

CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE, COMMITTEE

2nd Meeting 2021, Session 6

2 September 2021

**Introductory Evidence Session with the Cabinet Secretary for the Constitution,
External Affairs and Culture**

1. The purpose of this paper is to provide Members with background briefing for the Committee's introductory evidence session with the Cabinet Secretary.
2. Attached at **Annexe A** is a SPICe summary of the key issues addressed in the legacy reports published by our two predecessor committees from session 5 (the Finance and Constitution Committee and Culture, Tourism, Europe and External Affairs Committee).
3. The Cabinet Secretary has also provided a brief update on the current constitutional context and the common frameworks programme and this is attached at **Annexe B**.

Committee Clerks

August 2021

CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE, COMMITTEE

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Summary of legacy paper issues

Background

The remit of the new Constitution, Europe, External Affairs and Culture Committee will cover areas that two session five Committees (Finance and Constitution and Culture, Tourism, Europe and External Affairs) engaged with.

The session five Culture, Tourism, Europe and External Affairs Committee devoted much of its time to considering the implications of the UK's decision to leave the European Union. The Committee scrutinised the Withdrawal Agreement and the EUUK Trade and Cooperation Agreement. The [Committee's Legacy Paper](#) focussed heavily on this issue.

The session five Finance and Constitution Committee was designated the lead committee for scrutiny of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill and took the lead in coordinating the Parliament's response to the potential scrutiny challenge as a result of new constitutional arrangements. The Committee's [legacy expert panel report](#) highlighted some of the UK legislation and agreements which are important in understanding Scottish devolution now.

Introduction to paper

This paper provides a summary and explanation of the key ideas explored in the legacy reports of both session five committees which now fall within the remit of the Constitution, Europe, External Affairs and Culture Committee. Where applicable, details are given on the current position to aid members' understanding of the up-to-date position.

The context for both reports was an understanding that EU exit has re-shaped devolution and substantially increased its complexity.

Given the cross-cutting nature of many of the issues discussed in this paper, there remains a question over where lead responsibility will lie across session six committees.

Part one of this paper explains some of the areas considered by both the legacy reports.

Part two considers issues raised by either of the reports. A **Glossary** is also provided to explain some of the technical terms necessary in this paper.

Part one

Constitutional impact of leaving the EU

Much of the Finance and Constitution Committee's legacy expert panel report (which was agreed by the Committee¹) explored the changes to the devolution landscape as a result of the UK leaving the EU and the impact of those changes on the Parliament given the scrutiny challenge they present going forward.

The report noted that the Scottish Parliament's power to pass laws (legislative competence) has not changed significantly because of the UK's exit from the EU. There are, nevertheless, many practical and legal changes as a result of the UK leaving the EU that have the potential to constrain the Scottish Parliament and Scottish Government's ability to exercise their competence effectively because of the UK's post EU legislation and agreements.

The legacy expert panel report explained that, post exit, the devolution landscape is more complex to navigate. Rather than being able to understand devolution by reference to the Scotland Act 1998, it is now necessary to consider the Scotland Act 1998 as well as new legislation and agreements which affect areas previously governed by the EU including, for example, the withdrawal legislation; UK Internal Market Act 2020, common frameworks (see **Glossary**) and trade agreements (see **Glossary**).

The panel also noted section 12 of the European Union (Withdrawal) Act 2018 (see **Glossary**) which gives UK Ministers powers to freeze devolved competence in specific areas governed by retained EU law.

The legacy expert panel report noted the session five Finance and Constitution Committee had taken on a key role in scrutinising the UK Government and Scottish Government legislation relating to EU exit. It concluded, however, that "It is much less clear what the role of the successor Committee will be in scrutinising how or whether those powers are exercised" given that "This scrutiny function would primarily be carried out by the subject committees."²

The report suggested that a successor committee may wish to take on a monitoring and co-ordinating role, saying:

"There could be a monitoring and co-ordinating function in relation to how devolution is working following Brexit. For example, in reviewing how the common frameworks process is operating and/or the operation of the UK internal market in consultation with the subject committees. The successor Committee is also likely to have the lead role in agreeing guidance with the Scottish Government on how the Parliament's scrutiny function will work in areas such as the keeping pace power and the operation of common frameworks."³

¹ Finance and Constitution [Committee letter on the legacy expert group report](#) to the Presiding Officer, 23 February 2021

² [Legacy expert panel report to the Finance and Constitution Committee](#), February 2021, para 91-92

³ [Legacy expert panel report to the Finance and Constitution Committee](#), February 2021, para 92

The Panel's view was that there was a need for the Parliament to consider the extent to which a monitoring and co-ordination function in relation to how devolution is working after Brexit is needed. The panel recommended this include giving thought

to standard approaches to scrutiny of new arrangements such as common frameworks and oversight of how consent mechanisms are operating⁴.

The Session five Culture, Tourism, Europe and External Affairs Committee focused on the external impacts of the Brexit process in terms of EU-UK negotiations and the economic impacts of the new EU-UK relationship. However, the Committee recognised that as a result of Brexit, "responsibility in devolved policy spheres will be increasingly blurred and shared between the Scottish and UK Government"⁵.

Inter-governmental relations and inter-parliamentary working

The [Review of UK Government Union Capability](#) conducted by Lord Andrew Dunlop was completed in November 2019 but not published until 24 March 2021 (after both legacy reports were published). The report made a number of recommendations to the UK Government designed to improve the functioning of the Union from a UK Government perspective. Key recommendations made by the review include:

- A new Great Office of State in the Cabinet.
- A new structure supporting the separate offices of the Secretaries of State for Scotland, Wales and Northern Ireland with a single Permanent Secretary.
- A new fund for UK-wide projects, including joint projects with devolved governments.
- A new UK Intergovernmental Council (replacing the Joint Ministerial Committee), supported by an independent secretariat.

The review's recommendations have in some areas already been taken forward by the UK Government. The review recommended a new UK Intergovernmental Council with appropriate sub-committees to replace the Joint Ministerial Committee structure. Work has already begun on implementing some of the recommendations⁶.

The legacy expert report to the session five Finance and Constitution Committee emphasised the importance of inter-governmental relations to the efficacy of new constitutional arrangements. One of the challenges for the Parliament's capacity to carry out its scrutiny function which the report highlighted as likely to arise in session six was "the extent of inter-governmental disagreement both between the UK Government and EU and between the UK Government and the devolved governments"⁵.

⁴ [Legacy expert panel report to the Finance and Constitution Committee](#), February 2021, para 97

⁵ [Culture, Tourism, Europe and External Affairs Committee Legacy Paper](#). March 2021, para 25 ⁶

The latest progress update is available [here](#).

⁵ [Legacy expert panel report to the Finance and Constitution Committee](#), February 2021, para 154

The legacy expert report also concluded that there was a significant challenge for the Parliament in conducting meaningful scrutiny of inter-governmental working. It considered that this was a key area for scrutiny given the number and scope of new inter-governmental agreements such as common frameworks as well as the increased scope for policy-making on an informal inter-governmental basis. The report recommended that the Scottish Parliament work with the Scottish Government

to clearly define its scrutiny role to ensure meaningful scrutiny of inter-governmental working.⁶

Given the complexity of the new constitutional framework following the UK's departure from the EU (in particular the interaction between the Internal Market Act, Common Frameworks and Scottish Ministers' keeping pace power), the report of the European, External Affairs and Culture Committee stressed the importance of interparliamentary working during session six. The Committee saw this as "as a key means of adding value to scrutiny of the EU-UK relationship in the next session of Parliament"⁷ and recommended that its successor committee develop good relations with other legislatures across the UK and with ministers from other governments in the UK including UK Government ministers.

The value of inter-parliamentary working was also recognised by the legacy expert panel report to the Finance and Constitution Committee, which recommended "more effective inter-parliamentary working in response to the impact of Brexit on devolution. In particular, in developing inter-parliamentary working as a mechanism for improving the scrutiny of inter-governmental relations in areas such as common frameworks."⁸

Power of Scottish Ministers to keep pace with EU law

EU law ceased to apply in the UK at the end of 2020, and Scottish legislation no longer requires to be compatible with EU law. However, Scottish Ministers have indicated that, where appropriate, they would like to see Scots Law continue to align with EU law.

Part 1 (section 1(1)) of the [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021](#) confers a power on Scottish Ministers to allow them to make regulations (secondary legislation) with the effect of continuing to keep Scots law aligned with EU law in devolved areas (the "keeping pace" power).

The session five European, External Affairs and Culture Committee recommended that the extent to which there is alignment with or variation from the EU regulatory regime is likely to be a key scrutiny challenge in session six. The Committee felt that

⁶ [Legacy expert panel report to the Finance and Constitution Committee](#), February 2021, para 114, 116 and 148

⁷ [Culture, Tourism, Europe and External Affairs Committee Legacy Paper](#), March 2021, para 31

⁸ [Legacy expert panel report to the Finance and Constitution Committee](#), February 2021, para 24

how decisions on the use of the “keeping pace” power are made and the impact on those decisions of the interaction with the UK Internal Market Act 2021 and common frameworks will be an area which a future committee will wish to monitor and consider⁹.

Similarly, the legacy expert report to the Finance and Constitution Committee highlighted the need for the Parliament to consider its scrutiny role in relation to the keeping pace power and the interaction between the exercise of it by Scottish Ministers and other post EU exit UK legislation and constitutional arrangements. The legacy expert panel report recommended that the Scottish Parliament, in consultation with the Scottish Government, consider “the appropriate and

proportionate level of scrutiny of the operation of the future relationship with the EU, the keeping pace power, common frameworks and the market access principles and how these interact”¹⁰.

The legacy expert panel also noted the Finance and Constitution Committee’s successor committee’s likely “lead role in agreeing guidance with the Scottish Government on how the Parliament’s scrutiny function will work in areas such as the keeping pace power and the operation of common frameworks.”¹¹ Work on this guidance has continued at an official level during the pre-election period.

Keeping Pace with EU law

Following the UK’s departure from the EU, Scottish Ministers have indicated that, where appropriate, they would like to see Scots Law continue to align with EU law.

Part 1 (section 1(1)) of the [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021](#) confers a power on Scottish Ministers to allow them to make regulations (secondary legislation) with the effect of continuing to keep Scots law aligned with EU law in some areas of devolved policy (the “keeping pace” power).

In order to enable the Parliament to effectively hold the Scottish Government to account when using the keeping pace power, the Act requires Scottish Ministers to lay reports (first in draft form for consultation and then a final version) before Parliament on the intended and actual use of the power. There are two forms of reporting to Parliament, a Policy Statement and an Annual Report.

It is expected that the Scottish Government will lay the draft Policy Statement shortly after summer recess. Parliament officials began considering approaches to scrutiny of both the Policy Statement and the Annual Report during the election recess. It is anticipated that the Constitution, Culture, Tourism and Europe and External Affairs Committee will be the lead committee in considering the Policy Statement and the Annual Report.

⁹ [Culture, Tourism, Europe and External Affairs Committee Legacy Paper](#), March 2021, paras 26-28

¹⁰ [Legacy expert panel report to the Finance and Constitution Committee](#), February 2021, para 22

¹¹ [Legacy expert panel report to the Finance and Constitution Committee](#), February 2021, para 92

Trade

The regulation of international trade is reserved by Schedule 5 of the [Scotland Act 1998](#). However, implementing international obligations in relation to devolved matters is devolved.¹² The Act also enables the Scottish Government to assist the UK Government in relation to international relations, including the regulation of international trade, as it relates to devolved matters.¹³

Prior to UK exit from the European Union, responsibility for the negotiation and scrutiny of trade agreements rested primarily with the European Union. As such, trade policy represents a new area of policy-making for UK legislatures and governments.

Trade may fall within the remit of the Economy and Fair Work Committee. The Minister responsible is Ivan McKee MSP, Minister for Business, Trade, Tourism and Enterprise.

The legacy reports of both committees raised trade as an area which successor committees would need to be aware of given the potential for the [EU-UK Trade and Cooperation Agreement](#) (TCA – see **Glossary**) and future international trade agreements to impact on the scope and effectiveness of devolved legislation.

International trade agreements

As recent publicity surrounding the negotiations for a UK-Australia trade agreement demonstrates future bilateral trade agreements negotiated by the UK Government are also likely to include commitments in areas of devolved competence¹⁴. The commitments made as part of trade agreements may, therefore, present a constraint on the exercise of devolved competence.

Recognising this, the session five legacy reports of both the Culture, Tourism, Europe and External Affairs Committee and the Finance and Constitution Committee's legacy expert panel raised scrutiny of new international trade agreements as an area of interest to successor committees.

The legacy expert panel report focused its attention on the impact of trade matters on the devolution settlement, choosing to highlight in particular the scrutiny challenge for the session six Parliament. The report concluded that:

“While devolved administrations might have or be given powers to implement these agreements – as in the UK Trade Bill – there remain problems with parliamentary

¹² Schedule 5, paragraph 7(1) and 7(2)(a)

¹³ Schedule 5, paragraph 7(2)(b)

¹⁴ SPICe spotlight, [A good deal: agriculture and the UK-Australian free trade agreement](#), June 2021 ¹⁷ [Legacy expert panel report to the Finance and Constitution Committee](#), February 2021, para 142

scrutiny of the content of these trade agreements and how they might impact on changes in domestic regulatory policy.¹⁷

The legacy expert panel report noted that the Finance and Constitution Committee had “consistently emphasised that it is essential that the devolved institutions are involved at all stages of the trade negotiation process¹⁵” and that it had recommended that “the Ministerial Forum for Trade provides for meaningful engagement between the UK Government and the devolved administrations and allows for the four nations of the UK to develop a consensual position before the beginning of trade negotiations.”

The view of the session five Finance and Constitution Committee legacy expert panel was that “it is essential that the Forum is accountable to the devolved legislatures to enable scrutiny of its decisions”¹⁶. It also believed that future trade agreements with non-EU countries might have significant implications for the Scottish Government’s regulatory autonomy.

The EU-UK Trade and Cooperation Agreement (TCA)

The TCA’s governance arrangements provide wide-ranging powers for the European Commission and the UK Government in the management of the Agreement. It also provides a limited role for the UK Parliament in partnership with the European Parliament.

Despite the Agreement impacting on devolved matters, no role is set out for the devolved administrations or legislatures. Given the importance of the governance arrangements, devolved institutions may wish to explore ways to oversee and seek to influence the operation of the TCA¹⁷.

A ‘Partnership Council’, co-chaired by the European Commission and the UK Government, will oversee the implementation of the TCA. The Partnership Council will be supported by nineteen Specialised Committees and four working groups. The Specialised Committees will consider issues which are within devolved competence such as fisheries, law enforcement and judicial co-operation.

It is not yet clear what role the devolved administrations will play in the governance structures of the TCA. The governance structures will, however, be crucial to managing the relationship between the UK and the EU. As such, the Culture, Tourism, Europe and External Affairs Committee recommended that the Scottish Government, at Ministerial and official level as appropriate, should be present at meetings of the Partnership Council or its supporting committees and working groups where devolved policy areas are being discussed. The first meeting of the

¹⁵ Ibid, para 141

¹⁶ Ibid, para 141

¹⁷ SPICe Spotlight, [The governance and oversight of the EU-UK Trade and Cooperation Agreement – what role for the devolved institutions](#), March 2021

Partnership Council was held on 9 June 2021. According to the [agenda for the meeting](#), the devolved administrations were to be represented at the meeting.

The TCA governance structure also establishes a 'Parliamentary Partnership Assembly'. The Parliamentary Partnership Assembly (PPA) is proposed to consist of Members from the European Parliament and UK Parliament. The European Committee recommended that given the governance framework deals with devolved competences, that representation from the Scottish Parliament be included on the PPA.

The House of Commons Public Administration and Constitutional Affairs Committee is currently [undertaking an inquiry into "post-Brexit scrutiny of international treaties"](#). Included in the inquiry remit is consideration of the question:

What role should devolved governments and legislatures, Crown Dependencies and Overseas Territories have in relation to international treaties and arrangements?

The Committee is currently welcoming written evidence, the deadline for which is Wednesday 30 June 2021.

The session five Culture, Tourism, Europe and External Affairs Committee also recommended that its session six successor committee monitor the operation of the TCA, hearing from Scottish stakeholders that:

"the new 'trading relationship' with the EU is having a significant impact on key sectors of the Scottish economy and this is likely to intensify in the coming months"¹⁸.

Consideration of the operation of the Ireland and Northern Ireland Protocol was undertaken by the Culture, Tourism, Europe and External Affairs Committee. It was concerned by the implications of the Protocol for the trading relationship between Scotland and Northern Ireland and especially for the port of Cairnryan and the south west of Scotland. The effective operation of the Protocol is still subject to negotiations between the UK Government and the European Commission. It was a recommendation of the Committee that its successor monitor the operation of the Protocol as a matter of priority early in session six.

The report of the legacy expert panel to the Finance and Constitution Committee highlighted the impact of the TCA on future legislative scrutiny, stating that:

"When scrutinising Scottish bills or subordinate legislation, the limits on regulatory autonomy will not always be clear, given the impacts of the UKIMA, common frameworks and the Trade and Cooperation Agreement (TCA)... Analysing such legislation presents a different challenge to the more familiar one of determining what

¹⁸ [Culture, Tourism, Europe and External Affairs Committee Legacy Paper](#). March 2021, para 4

*the limits of legislative or executive competence are. Both exercises will be necessary to fully understand the policy approach being taken.*¹⁹

The legacy expert panel report also raised the administrative changes linked to trade, highlighting new UK-wide bodies such as the Trade Remedies Authority and the Trade and Agriculture Commission, explaining that “While these bodies are often established to keep them at arm’s length from Ministers, their activities may involve policy choices and have real world impacts.”²⁰

Part two

Legislative powers

The legacy expert panel report to the Finance and Constitution Committee highlighted the changing nature of legislative powers in the post EU era and the scrutiny challenge which this posed. It noted the need for scrutiny of the exercise within devolved competence of the legislative powers of both UK Government and Scottish Government Ministers in areas previously within the competence of the EU and the statutory and non-statutory constraints on the use of those powers²¹. Many of those statutory and non-statutory constraints are explored in this paper.

United Kingdom Internal Market Act 2020

The [United Kingdom Internal Market Act 2020](#) establishes two market access principles to protect the flow of goods and services in the UK’s internal market²²:

- the principle of mutual recognition means goods and services which can be sold lawfully in one nation of the UK can be sold in any other nation of the UK
- the principle of non-discrimination means authorities across the UK cannot discriminate against goods and service providers from another part of the UK.

The market access principles in the Act have the potential to disapply devolved legislation and significantly reduce its impact. Before the Act came into force, Scottish legislation applied to all goods and services within Scotland.

The UK Internal Market Act 2020 means that goods and services produced in Scotland will be subject to Scottish legislation but those coming into Scotland from elsewhere in the UK will not be so long as they meet any regulatory standards in the place they originated.

Further, goods which originate in another country (i.e. outside the UK) but which meet the rules of the UK nation in which they arrive can then be sold across the UK. Accordingly, goods which are imported first into another UK nation and transported

¹⁹ [Legacy expert panel report to the Finance and Constitution Committee](#), February 2021, para 118

²⁰ *Ibid*, para 139

²¹ *Ibid*, para 170-177

²² Explored in more detail in detail in the [SPICe Briefing on the Internal Market Bill](#).

from there into Scotland do not need to meet different Scottish rules and standards. This means that trade agreements have the potential to increase the impact of the Internal Market Act.

UK Government Ministers do have the power to disapply the Act's market access principles where the UK Government has agreed with one or more of the devolved governments that divergence is acceptable through the common frameworks process, but they are not obliged to do so.

The Finance and Constitution Committee's legacy expert panel report stated that "as a minimum, the Parliament will need to be sighted on and understand the impact on its competences arising from the operation of the UK internal market and especially the level of policy divergence both within the UK and between the different parts of the UK and the EU."²³

The [Scottish Government has also argued](#) that the UK Internal Market Act means that the UK Government can more readily disregard the views and policies of devolved administrations in trade negotiations, as any outcomes of negotiations can be imposed across the UK through the Act's provisions.

The [Scottish Government has stated](#) it believes that "while devolved legislatures will technically still be able to legislate as they currently do, laws that they pass will be fundamentally undermined by the Act's market access principles as well as being potentially open to legal challenge under the Act"²⁴.

The UK Internal Market Act also gives the UK Government a new power to spend in devolved policy areas such as economic development, culture, infrastructure (including health, education, housing and prisons), domestic educational and training activities and exchanges, and international educational and training activities and

exchanges. The UK Shared Prosperity Fund will be run by the UK Government with potentially little involvement of the Scottish Government in which case it may be challenging for the Scottish Parliament to scrutinise this spending in devolved areas.

Common Frameworks

During its membership of the European Union, the UK was required to comply with EU law. This meant that, in many policy areas, a consistent approach was often adopted across all four nations of the UK, even where those policy areas were devolved. With the requirement to comply with EU law now at an end, the UK and devolved governments have agreed that a number of common frameworks will be needed to avoid significant policy divergence between the nations of the UK, where that would be undesirable.

The Scottish Government and the Scottish Parliament have worked together to produce a protocol for the sharing of information on common frameworks. As part of

²³ Ibid, para 23

²⁴ [After Brexit: The UK Internal Market Act and devolution](#), Scottish Government, March 2021, para

its scrutiny role, the Scottish Parliament needs to be able to consider the Scottish Government's approach to the development of common frameworks. The committees of the Scottish Parliament will lead on common frameworks in their policy area, providing scrutiny of these when required.

The legacy expert panel noted in its report to the session five Finance and Constitution Committee that a successor committee could have "a monitoring and co-ordinating function in relation to how devolution is working following Brexit²⁵", extending to reviewing how the common frameworks process is operating and agreeing guidance with the Scottish Government on how the Parliament's scrutiny function will work in areas such as the operation of common frameworks.

External Affairs

Due to the work involved in scrutinising the implications of the UK's departure from the EU and the impact of the COVID-19 pandemic, the session five Culture, Tourism, Europe and External Affairs Committee had little time to consider external affairs matters.

Whilst the Committee launched an inquiry into the Scottish Government's external affairs policy in June 2019, other commitments meant it was unable to take the inquiry forward. As a result, the Committee recommended that "scrutiny of the Scottish Government's external affairs policy may be an area of scrutiny which a successor Committee may wish to undertake in the next session"²⁶.

Culture

In the area of culture policy, the session five Culture, Tourism, Europe and External Affairs Committee legacy report highlighted four areas of work it had considered:

- arts funding;
- support for the screen sector; • Glasgow School of Art; and
- census 2022.

In relation to arts funding, the Committee concluded that "the impact of the Covid-19 pandemic has placed even greater pressure upon the arts, including funding"²⁷. The Committee highlighted the findings of its arts funding inquiry and recommended that a successor Committee continue to monitor how funding is being used to support the arts including assessing whether "government portfolios are strategically aligned to fund the arts in a way that supports and delivers national outcomes"²⁸.

In relation to the screen sector, the Committee recommended that the session six Committee should "scrutinise public sector broadcasters, and the broadcasting

²⁵ [Legacy expert panel report to the Finance and Constitution Committee](#), February 2021, para 92

²⁶ [Culture, Tourism, Europe and External Affairs Committee Legacy Paper](#). March 2021, para 38

²⁷ [Culture, Tourism, Europe and External Affairs Committee Legacy Paper](#). March 2021, para 62

²⁸ [Culture, Tourism, Europe and External Affairs Committee Legacy Paper](#). March 2021, para 62

landscape generally, regarding commissioning of Scottish content and the role of commissioners based in Scotland”²⁹.

The Committee also recommended that its successor Committee should “continue to monitor the progress of Screen Scotland in the next session of Parliament”³⁰.

In relation to the Glasgow School of Art, the report recommended that at the conclusion of the Scottish Fire and Rescue Service investigation into the 2018 fire, the Scottish Government should establish a public inquiry with judicial powers into the 2014 and 2018 fires at the Glasgow School of Art.

The Culture, Tourism, Europe and External Affairs Committee was the lead Committee scrutinising the [Census \(Scotland\) Amendment Bill](#) and subsequently on associated secondary legislation required for the delivery of the census in 2021. As a result of the Covid-19 pandemic, the Scottish Government decided to postpone the census until March 2022.

The legacy report recommended that a successor Committee “continue to monitor progress in delivery of the Census in 2022 and, in particular, to scrutinise the cost of delivering the Census and how the data from the Scottish Census will be comparable to other census data in the UK”³¹.

Covid-19 and culture

In response to the Covid-19 pandemic, the Culture, Tourism, Europe and External Affairs Committee undertook a rolling programme of scrutiny to examine the impact of the virus on Scotland’s culture and tourism sectors in recognition of the fluid nature of the response to the pandemic.

The Committee used its Legacy Paper to recommend that a session six Committee should “take stock of the position of the culture and tourism sectors early in the next session of Parliament”³².

²⁹ [Culture, Tourism, Europe and External Affairs Committee Legacy Paper](#). March 2021, para 68

³⁰ [Culture, Tourism, Europe and External Affairs Committee Legacy Paper](#). March 2021, para 71

³¹ [Culture, Tourism, Europe and External Affairs Committee Legacy Paper](#). March 2021, para 79

³² [Culture, Tourism, Europe and External Affairs Committee Legacy Paper](#). March 2021, para 46

Glossary

Common framework: an agreed approach to a particular policy, including the implementation and governance of it. Common frameworks are being developed to ensure that rules and regulations in certain policy areas remain consistent across the UK.

Deficiency correction: Changes required to be made to EU retained law to ensure it worked effectively in domestic law. Over 80,000 ‘deficiencies’ were corrected. Given the unprecedented scale of the exercise, UK and Scottish Government Ministers were given special powers under the [European Union Withdrawal Act 2018](#) (EUWA) to correct deficiencies through subordinate legislation.

EU-UK Trade and Cooperation Agreement (TCA): The TCA sets out preferential arrangements in areas such as trade in goods and services. It is underpinned by provisions ensuring a level playing field and respect for fundamental rights. The TCA does not match the level of economic integration that existed while the UK was an EU Member State, but it does go beyond traditional free trade agreements.

Protocol 1: Where Scottish Ministers allowed the UK Government to correct deficiencies within devolved competence on their behalf, rather than exercising their own equivalent powers in the EUWA, the Scottish Ministers notified the Scottish Parliament under this protocol which was agreed between the Scottish Government and the Scottish Parliament. The role of the Parliament was to scrutinise the proposal by Scottish Ministers to consent to the deficiency being corrected by UK statutory instrument laid in the UK Parliament (rather than in legislation laid in the Scottish Parliament). There may be some instruments containing provisions relating to devolved matters made under the EUWA to fix deficiencies in retained EU law in session six.

Protocol 2: A number of Brexit related UK Parliament Acts have conferred powers on UK Ministers to make regulations in areas of devolved competence. It is expected that the UK Government will make use of these powers to make instruments that would include provisions within the legislative competence of the Scottish Parliament. There are significant numbers of such powers which are far wider than deficiency correcting and will have an impact on policy. In most cases Scottish Ministers’ consent will be sought ahead of the exercise of these powers by UK Ministers. The Scottish Parliament and the Scottish Government have agreed this protocol which will enable the Scottish Parliament to scrutinise the consent by Scottish Ministers to such provisions.

Retained EU law: a snapshot of the EU law which was in place in the UK on 31 December 2020. Created so that there was legislative continuity in the law which applied in the UK immediately prior to and immediately after leaving the EU.

Section 12 powers: the European Union (Withdrawal) Act 2018 gives UK Ministers powers to make freezing regulations for up to two years from ‘exit day’ (i.e., until 31 January 2022). The regulations themselves expire five years after they come into

force. The power could be used to prevent the introduction of new regulatory measures by the Scottish Parliament and Scottish Government in policy areas which are currently devolved. To date the UK Government has made no such regulations. These powers are known, for short, as section 12 powers because the power to make freezing regulations in relation to the Scottish Parliament's competence is in section 12 of the Act; the equivalent power to freeze the Scottish Government's competence to make secondary legislation is in Schedule 13, paragraph 1 of the Act. Both these sections amended the Scotland Act 1998 (sections [30A](#) and 57(4) respectively).

UK Internal Market Act 2020: An Act of the UK Parliament, the [United Kingdom Internal Market Act 2020](#) establishes two market access principles to protect the flow of goods and services in the UK's internal market.

Sarah Atherton (Constitution), Iain McIver (Europe and External Affairs) and Ned Sharratt (Culture) SPICe research
14 June 2021

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.

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26th August 2021

Dear Clare

Congratulations you on your appointment as Convener of the Constitution, External Affairs and Culture Committee. I thought it would be useful to provide a brief update on the current constitutional context, and about the common frameworks programme before my committee appearance on 2 September.

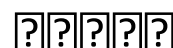
The Constitutional Consequences of EU Exit

The people of Scotland decisively rejected leaving the EU in the 2016 referendum.

Nevertheless the UK Government chose to take Scotland out of the EU, against its will and at the height of a global pandemic, a reckless decision that that is causing significant economic and social damage to Scotland, and indeed the whole of the UK.

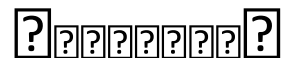
Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

The Scottish Parliament, Edinburgh EH99 1SP



EU exit also means a fundamental change in the UK's constitutional arrangements. The challenge for devolved governments and legislatures is how that change will recognise and respect their roles and responsibilities under the devolution settlements and legislation. Some of the challenges come in the new structures that are being created following EU exit. These new systems of governance for the UK post EU membership include:

- the agreement of Common Frameworks;
- the impact of the Internal Market Act;
- the implementation of the Trade and Co-operation Agreement, including the involvement of devolved institutions;
- and the scope for Scotland to remain aligned with the EU in devolved areas.



Other challenges have arisen from the pressures that the process of EU exit have placed on the existing systems of UK governance and the devolution settlement.

The process of EU exit has demonstrated the limits of the protection of the devolution settlement within the UK constitution, and that it is liable to be changed unilaterally by the UK Government and Parliament should they wish.

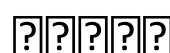
For example, since 1999 UK governments of various complexions scrupulously observed the Sewel Convention that the UK Parliament would not normally legislate for devolved matters or adjust the competence of the Scottish Parliament without its consent. That is no longer the case.

Since the EU referendum there have been four separate occasions where the UK Government has overridden this convention and passed legislation despite an explicit refusal of consent by the Scottish Parliament, most notably with the UK Internal Market Act.

The Internal Market Act is the single most important factor in the changed context. As you are aware the Scottish Government remains resolutely opposed to the Act, and the Welsh government is challenging the legality of some of its provisions in relation to the Government of Wales Act. What are in effect extensive new constraints on the exercise of devolved powers have been imposed without consent, and without any of the exemptions for wider

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policy aims that applied when the UK was subject to EU rules. For example, the sensible and proportionate exemptions from European Single Market rules – on the grounds of, for example, public health or environmental protection – do not exist under the UK Government’s imposed regime.

The Act also confers new powers on UK Ministers to further alter the powers of the Scottish Parliament without its consent: delegated powers in the Act mean that devolved policy areas can be brought within – or excluded from – the scope of the market access principles by UK Ministers alone, without the agreement of the Scottish Parliament.

Work is ongoing to fully map out and understand the Act’s impact: it will take time to fully grasp its implications for the devolution settlement. However it is clear that the increased complexity and uncertainty introduced by the Act presents unprecedented challenges for the exercise of the committee’s scrutiny function – something brought out well in the committee’s legacy report.

Your committee will, for example, have to address complex new questions around competence, as the entire Act has been placed in Schedule 4 of the Scotland Act and therefore beyond any amendment by the Scottish Parliament. The policy effect of proposed devolved legislation may also in many cases be difficult to gauge, as the unqualified application of the Act’s market access principles will lead to situations where rules set elsewhere in the UK will automatically apply in Scotland regardless of decisions taken by the Scottish Parliament.

The spending powers in the Act allow the UK Government to act in areas exclusively devolved to the Scottish Parliament. Spending is only one aspect of coherent policy design, so it is unclear how the UKG will ensure its decisions in these areas will support wider devolved policy objectives.

It is also unclear how this spending will be funded, that is whether there will be additional funding for devolved activity in Scotland, or whether UKG will bypass the Barnett process and effectively reduce the devolved budget.

Common Frameworks

An update on frameworks delivery is included as an annex to this letter.

In many respects work on common frameworks is a positive example of co-operation between the four nations of the UK. Work on the programme is informed by a set of principles agreed by JMC Ministers October 2017 (see Annex A).

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Those principles recognised that new arrangements might be needed to reflect the UK’s changing trading relationships after EU exit, or to ensure the functioning of the UK’s internal market (while acknowledging the legitimacy of policy divergence).

Crucially the principles also state that frameworks must respect devolution and the democratic accountability of the devolved legislatures, and that they will afford at least equivalent flexibility to tailor devolved policy as was the case under EU law.

As you can see from the annex progress has been made on agreeing provisional frameworks which have been operating since the start of this year.

However, four nations agreement is needed in relation to a number of important cross cutting issues, including around operational interaction with the Northern Ireland protocol – in particular how the intra-UK policy divergence required under the protocol will be addressed through common frameworks – and how reserved matters such as international relations will be addressed in policy issues covered by a common framework, in line with the commitment to close working on these matters in the JMC frameworks principles.

Frameworks’ interaction with the UK Internal Market Act remains the biggest challenge, and the Act makes the finalisation and implementation of common frameworks significantly more difficult. As matters stand, policy divergence agreed through a framework would, in almost all circumstances, be undermined by the automatic requirement under the Act to accept standards set elsewhere in the UK.

Late in the Bill’s parliamentary passage, UK ministers offered a concession in response to widespread criticism regarding the Act’s impact on common frameworks: a mechanism that would allow for UK ministers to use delegated powers under the Act to exclude policy areas from the Act’s effect, where divergence has been agreed through a common framework. UK ministers assured Parliament at the time that:

In those cases, the Secretary of State would be able to bring to the House a statutory instrument to exclude from the market access principles a specific agreed area of divergence. This would follow consensus being reached between the UK Government and all the relevant parties that this is appropriate in respect of any specific defined topic within a common framework³³.

Officials from the four nations are developing a process that, if adopted, would allow for policy divergence agreed through common frameworks to be excluded from the Act, in a

³³ Lord Callanan, Parliamentary Under Secretary of State, BEIS, House of Lords, 15 December 2020.

<https://hansard.parliament.uk/lords/2020-12-15/debates/30D48FC1-D74D-4627-8045405C01172EAA/UnitedKingdomInternalMarketBill>

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manner that gives effect to the assurances offered by UK Government ministers in Parliament, and in line with the JMC (EN) frameworks principles. It is extremely regrettable that the UK Government did not take the opportunity to amend the Bill last winter to ensure that policy divergence managed by agreement through common frameworks would not be caught by the Act. If frameworks are to operate as intended, a clear exclusions process is needed that is supported by an unequivocal political commitment to ensure that where policy divergence has been agreed through a common framework, UK Ministers will exercise their delegated powers and grant an automatic exclusion from the market access principles set out in the Act. This work is ongoing and I hope to be able to provide a further update in the coming weeks.

The Scottish Government is fully aware of the role effective parliamentary scrutiny must play in the development and implementation of common frameworks, and of the need to properly address the cross-cutting issues that bear on frameworks before effective scrutiny can be undertaken. My officials have been in regular contact with parliamentary clerks, and I can assure the committee that the Scottish Government is doing all it can to progress these matters with the UK Government.

While a commitment from UK Ministers to exempt policy divergence covered by a common framework from the market access principles in the Act would be welcome, it would not address in any way the fundamental damage the Act is doing to the devolution settlements: for as long as it is in force it will act as an insurmountable barrier to more equitable, respectful and productive relations between the governments of the UK.

Inter-governmental relations

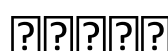
Responsibility for intergovernmental relations in the Scottish government sits with the Deputy First Minister but I wanted to say a little about the approach that the Scottish Government is taking to relations with the UK government and the other devolved governments.

As you know, the Scottish Government firmly believes that independence within the EU is the best way to secure Scotland's future and to protect and enhance the powers of the Scottish Parliament. But for as long as Scotland remains part of the UK the Scottish government is committed to working within the current constitutional framework. We will continue to make clear our principled opposition to the decision to leave the EU and work hard to mitigate, where possible, the economic and social damage it is causing. We will also continue to resist and overcome the damage to the powers and responsibilities of Scottish Ministers and the Scottish Parliament being wreaked by the Internal Market Act.

We will support cooperative working with the UK Government and other devolved governments in an equal partnership and by consensus to secure Scotland's interests.

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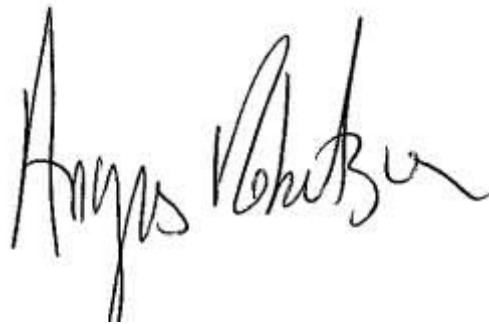
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The committee is interested in the Intergovernmental Relations Review. It is instructive that discussions have been underway since March 2018. The detail of progress made in work in line with the remit *to ensure existing intergovernmental structures were fit for purpose in light of the UK's exit from the EU* was set out in a UK government publication shortly before the Scottish election³⁴. Discussions between officials continue, but I am clear that while improved structures and processes would be of some value, what is needed is a fundamental change of attitude and behaviour by the UK government if there is to be a meaningful improvement in inter-governmental relations. I understand that the Chancellor of the Duchy of Lancaster intends to write to his counterparts in devolved governments early next month about the detail of the review – either myself or Mr Swinney would be happy to provide a further update to the committee after that.

I hope this information is useful to the committee and I look forward to seeing you at next Thursday's meeting.

Best wishes,



ANGUS ROBERTSON

³⁴ <https://www.gov.uk/government/publications/progress-update-on-the-review-of-intergovernmental-relations>
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ANNEX A: Common Frameworks: Definition and Principles (agreed at JMC (EN) October 2017)

Definition

As the UK leaves the European Union, the Government of the United Kingdom and the devolved administrations agree to work together to establish common approaches in some areas that are currently governed by EU law, but that are otherwise within areas of competence of the devolved administrations or legislatures.

A framework will set out a common UK, or GB, approach and how it will be operated and governed. This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued. Frameworks may be implemented by legislation, by executive action, by memorandums of understanding, or by other means depending on the context in which the framework is intended to operate.

Context

The following principles apply to common frameworks in areas where EU law currently intersects with devolved competence. There will also be close working between the UK Government and the devolved administrations on reserved and excepted matters that impact significantly on devolved responsibilities.

Discussions will be either multilateral or bilateral between the UK Government and the devolved administrations. It will be the aim of all parties to agree where there is a need for common frameworks and the content of them.

The outcomes from these discussions on common frameworks will be without prejudice to the UK's negotiations and future relationship with the EU.

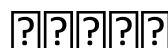
Principles

1. Common frameworks will be established where they are necessary in order to:

- enable the functioning of the UK internal market, while acknowledging policy divergence;
- ensure compliance with international obligations;
- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;

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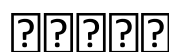
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- enable the management of common resources;
- administer and provide access to justice in cases with a cross-border element;
- safeguard the security of the UK.

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2. Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:
 - be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent;
 - maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules;
 - lead to a significant increase in decision-making powers for the devolved administrations.

3. Frameworks will ensure recognition of the economic and social linkages between Northern Ireland and Ireland and that Northern Ireland will be the only part of the UK that shares a land frontier with the EU. They will also adhere to the Belfast Agreement.

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ANNEX B: Update on Frameworks Delivery.

This note provides an overview of frameworks delivery as at 16 August 2021. This update follows up on the previous update on frameworks delivery that the former Cabinet Secretary for the Constitution, Europe and External Affairs' provided in [his letter to the Finance and Constitution Committee of 8 February](#).

Full frameworks and frameworks that have undergone formal scrutiny

Three frameworks have undergone formal scrutiny by the Scottish Parliament:

- **Hazardous Substances Planning** – scrutinised by the former Local Government and Communities Committee, with [recommendations sent to the Scottish Government on 13 January 2021](#).
- **Nutrition Labelling, Composition and Standards** – scrutinised by the former Health and Sport Committee, with [recommendations sent to the Scottish Government on 22 December 2020](#).
- **Food and Feed Safety and Hygiene** – scrutinised by the former Health and Sport Committee, with [recommendations sent to the Scottish Government on 16 February 2021](#).

The Hazardous Substances Planning framework was finalised and received final JMC (EN) approval from all four administrations in late March 2021.

Work to finalise the Nutrition Labelling, Composition and Standards and the Food and Feed Safety and Hygiene frameworks is on-going.

Provisional frameworks

Most remaining frameworks were approved as provisional frameworks by portfolio Ministers of all four administrations by the end of 2020 or in early 2021. They had also been approved by JMC (EN) Minister from the Scottish, Welsh and UK governments. However, in February 2021, these frameworks still lacked provisional JMC (EN) approval from the Northern Ireland Executive.

The following five provisional frameworks received provisional JMC (EN) approval from the Northern Ireland Executive shortly before the start of the Scottish and Welsh pre-election periods:

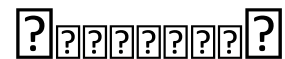
- Food Compositional Standards and Labelling
- Blood Safety and Quality

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- Organs, Tissues and Cells Safety and Quality
- Public Procurement
- Public Health Protection and Health Security

The first four of these have also been laid in the UK Parliament and published on [UK Government's webpage](#). All administrations agreed that formal scrutiny is not meant to start at this point and legislatures were informed that they will receive updated versions of these



provisional frameworks for formal scrutiny once all administrations agree that the relevant frameworks have been sufficiently developed.

Since then, JMC (EN) Ministers from all four nations have agreed a revised clearance process for frameworks. According to this revised process, portfolio ministers agree individual provisional frameworks on behalf of their administrations. This is carried out through InterMinisterial Groups (IMGs) where these have been established. So as to ensure continued adherence to JMC (EN) Principles and consistency, individual frameworks will be continue to be reviewed and signed off by the UK Common Frameworks Project Board before they are agreed by portfolio ministers. This means that, while the JMC (EN) Ministers retain strategic oversight for UK Common Frameworks, all provisional confirmation agreement of individual frameworks is entrusted to portfolio ministers.

This had the effect that the remaining provisional frameworks, which had been signed off by portfolio Ministers across all administrations and by all JMC (EN) Ministers except for JMC (EN) Ministers in the Northern Ireland Executive, are now considered to have been confirmed as provisional frameworks.

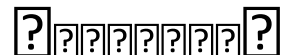
The 21 provisional frameworks that are operational but have not yet been sent to legislatures for scrutiny, therefore, are:

- **Food Compositional Standards and Labelling*** □ **Blood Safety and Quality***
- **Organs, Tissues and Cells Safety and Quality***
- **Public Procurement***
- **Public Health Protection and Health Security**
- **Emissions Trading System** – it should be noted that extensive scrutiny of the legislation associated with the framework has already been undertaken.
- **Radioactive Substances**
- **Resources and Waste**
- **Ozone-depleting Substances and F-gases**
- **Air Quality**

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- **Industrial Emissions – Best Available Techniques**
- **Chemicals and Pesticides**
- **Agricultural Support**
- **Animal Health and Welfare**
- **Zootechnics**
- **Plant Health**
- **Plant Varieties and Seeds**
- **Fisheries Management and Support****
- **Fertiliser Regulations**
- **Late Payment (commercial transactions)**
- **Organic Farming**



* *These provisional frameworks have been published.*

** *The Fisheries framework is in three parts, including a short administrative arrangement building on existing working arrangements (e.g. the UK Fisheries Monitoring Centre agreement) and a provisional approach. The main part of the framework to ensure delivery of international obligations and joint management of a common resource is the Joint Fisheries Statement and further detailed in Fisheries Management Plans, as set out in the UK Fisheries Act. This has a statutory consultation and legislative scrutiny process as set out in Schedule 1 of the Act.*

As outlined in the former Cabinet Secretary for the Constitution, Europe and External Affairs' previous communication to the Finance and Constitution Committee, all provisional frameworks have undergone collaborative policy development, testing of policy conclusions, peer review and, where appropriate, external sector-specific engagement.

While we consider these provisional frameworks to be robust and fit for purpose, the impact of the UK Government-EU Trade and Co-operation Agreement, the implementation of the Northern Ireland Protocol and the passing of the UK Internal Market Act mean that it has been necessary to review the terms of a number of provisional frameworks. This work is on-going. Provisional frameworks will not be finalised as full frameworks until such development, necessary stakeholder engagement and formal scrutiny by all four legislatures have taken place.

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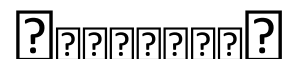
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Further frameworks in development

There has also been agreement at official level to reconsider the need for frameworks for **Mutual Recognition of Professional Qualifications**, and **Services Directive**, which had previously been expected to move to no further action. What progress can be made in these areas is dependent on a number of factors, in particular the impact of the UK Internal Market on these policy areas. Discussion around the potential need for frameworks in these policy areas are on-going.

'No framework required' areas

In 2020, a reclassification exercise was undertaken jointly by the UK Government and the devolved governments to determine where frameworks should be reclassified as 'no framework required' (this classification was previously referred to as 'no further action'). This classification means that the UK Government and devolved governments are in agreement that the impact of divergence across the UK is low and that there are alternative opportunities for future joint ways of working, meaning that a formal framework agreement is not required. This exercise has resulted in fewer frameworks requiring development than was previously published in the UK Government's [revised frameworks analysis in 2020](#).



Parliamentary Scrutiny

Parliamentary scrutiny is an essential part of the frameworks development process. It is important to ensure that the Scottish Parliament is suitably informed about, and is able to comment, on proposed frameworks.

The Scottish Government and the Scottish Parliament's former Finance and Constitution Committee had previously agreed a robust and flexible process for scrutiny, which was set out in a [letter of 24 February 2021 from the former Cabinet Secretary for the Constitution, Europe and External Affairs to the former Committee](#). The former Committee agreed to this process in

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[its letter of 5 March 2021](#). This process emphasises the importance of policy leads responsible for individual frameworks engaging with relevant committee clerks to plan for and take forward formal scrutiny. The Scottish Government intends to continue to follow this process. A flowchart of this process, accounting for the above-mentioned change to the clearance process of provisional frameworks that has been agreed by all four governments, is included in **Annex C**.

Lead scrutiny committees at the Scottish Parliament received a summary or update of each provisional framework before the end of 2020.

We hope the remaining provisional frameworks will be able undergo formal scrutiny by the Scottish Parliament from autumn 2021 onwards. However, achieving this aim will depend on further progress being made on the resolution of cross-cutting issues, particularly around the UK Internal Market Act exclusion process and on standardised text on international relations and trade.

Stakeholder engagement

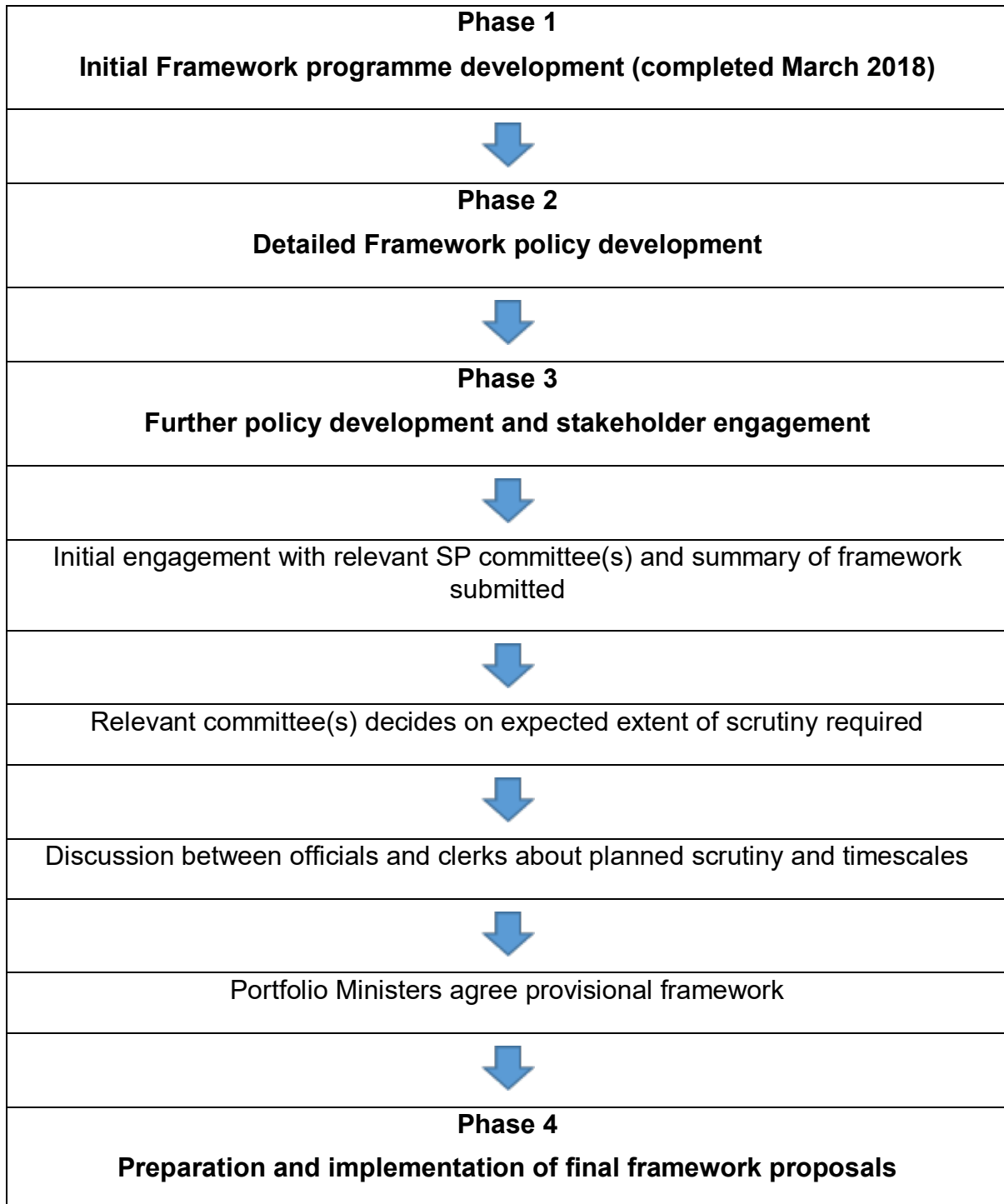
The JMC(EN) agreed that all administrations should seek out opportunities to jointly engage with the stakeholder community where Ministers agree that it would be appropriate.

A stakeholder engagement plan was agreed by the UK Frameworks Project Board and has been used to inform stakeholders about frameworks. Due to the pandemic and a lack of clarity regarding key cross-cutting considerations, stakeholder engagement on a number of provisional frameworks was not concluded before the end of the Transition Period. The pandemic has also impacted on how effective stakeholder engagement can take place. The on-going lack of resolution of cross-cutting issues has further delayed stakeholder engagement on some frameworks. We remain committed to ensuring that the required stakeholder engagement on all framework policy areas has taken place before they are finalised as full frameworks.

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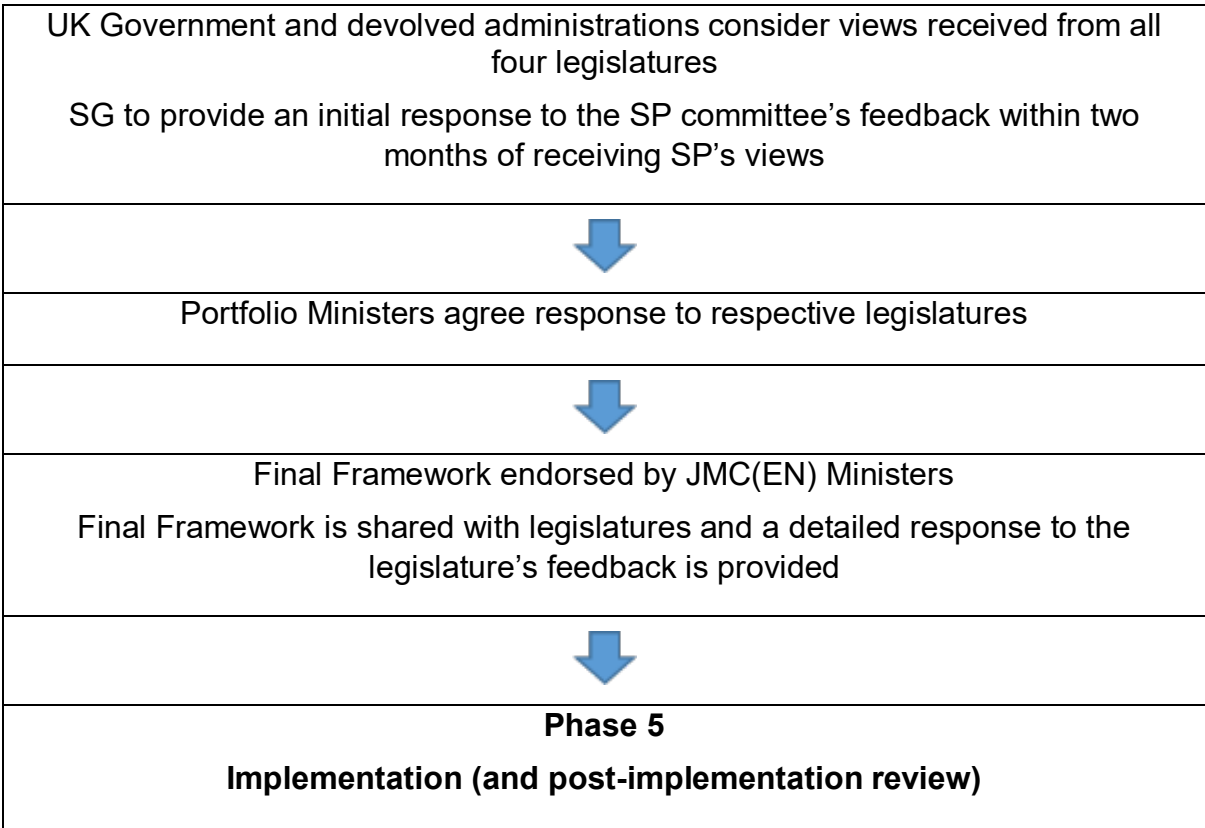
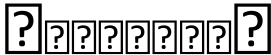
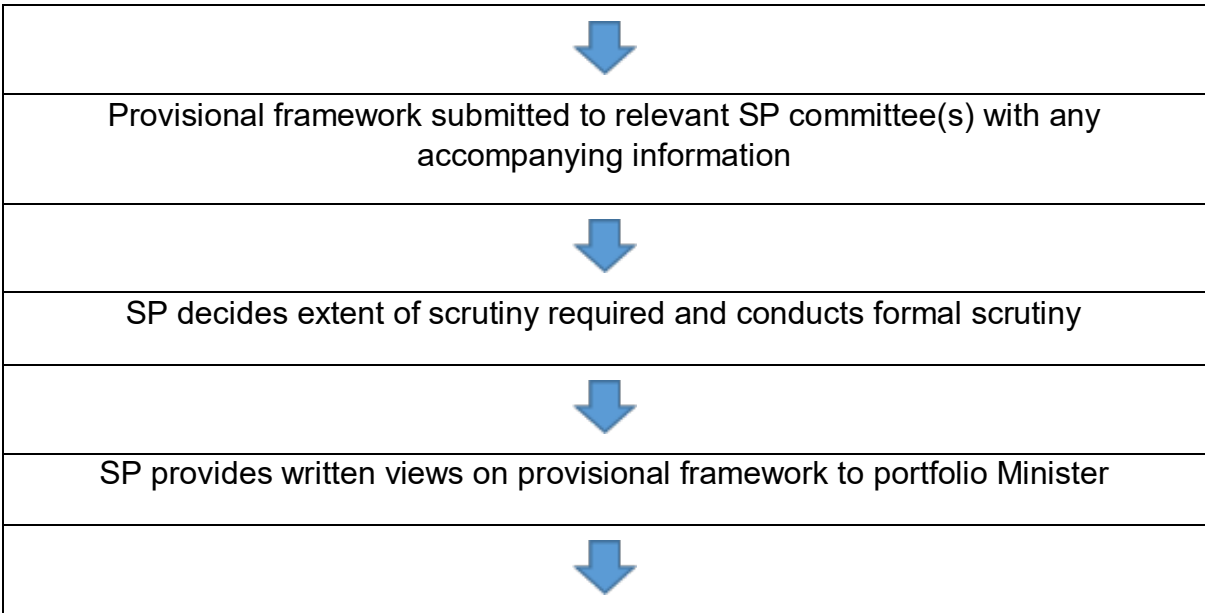
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ANNEX C: The parliamentary scrutiny process mapped against phases of framework development



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