



Law Society
of Scotland

Consultation response

DEFRA Common frameworks

April 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Environmental Law and Constitutional Law and Human Rights Sub-committees welcome the opportunity to respond to the House of Common's Environment, Food and Rural Affairs Committee's Inquiry on *DEFRA Common frameworks*¹. We have the following comments to put forward for consideration.

General remarks

We welcome publication of the DEFRA common frameworks which have been anticipated for some time.

In October 2017, the UK and devolved governments agreed a set of principle for the establishment of common frameworks, including that "common frameworks will be established where they are necessary in order to: enable the functioning of the UK internal market, while acknowledging policy divergence".² In late 2017, the Cabinet Office published a list of 111 points where EU law intersects with devolved matters in relation to Scotland (160 points overall where EU law intersects with devolved powers across the UK). This has been supplemented by the publication of various *UK Government's Frameworks analysis* documents from 2017 to date, with the most recent dating from November 2021³. These analyses have set out the UK Government's policy positions on whether a policy area requires a common framework or not, including whether a common framework has any associated primary legislation. The most recent analysis sets out 29 policy areas where common rules and ways of working are or will be implemented through a non-legislative Common Framework agreement, and 3 policy areas where new primary legislation has been introduced which implements common rules and ways of working, alongside a non-legislative Framework agreement.

¹ <https://committees.parliament.uk/work/6591/>

² JOINT MINISTERIAL COMMITTEE (EU NEGOTIATIONS) COMMUNIQUE, 16 October 2017, accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

³ <https://www.gov.uk/government/publications/frameworks-analysis>

We note that there are no domestic legal constraints on the powers of the UK Parliament or UK Government concerning common frameworks. Transforming the common frameworks principles into functional structures has been largely achieved through inter-governmental negotiations. There are a “wide variety of approaches, levels of detail and progression” among the framework structures.

The common frameworks are therefore in place either because of non-legislative agreements or because legislation provides a statutory arrangement for regulating the points of intersection between devolved matters and EU law. Accordingly, we note that the devolved governments will be bound to such common frameworks either because they have agreed to them or because they are bound by law.

Consultation questions

To what extent do the Common Frameworks create a suitable basis for ensuring UK-wide consistency in decision-making and for managing divergence?

The DEFRA frameworks are detailed documents with their contents of particular significance to those operating within the relevant sectors. We do not seek to comment on the detail of each framework.

While differentiation is a natural consequence of devolution, we consider that strong collaboration between the UK Government and devolved administrations is essential, particularly in connection with environmental matters given the transboundary effects of environmental impacts. We welcome the use of common frameworks as a way of avoiding undesirable fragmentation and the potentially disruptive impact of policy divergence.

The areas highlighted in the Common Frameworks are important, complex and often very technical. They comprise highly regulated areas of policy implemented originally by EU Directives, Regulations and Decisions and transposed by UK Acts and subordinate legislation, Scottish Acts and Scottish subordinate legislation; as well as a number of administrative, non-statutory arrangements.

Common Frameworks have the potential to resolve the tensions within the devolved settlement through managing regulatory divergence on a consensual basis while facilitating open trade within the UK internal market.

However, it is not clear how the DEFRA Common Frameworks fit with the new Inter-Governmental review arrangements and with the United Kingdom Internal Market Act 2020 and the role of the Office for the Internal Market (OIM). The Government should explain further how these will function in practice.

We welcome the clear and detailed procedural arrangements set out in the common frameworks. However, it is not yet clear how the DEFRA frameworks fit with the work of the Office of Environmental Protection, as established by the Environment Act 2021, and the work of environmental governance bodies in the devolved authorities, for example, Environmental Standards Scotland as established by the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

It is important that these Frameworks are scrutinised carefully in the UK and devolved Parliaments. It is important that this process complies with obligations under the Aarhus Convention, particularly Articles 7 and 8, in relation to public participation in policy making.

Do they strike the right balance in terms of respecting devolved competence and allowing each government of the UK to support their food and farming sector, but without creating the risk of unfair competition between the four nations?

The provisional draft common frameworks in the following DEFRA areas which the Committee is considering in this Inquiry are:

- a. agricultural support
- b. animal health and welfare
- c. plant varieties and seeds
- d. fertilisers
- e. plant health
- f. organics
- g. chemicals and pesticides
- h. food compositional standards and labelling
- i. air quality
- j. ozone depleting substances and fluorinated greenhouse gases
- k. integrated pollution prevention and control best available techniques and
- l. fisheries management and support

They can be grouped together as follows:

- a. The Agriculture Group,
- b. The Air Quality Group
- c. The Fisheries Management and Support Common Framework, and
- d. Integrated pollution prevention and control best available techniques

The Agriculture Group

This group comprises the common frameworks on agricultural support, animal health and welfare, plant varieties and seeds, plant health, fertilisers, organics, chemicals and pesticides, fisheries management and support, food compositional standards and labelling.

There is a significant level of similarity between the approach taken in setting out the frameworks in the agriculture group. A good example is the common framework on animal health and welfare. It approaches the task of setting out the common framework by setting out as follows: Framework Outline Agreement Section 1: What are we talking about, Section 2: Breakdown of policy area and framework, Section 3: Operational Detail, Section 4. This broad approach to formulating the common framework is followed (with many variations) by all the common frameworks in this group. It should be noted however that the common frameworks in the agriculture group (and across the groups) are not uniform. One suggestion which we make would be that

common frameworks should be edited to produce a single style resulting in frameworks being more easily accessed and understood. The lack of a common editorial standard means that it is difficult to compare and contrast the common frameworks across the group. An example of the lack of uniformity is the use of different diagrams to illustrate the dispute avoidance/resolution applicable. For example, the Plant Varieties and Seeds Provisional Common Framework diagram (page 37) is quite different from that for the Animal Health and Welfare Common Framework (page 21) or the Air Quality Framework (page 26).

However, from our analysis each common framework is accompanied by a concordat (except that of fisheries management and support where a Memorandum of Understanding applies between the UK, Scottish and Welsh Governments and the Department of Agriculture Environment and Rural Affairs Northern Ireland). It therefore appears that each of these frameworks does respect the devolved competence in as much as each government within the UK agreed to the measures to support their food and farming sector.

In our view at the moment, it is speculative to consider whether the common framework and concordat system will prevent unfair competition between the Four Nations. No doubt if that were to happen in the future corrective measures will be applied.

The Air Quality Group

This group comprises the common frameworks on air quality and ozone depleting substances and fluorinated greenhouse gases. This group also involves confirmation that there has been collaboration between the Governments in the UK for example in the Ozone-Depleting Substances Framework it is confirmed that the document was developed collaboratively between officials from the UK Government, Scottish Government, Welsh Government and the Department for Agriculture, Environment and Rural Affairs. The Air Quality Framework goes further to confirm that “*The discussions will be without prejudice to the competence of the UK Government or as the case may be, the competence of the Scottish Government, Welsh Government and the Northern Ireland Executive*” (page 5). The Air Quality Framework also contains extensive provisions about working together, collaboration and where necessary the consent of the Scottish, Welsh and Northern Ireland Executive Ministers is required. This is a position which takes into account devolved competence.

The fisheries common framework is a standalone framework. It makes clear in paragraph 3.1 that “*The UK Fisheries Management and Support Framework (the Fisheries Framework) is an agreement between UK Government, the Scottish Government, Welsh Government, and the Department of Agriculture, Environment and Rural Affairs (DAERA) (hereafter referred to as the Parties), pertaining to the management of fisheries by the four fisheries policy authorities (the Secretary of State, the Scottish Ministers, the Welsh Ministers, and DAERA). The Fisheries Framework reflects the Fisheries Act 2020 (the Act) and its requirements, the dynamic nature of fisheries management, the history of collaborative working between the fisheries policy authorities, and the extent of devolved competence in fisheries matters.*” Such a legislative provision and the framework which is referred to, take into account devolved competence as set out in the legislation.

The Integrated pollution prevention and control best available techniques is a standalone framework. Provisions in the framework indicate that it has been produce in a consensual way; “*This document has been*

developed collaboratively between officials from the UK Government, Scottish Government, Welsh Government and Northern Ireland Executive” (page 1).

Are there any potential practical challenge that could arise from the operation of the Common Frameworks?

It is difficult to foresee practical challenges which could undermine the operation of the Common Frameworks.

Legal challenges are expressly ruled out: *“This Concordat is not intended to be legally binding or enforceable Best Available techniques Framework” (page 20, paragraph 3), and “This concordat is not intended to constitute a legally enforceable contract or to create any rights or obligations which are legally enforceable. It is a statement of the principles that will guide relations between the four Parties.”* Agricultural Support Provisional Common Framework (Page 20, paragraph 6). This is subject to the provisions of devolution legislation which govern matters relating to legislative competence.

If there are other challenges which emerge from the operation of the Common Frameworks, the dispute mechanisms which apply in terms of the concordats seem to be adequate to deal with them. The escalation from Officials to Ministers has some precedent in the Memorandum of Understanding between the UK Government and the Devolved Administrations originally published on 1 October 1999 and reflects the position set out in the Review of Intergovernmental Relations published on 13 January 2022. That review provides for a process which applies to, among other things, common frameworks: *“Any government may refer a disagreement to the IGR Secretariat as a dispute. Escalation of a disagreement between governments as a dispute will only be considered after due and full consideration has been given at portfolio-level (including F:ISC regular engagement), where a disagreement cannot be resolved at portfolio level, and has significant implications for the relationship between two or more governments. This will include circumstances where governments disagree about the interpretation of, or actions taken in relation to, matters governed by intergovernmental agreements, rules or procedures (including Common Framework Agreements)”*.

What is the impact of their operation on key stakeholders?

We have no comment in relation to the immediate impact of the operation of common frameworks on key stakeholders. However, we note that it will be important to keep the practical operation of the frameworks under regular review, with published reporting, so as to monitor their operation on an ongoing basis.

Any other notable observations relating to the content of the framework(s) that may warrant Committee scrutiny.

We have no comment.



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