessment of risk or its management.

Societal interests

6. A successful CF programme should be responsive to societal interests. That should be reflected in effective parliamentary scrutiny as well as more direct stakeholder engagement.

7. Compared to the scrutiny of discrete substantive legal instruments, parliamentary scrutiny of the design of CFs is more challenging. Difficulties have clearly been encountered with the timely flow of up-to-date draft outline frameworks. But the interest of parliamentarians extends beyond the design of the CFs and relates also to the impact of agreed CFs on future regulatory changes. These moments of change will trigger the standard procedures and protocols for parliamentary scrutiny. The CF programme **should not inhibit effective and even critical parliamentary scrutiny**. Nor should parliamentary scrutiny exhaust the ability of societal interests to represent themselves in evaluating future regulatory developments.

The Coherence of the Governance Architecture

8. The second benchmark relates to the overarching coherence of the governance architecture of a UK Internal Market. CFs are an *ex ante*, 'soft' intergovernmental and cooperative mode of governance. How and whether that approach can succeed in achieving its aims (as measured against the first benchmark) depends on its interaction with any other governance tools and techniques including the *ex post*, 'hard' governance of the United Kingdom Internal Market ('UKIM') Act 2020 and its disapplication of future divergent rules insofar as they conflict with Market Access Principles.

9. It is evident that insofar as regulatory divergence can be a legitimate outcome of a CF process, the application of the UKIM Act could serve to frustrate that divergence through the introduction of regulatory competition.

How should common frameworks fit within the broader devolution settlement?

10. It is important to recall that intergovernmental cooperation between devolved administrations and the UK Government did not begin with CFs. Indeed, it is an intrinsic part of the devolution settlement and is the subject of an overarching Memorandum of Understanding ('MoU') with accompanying Concordats) as well as more sectoral and detailed MoUs and concordats. The CF

programme both relies upon these existing overarching mechanisms of coordination and cooperation as well as emulating them in their own internal procedures.

11. How well intergovernmental cooperation works in practice is something which evolves over time and is currently under review. The CF programme and the review mechanisms that are built into these frameworks could create valuable opportunities to learn from experience and develop good practices in intergovernmental cooperation.

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

12. The UKIM Act restricts the effects of future regulatory divergences within its scope. As such, if the CF process results in an accepted regulatory divergence, that outcome then becomes subject to the application of the market access principles which could then result in the disapplication of the effect of a new rule when applied to goods or services originating in a part of the UK which has different rules.

13. Amendments to the original Bill sought to take the outcomes of CF processes out of the scope of the market access principles. The compromise accepted vests in UK ministers a discretion to amend the Schedules to the Act to exclude the application of these principles to such outcomes. This is, however, a discretion. It may or it may not be exercised. If it is exercised then the Act now also requires that UK ministers seek the consent of devolved ministers. To that extent the principle of consent is recognised. Nonetheless, outcomes of CFs are not excluded from the Act and UK ministers have taken to themselves a discretion as to whether to insulate such outcomes from the effects of the Act.

How should common frameworks facilitate cooperation or manage divergence between the four administrations? Is the dispute mechanism that has been proposed satisfactory?

14. It is perhaps worth reiterating that the CF process rests on maintaining processes of engagement between officials with a view to the avoidance of disagreements that might then have to be handled by a dispute-resolution mechanism. To the extent that this builds on existing ways of working there ought to be a degree of confidence that the process of dialogue at official level should continue to manage the evolving policy environment.

15. That said, the escalation policy envisaged in the dispute-resolution mechanisms is appropriate. What will need to be determined, however, is whether a dispute flows from an obvious divergence of viewpoint as to policy objectives and imperatives rather than differences over technical changes. The ability of officials – even senior officials – to resolve overtly political differences is clearly quite limited and so the escalation policy should ensure that a dispute can be more rapidly moved through the ranks to a level appropriate for the resolution of the dispute.

16. The effectiveness of the dispute-resolution function has to be considered in the wider context of the reach of the UKIM Act. The risk that an agreed outcome – including an agreement to disagree following a dispute-resolution process – may be rendered ineffective through the application of the market access principles creates a disincentive to commit to a process of seeking consensus or accepting disagreement. Rather than the legal context creating incentives for the parties to engage cooperatively, the Act offers a perverse incentive to allow divergences to be managed through the effects of the Act.

What international examples of coordinating devolved policy issues, if any, could inform the development of common frameworks?

17. International comparisons – eg Switzerland – have a limited utility in that the structures for cooperation necessarily reflect underlying constitutional settlements which vary from one country to another. While the devolution settlement in the UK is based on the principle that everything is devolved unless reserved, the scope of the reservations and the unfettered competence of the UK Parliament to legislate with or without the consent of the devolved legislatures necessarily gives a particular shape to how the CFs function. This is evidenced most clearly by the impact of the UK Internal Market Act.

How will common frameworks interact with the Northern Ireland Protocol? How should they operate with respect to Northern Ireland?

18. The Protocol on Ireland/Northern Ireland creates obligations of continuity in the alignment of certain rules applicable to Northern Ireland with existing and future EU rules. It should also be noted that the Scottish Parliament has passed the *UK Withdrawal from the European Union (Continuity) (Scotland) Bill* which will give Scottish Ministers a discretion whether to align Scottish law with future

changes in EU law. The interaction of such 'continuity' provisions with common frameworks gives rise to different outcomes.

19. As regards Northern Ireland, the maintenance of continuity with EU law – and with it, potential divergence from the position in other UK jurisdictions – cannot be affected by the CF process. Moreover, the operation of the UKIM Act has to have regard to the effects of the Protocol for changes in rules applicable to Northern Ireland.

20. As for Scotland, a voluntary decision to align with EU law and so potentially diverge from the position in England and Wales may well be subject to the CF process and indeed may trigger the application of the UKIM Act.

21. Layered on top of all of this are the continuity obligations that may arise for the whole of the UK deriving from the Trade and Cooperation Agreement between the EU and the UK. To the extent that 'level playing field' requirements result in continuing alignment between the EU and the UK, the scope for domestic legal change falling within the scope of CF processes may be correspondingly limited.

What role should common frameworks have during the negotiation and implementation of any international agreements that touch on devolved competences?

22. Common Frameworks manage the exercise of regulatory autonomy. The space for regulatory autonomy is a function of the devolution settlement in both its internal and external dimensions.

23. For the external dimension, it is clear that the conduct of international relations is a reserved matter. Despite the role which may be played by devolved administrations in the subsequent implementation of international agreements, this does not translate upstream to having influence over the conduct of those negotiations. Indeed, it is obvious that notwithstanding the terms of the Constitutional Reform and Governance Act 2010, the UK Parliament has very limited powers to scrutinise negotiated agreements prior to ratification. On that basis, there seems very little – if indeed, any – scope for CFs during the negotiation of international agreements.

24. Nonetheless, it is apparent from the terms of the Trade Bill that devolved administrations will themselves have responsibilities for the implementation of international obligations within the scope of their competences. The Bill sets out its own statutory processes

for intergovernmental relations in the implementation of international obligations. It seems likely that these provisions will be the dominant force rather than the mechanisms established in CFs.

25. It should also be noted that UK ministers have powers under the devolution statutes to secure compliance with international agreements. There is, therefore, a hard constraint that could be applied where otherwise exercises of regulatory autonomy might have been permitted (including exercises constrained by a CF process).

How successful has the common frameworks programme been to date? What has worked and what has not? What lessons should be learnt from progress so far?

26. The answer to this probably depends on whether one is asking those involved in the procedures and those seeking to observe the process. As observers, the process has lacked transparency and as the Committee has itself observed, the flow of draft documents and their incomplete (and sometime dated) contents have made it difficult to determine their potential to achieve their aims.

27. For participants, there has been undoubted uncertainty as to the implications of a future EU-UK trade deal although it was at least clear by the end of 2019 that the UK would not pre-commit to alignment with EU rules. The more direct source of uncertainty was the threat of legislation for a UK Internal Market and its implications for any regulatory divergences arising from CFs. With the added pressures from the management of Covid, the programme for producing CFs by the end of the transition period was not helped by the publication of the UKIM Bill in September.The UKIM Act also had a more immediate consequence in that issues related to professional qualifications would be dealt with directly via legislation rather than falling within the ambit of work on CFs.

28. Perhaps the single biggest area of difficulty was what would happen to emissions trading. This was within scope of the CF analysis with both legislative and non-legislative action considered appropriate. That the UK might pursue a carbon tax rather than a UK emissions trading scheme created uncertainty. That now appears to be resolved in that the EU-UK Trade and Cooperation Agreement anticipates that the UK will have its own carbon pricing regime.

Should any other areas be covered by a common framework beyond those already in progress?

29. As noted previously, a benchmark of the success of the CF programme is its capacity to produce coherence in the management of future changes in regulatory policy within the UK. The technique of *ex ante* coordination is limited under the CF programme to modifications of retained EU law. While this explains the origins and parameters of the programme, it doesn't explain why changes in the future that are not changes to retained EU law but rather reflect exercises of pre-existing competences that are neither authorised nor defined by EU law should not also be the subject of an *ex ante* coordination mechanism.

30. There is an argument for mainstreaming the CF approach to secure both consensus and coherence in the governance of regulatory policy in the UK beyond the areas covered by the CF programme. This intuition is underscored by the commonality of approach evidenced across the outline CFs published to date. Their use of a common template suggests that a more horizontal approach to intergovernmental coordination may be possible (and is to some extent de facto being achieved through the CF programme).

31. With intergovernmental relations under review, there is ample scope to revisit the Concordats attached as supplementary agreements to the devolution Memorandum of Understanding with a view to adapting them to the UK's withdrawal from the European Union and incorporating new demands and new structures for intergovernmental cooperation. One approach would be to refashion common elements of frameworks and concordats into a horizontal concordat setting out procedures for cooperation and dispute resolution as a replacement to Supplementary Agreement 'B' and retaining a focus on managing changes to retained EU law. However, consideration could be given to widening the scope to encourage transparency, dialogue and regulatory cooperation more generally.

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?

32. As intimated previously, there is a distinction to be drawn between scrutiny of the design and operation of CFs as a whole and scrutiny of the application of these CFs to a particular instance of change in domestic regulatory policy within their scope. To the extent that the latter gives rise to the generation of a particular legal instrument – typically a statutory instrument – then

parliamentarians have something to subject to scrutinise and can make their evaluations of the effectiveness of CF processes more meaningful. It is at this operational level that devolved parliamentary committees might feel that scarce time and human resources may be better deployed.

33. An opportunity presents itself for the House of Lords Common Frameworks Scrutiny Committee to play a meaningful role. There is a need to evaluate how well these frameworks function and what general lessons can be learned from their development and evolution over time. This could also usefully dovetail with the review requirements specified in the UKIM Act relating to the use of powers to amend the Act (including for the purposes of reflecting the outcome of CF processes). We believe that the Committee could play a pivotal role in developing the evidence basis to support these reviews.

34. Inter-parliamentary cooperation should be encouraged. Given the limits on the interests and capacities of individual committees to scrutinise the highly procedural CFs, there is merit in developing effective inter-parliamentary processes – roundtables and stakeholder engagement events – capable of bringing together parliamentarians across the UK and devolved legislatures in identifying examples of good and bad intergovernmental working practices, positive and perverse incentives, scrutiny successes and failures. The CF Select Committee could play a leading role in facilitating a process of parliamentary dialogue and scrutiny operating in parallel to the intergovernmental frameworks for cooperation between officials and governments.

15 January 2021