

Katy Hayward, Viviane Gravey and Lisa-Claire Whitten¹ – Written submission (PBC0024)

Executive Summary

This evidence submission concentrates on the matter of the degree to which we know more about the operation of common frameworks since the publication of the 1st Report of the Common Frameworks Scrutiny Committee on 31 March 2021.² In the intervening period, there has been progress made. For example, the Northern Ireland Executive – after considerable delay– signed off on the remaining 21 common frameworks. And the Joint Consultative Working Group is up and running, with weekly communication and monthly meetings which inform the UK as to amendments to EU legislation that applies to Northern Ireland under the Protocol. However, some of the problems that were identified in the Committee’s 1st Report have been compounded. We have grave concerns about communication, transparency and scrutiny when it comes to the operation of the common frameworks and the protection of the principles underpinning them.

Context-Setting

1. The unique context for common frameworks in Northern Ireland

1.1. Since the end of the transition period on 31 December 2020, legislation that applies in Northern Ireland includes that which comes through (i) Stormont on devolved areas, (ii) Westminster for reserved and excepted areas, (iii) retained EU law (through the EU [Withdrawal] Act 2018), and (iv) directly applicable EU legislation (through the Protocol given direct effect by s7A of the 2018 Act as amended by s5 the EU Withdrawal [Agreement] Act 2020).

1.2. Applicable EU law supersedes domestic law. This means that common frameworks can only operate in Northern Ireland if they do not conflict with the EU law that applies in the same area through the Protocol (as listed in Annexes 1-5).

1.3. As such – even as noted in the earliest definition of a common framework as set out by the communiqué from the Joint Ministerial Committee (EU Negotiations) of 16 October 2017,³ a common framework sets out ‘a common UK, *or GB*, approach’ [*italics added*].

¹ Queen’s University Belfast, but this evidence is submitted in a personal capacity and should not be read to represent the views of our employer.

² <https://committees.parliament.uk/publications/5346/documents/53245/default/>

1.4. Five of the thirty-two active common frameworks only apply to Northern Ireland: operator licensing and commercial transport, driver licensing, roads motor insurance, rail technical standards. The sixth area identified as being NI-specific that intersected with EU law – equal treatment legislation – was deemed in September 2020 to not require further action.⁴

1.5. Dynamic alignment of Northern Ireland to some 300 EU legislative instruments through the Protocol means that UK-EU divergence over time will result in divergence between GB and NI. Some of these instruments fall within areas that are covered by common frameworks.⁵ As the Committee’s 1st Report notes, in some cases the whole policy area of a framework is covered by the Protocol, meaning that NI will need to continue compliance with the relevant EU law. In other cases, at least part of the common framework has some intersection with the Protocol.

2. The state of play with common frameworks in Northern Ireland

2.1. So far, only seven common frameworks have been published; and of these, only the one on hazardous substances has been formally approved by all necessary ministers.⁶ Others remain being provisionally applied with no frameworks published since March 2021. Five are considered to be implementable in NI (i.e. at phase 3 or higher).

2.2. The Northern Ireland Executive endorsed the common frameworks principles on 15 June 2020. However, after approving 5 frameworks for provisional application in March 2021, it delayed approval of the outstanding 21 until *****. The reasons for this delay are unclear; officials have cited “teething issues” in the process.⁷

2.3. The Committee for the Executive Office enquired as to whether the First Minister and deputy First Minister would accept the invitation (10 November 2020) to give evidence to the House of Lords Common Frameworks Scrutiny Committee. It was informed that ‘Regrettably due to

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919729/Frameworks-Analysis-2020.pdf

⁵ Gravey and Whitten (2021) The NI Protocol & the environment: the implications for Northern Ireland, Ireland and the UK (March 2021), Brexit & Environment <https://www.brexitenvironment.co.uk/download/7559/>

⁶ <https://www.gov.uk/government/collections/uk-common-frameworks>

⁷ In evidence to the Committee for the Executive Office on 13 January 2021 (see n19) officials cited “teething issues” in the procedure for UK Government seeking NI Executive approval, described “a lack of understanding and misunderstanding of the process” at NI level and the short notice given: “there were a few cases where policy teams were expecting a bit more time...they were caught on the hop”.

existing diary commitments the invitation had to be declined. An alternative date has not been proposed by the Committee'.⁸

2.3.1. When the Junior Ministers in the NI Executive give their monthly briefings to the Committee on TEO, they always include a short update on common frameworks.

2.4. The Executive Office (TEO) leads and coordinates the Northern Ireland Civil Service (NICS) response to the UK's exit from the European Union. A NICS Common Frameworks forum brings together all departments 'to identify any barriers to progress and disseminate guidance and learning, including on preparing consistent documentation for Assembly scrutiny'.⁹

2.4.1. The last written departmental briefing from the Executive Office to the Committee was submitted on 6 October 2020.

2.5. The Committee for the Executive Office scrutinises TEO in its coordination of this process, whilst five other Committees scrutinise the individual common frameworks. These are: Agriculture, Environment and Rural Affairs (AERA), Economy, Finance, Health and Infrastructure. One common framework (chemicals and pesticides) intersects with two committees (AERA and Economy).¹⁰

2.6. There have been ten appearances by officials before NI Assembly committees to report on progress being made in common frameworks, and one mention of the same. These are:

2.6.1. *Committee for Agriculture, Environment and Rural Affairs (AERA):*

- Common Framework for Fluorinated Greenhouse Gases and Ozone-depleting Substances: Department of Agriculture, Environment and Rural Affairs (DAERA) Briefing (26 Nov 2020)¹¹
- Common Framework for Chemicals and Pesticides: DAERA Briefing (3 Dec 2020)¹²

⁸ <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/executive-office/brexit-scrutiny/departmental-correspondence/20210113-the-executive-office-response---house-of-lords-common-frameworks-scrutiny-committee.pdf>

⁹ <http://www.niassembly.gov.uk/globalassets/committee-blocks/executive-office/2017---2022/20201006-the-executive-office---common-frameworks.pdf>

¹⁰ <http://www.niassembly.gov.uk/assembly-business/brexit-and-beyond/brexit-and-devolution/#Common>

¹¹ <http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2020/11/26&rID=317171&hwCID=3149879&aID=24358&pg=3&evid=12464&sesID=23&dID=0&init=C#3149879>

¹² <http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2020/12/03&rID=318341&hwCID=3154459&aID=24427&pg=3&evid=12545&sesID=23&dID=0&init=C#3154459>

- Common Frameworks on Animal Health and Welfare and on Zootechnical Breeding: DAERA Briefing (10 December 2020)¹³
- Common Framework for Resources and Waste Policy: DAERA Briefing (14 Jan 2021)¹⁴

2.6.2. *Committee for Finance:*

- Public Procurement Common Framework: evidence from Construction Employers Federation (24 Feb 2021).¹⁵

2.6.3. *Committee for Health:*

- Common Framework on Food and Feed Safety and Hygiene, and Common Framework on Nutrition Labelling, Composition and Standards: Food Standards Agency (4 Feb 2021)¹⁶
- Brief mention of the four common frameworks under health (15 April 2021).¹⁷

2.6.4. *Committee of Infrastructure:*

- Common Frameworks: Department for Infrastructure (16 Dec 2020)¹⁸
- Common Framework on Hazardous Substances: Department for Infrastructure (3 Feb 2021)¹⁹

2.6.5. *Committee for the Executive Office:*

- Common Frameworks: Executive Office Briefing (7 Oct 2020)²⁰
- Common Frameworks: Executive Office Briefing (13 Jan 2021)²¹

2.7. There has been just one question asked in the NI Assembly on the subject of common frameworks, posed by an Alliance Party MLA to the First Minister and deputy First Minister.²² The question noted that the Executive Office Committee recommended 'increased coordination and

¹³<http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2020/12/10&rID=319433&hwcID=3183976&aID=24585&pg=3&eveid=12612&sesID=23&dID=0&init=C#3183976>

¹⁴<http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2021/01/14&rID=321647&hwcID=3219797&aID=24838&pg=3&eveid=12673&sesID=23&dID=0&init=C#3219797>

¹⁵ <http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=25492&eveID=12794>

¹⁶<http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2021/02/04&rID=324722&hwcID=3259029&aID=25246&pg=3&eveid=12830&sesID=23&dID=0&init=C#3259029>

¹⁷ <http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=26033&eveID=13051>

¹⁸<http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2020/12/16&rID=320316&hwcID=3187179&aID=24666&pg=3&eveid=12633&sesID=23&dID=0&init=C#3187179>

¹⁹<http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2021/02/03&rID=324718&hwcID=3250698&aID=25171&pg=3&eveid=12799&sesID=23&dID=0&init=C#3250698>

²⁰<http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2020/10/07&rID=310753&hwcID=2999316&aID=23662&pg=3&eveid=12287&sesID=23&dID=0&init=C#2999316>

²¹<http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2021/01/13&rID=321640&hwcID=3214338&aID=24853&pg=3&eveid=12676&sesID=23&dID=0&init=C#3214338>

²² "Ms Armstrong asked the First Minister and deputy First Minister, given that the level of awareness and knowledge of the common frameworks is extraordinarily low, ... what the Executive Office and the Department for the Economy are doing to ensure that, in particular, the service sector is aware of the implications." (AQT 827/17-22)

communication' on common frameworks, and asked what is being done to raise awareness of the implications.²³ The First Minister agreed that 'there is not an awful lot of knowledge of the common frameworks' and said that work on them would continue in 2021.²⁴

2.8. In terms of public information, the EU Exit Hub through the Research and Information Service at the Assembly hosts a clear and useful set of webpages on the subject.²⁵

2.8.1. However, 'Common Frameworks' is not listed on the alphabetical list of subjects to search the official record of the Assembly, even though "Capita: Contractual Failings", "Car Parking: Healthcare workers" and "Court Care home, Ballymoney" are all there under "C".

Evaluation and Analysis

3. The extraordinary challenge for managing intra-UK divergence in Northern Ireland

3.1. A simple way of picturing the challenge for Northern Ireland is to imagine Northern Ireland having to keep track of six different spinning plates: first, evolving (or new) EU legislation that applies through the Protocol; second, legislative common frameworks in the UK; third, UK law as it applies in Northern Ireland; fourth, changes to retained EU law; fifth, changes in Irish and/or EU law that come under a policy area for North/South cooperation on the island of Ireland; and, last but not least, domestic policy development in NI.

3.1.1. Keeping track of these requires Northern Ireland legislature to be informed of what is evolving in these areas. We have identified several specific difficulties in this regard, many of which relate to procedure and to information.

4. Keeping track of applicable and evolving EU legislation

4.1. There has long been a problem with the lack of scrutiny by the NI Assembly of EU legislation applying in Northern Ireland. NI has never had

²³<http://aims.niassembly.gov.uk/officialreport/reportssearchresultsreport.aspx?&eveDate=2020/12/14&rID=319621&hwclD=3367586&alD=0&pg=3&sesID=23&dID=0&init=C#3367586>

²⁴ "The Member is right to say that there is not an awful lot of knowledge of the common frameworks. We will have to take notice of them after the transition period ends. A number of common frameworks have been worked through. Many of them have been agreed provisionally. Some are still to be worked through. I hope that we can continue that work in 2021."

²⁵ <http://www.niassembly.gov.uk/assembly-business/research-and-information-service-raise/eu-exit-hub/common-frameworks/>

a dedicated committee for EU scrutiny, for example. And it has always suffered from *poor communication from Westminster to alert Stormont to applicable legislation*. Difficulties in this process have been further exposed by Brexit and the Protocol. They have more consequence now than before given that the UK is outside the 'basket' of the EU's single market and that there is a possibility.

4.2. The UK-EU *Joint Consultative Working Group* has established a pattern of working that is quite regularised but there are still significant deficiencies in terms of the effectiveness of keeping the NI legislature informed as to any necessary amendments. These arise in the main from the fact that the whole process relies on Westminster and/or Whitehall passing information on to NI.

4.3. A major difficulty for keeping the statute book complete as well as for scrutiny is the amount of detail available from Westminster on the amended EU legislation that is to apply in Northern Ireland.

4.3.1. Explanatory memoranda on such amended regulations as are being processed through Westminster even within aspects of devolved competence, these do not have sufficient detail as to consider the implications for NI.²⁶

4.3.2. The House of Lords European Affairs Committee (and the sub-committee on the Protocol), and the European Scrutiny Committee in the Commons, receive copies of correspondence from Government ministers about amendments being made to EU legislative instruments that are to apply in NI under the Protocol.²⁷ But it is often only at the request of Committee chairs that government ministers give more information on the potential implications for Northern Ireland.²⁸

4.3.3. As a consequence of such poor information-sharing between the legislatures, there is an inevitable lack of awareness among stakeholders in Northern Ireland of the amended regulations that will apply to them.

²⁶ http://europeanmemoranda.cabinetoffice.gov.uk/files/2021/06/EM_8537-21_esigned.pdf

²⁷ For example, this request from the European Scrutiny Committee regarding the same TSE-related amendment to EU regulation:

<https://committees.parliament.uk/publications/6424/documents/70246/default/>

²⁸ For example, this long letter for Lord Benyon on the amendment to the above-mentioned EU regulation:

<https://committees.parliament.uk/publications/7373/documents/77165/default/>

- 4.3.4. *It is possible to see how the common framework – particularly the monthly working group meetings between officials – can contribute towards filling that information gap.*

5. Challenges for North/South cooperation

5.1. Some of the common frameworks have direct implications for north/south cooperation but there is no clear or formalised way to manage this.

- This was seen in evidence to the CAEARA (14 Jan 21) in response to a question of liaison with counterparts in the Republic of Ireland: “we have been having contact with the EU as a whole, so we have not engaged at a policy level with Southern colleagues so far, but I expect that to change now that we have the cooperation agreement in place. ... The policy teams keep in touch with colleagues in the South, and they collaborate and discuss as necessary in the policy development forum as well. There are well-established relationships...I do not see that there would be or has been any involvement of Southern colleagues in the framework, but the framework document states that any future arrangements must take account of the fact that we live on the island of Ireland and have close relationships with our Southern counterparts... as a mechanism, the framework is really an inter-UK thing.”

5.1.2. For reasons discussed above, the difficulties when it comes to formalising NI policy with respect to east/west and north/south relationships only becomes more difficult outwith the shared EU context.

- *Consideration of the implications of existing and forthcoming common frameworks on, in particular, north-south cooperation ought to be accommodated in the consultation and scrutiny process.*

6. Further difficulties for scrutiny in the NI Assembly

6.1. *Too little time*

6.1.1. In January 2021, an MLA on the Committee for the Executive Office coordinating the common frameworks complained, “from our point of view as MLAs, the scrutiny role has been very challenging,

if not impossible, given the time frame, obviously, that you were working in. We just need to be kept abreast of it.”²⁹

- 6.1.2. We now gather (from evidence provided by George Eustice) that the deadline for the full implementation of the common frameworks has been moved from end 2021 to March 2022, although this has not been formally announced to the NI legislature.
- 6.1.3. The NI Assembly is coming towards the end of its mandate (the election has to be held on or before 5 May 2022). This means that there is a substantial amount of legislation already being considered by relevant committees in the NI Assembly.
- 6.1.4. For example, the Committee which has the most common frameworks to cover and scrutinise, Agriculture, Environment and Rural Affairs, is considering two large bills on climate change to complete within the next six months.
- 6.1.5. The chair of the Committee on Infrastructure raised a concern about the ambiguity in the timeframes the common frameworks process is working to, most particularly given the sense that they are rather hypothetical until the point when divergence occurs.
- As one official put it in evidence to the Committee on Infrastructure (16 Dec 2020): “The real deadline for these frameworks is the first time that we need to do something that diverges in these areas.”³⁰
 - The chair of the committee commented: “I am a bit concerned about there being no fixed deadline, given that we are aware that there will be issues [that] have been identified even in the draft frameworks. My concern, from being in this place for such a long time, is that policy development and then moving forward with legislation can be quite a slow process, yet there will be very real issues on the ground that need a speedy response, as opposed to the very long, protracted process that we are used to”.
 - Proposed changes to the status and content of retained EU law by Lord Frost make it likely such a decision to diverge, and thus need for common frameworks to become operational, will come from England and sooner rather than later.³¹

²⁹<http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2021/01/13&rID=321640&hwcID=3214338&aID=24853&pg=3&evid=12676&sesID=23&dID=0&init=C#3214338>

³⁰<http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2020/12/16&rID=320316&hwcID=3187179&aID=24666&pg=3&evid=12633&sesID=23&dID=0&init=C#3187179>

6.2. *Horizon-scanning*: there is a need for proper horizon-scanning from Northern Ireland by MLAs, officials and agencies.

6.2.1. The Food Standards Agency (4 Feb 21) gives an example of what this might entail:

- “We have trained our policy colleagues to make sure that they can carry out desk-based monitoring of EU legislation, which will include things like checking the comitology register, which is the register of EU committees and documents and committee meetings. We are also in regular contact with the UK Mission to the EU (UKMis Brussels), which will provide additional intelligence on proposals... we have very close working relationships with the Food Safety Authority of Ireland. That is another way in which we can keep track of what is going on”

6.3. *Cross-cutting analysis*: although only one common framework applicable in NI cuts across the competence of two NIA committees, it is clear that there is a need for analysis on a cross-framework.

6.3.1. For example, this evidence on frameworks under the remit of the CAERA:

- “...the nutrition labelling, composition and standards framework that you considered in the autumn was written many months before and did not sufficiently account for the Northern Ireland protocol. It will be updated to reflect the obligations in the Northern Ireland protocol. For instance, it needs to make it clear that there is more chance of divergence than was expected. We will, basically, import the language that we have used in the food and feed safety and hygiene framework into the nutrition labelling, composition and standards framework. ... We want to ensure that the nutrition framework properly aligns with what we are doing on food and feed safety.”

6.4. *Stakeholders*: the coordination of stakeholder engagement through the Cabinet Office has meant that the quality and value of this engagement was less than it might have been than if it had been organised with much more direct input from NI departments.

6.4.1. This is important because stakeholder engagement should not just be a one-off event but a process, especially given that the

³¹ <https://www.gov.uk/government/speeches/lord-frost-statement-to-the-house-of-lords-16-september-2021>

common frameworks are a novel initiative and can be expected to evolve.

6.4.2. Moreover, the most likely way in which problems or issues with a common framework are likely to come to the attention of MLAs is if someone in industry raises it with them. This is arguably too late in the process. We agree with the conclusion of the Committee's 1st Report, that 'Future reviews of the frameworks should include an open and well-publicised stakeholder consultation process that reaches beyond the small number of stakeholders previously consulted, so as to ensure that all those directly affected have a meaningful opportunity to contribute' (para. 55).

6.4.3. We would go further and say that good quality stakeholder engagement should be written-into the governance of each common frameworks, and should be required to be conducted separately in each jurisdiction, with invitations extended from the devolved departments. To allow stakeholders to gather views from those they represent (as appropriate) sufficient information should be provided beforehand on the common framework and its scope, and adequate notice of the consultation should be given.

6.4.4. There is perhaps a misperception that impact on stakeholders is minimal if it can be sorted out at the level of officials.³² This is, of course, not true – stakeholders are the ones who give effect to the legislation in many ways. Just because officials can agree on a position does not mean that there still yet may be difficulties on the ground.

6.5. *Flexibility* within the common frameworks regime is necessary and reflects the flexibility available within the EU too. There continues to be scope for a NI-specific interpretation of legislation.

6.5.1. For example, under the common framework on Chemicals and Pesticides, evidence to the Committee of AERA (3 December 2020) suggested:

- 'There is much ongoing work on the monitoring of pesticides in our waterways, and policies have been put in place that have not been replicated in, for example, England. ... We will be able to continue with those policies. The UK Government may seek to influence those policies ... but they cannot stop us from doing

³² As one official said in evidence to the Committee on AERA: "The framework is about internal arrangements between UK Administrations, so there is no direct impact on stakeholders."

that, and I do not think that they would want to. We still have that freedom in policies that we can adopt to meet the aspirations of the legislation.³³

6.5.2. And this case from the common framework for resources and waste policy (evidence to the Committee on AERA, 14 January 2021):³⁴

- 'Where EU directives had set minimum targets, different jurisdictions have had different standards. Again, that is recognised. Against that, some waste streams, notably producer responsibility regimes, currently operate on a UK-basis anyway and are underpinned by GB legislation and equivalent Northern Ireland legislation or by UK-wide legislation.'

24 September 2021

³³<http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2020/12/03&rID=318341&hwcID=3154459&aID=24427&pg=3&eveid=12545&sesID=23&dID=0&init=C#3154459>

³⁴<http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2021/01/14&rID=321647&hwcID=3219797&aID=24838&pg=3&eveid=12673&sesID=23&dID=0&init=C#3219797>