



Law Society
of Scotland

Consultation response

Environmental Common Frameworks

May 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 Scottish Parliament's Net Zero, Energy and Transport Committee's inquiry on Environmental *Common Frameworks*¹. We have the following comments to put forward for consideration.

Consultation questions

1. Are the frameworks clearly drafted, including in relation to their purpose and scope?

We welcome publication of the common frameworks within scope of this inquiry which have been anticipated for some time.

The environmental common frameworks are detailed documents with their contents of particular significance to those operating within the relevant sectors.

The provisional common frameworks which the Committee is considering in this Inquiry are:

- a. Radioactive substances
- b. Air quality
- c. Best available techniques
- d. Ozone depleting substances and fluorinated greenhouse gases
- e. Chemicals and pesticides

We note that there is a significant level of similarity between the approach taken in setting out the environmental frameworks. A good example are the frameworks on radioactive substances and chemicals and

¹ <https://yourviews.parliament.scot/nzet/environment-common-frameworks/>

pesticides. These broadly both approach the task of setting out the common framework as follows: Section 1: What are we talking about, Section 2: Breakdown of policy area and framework, Section 3: Operational Elements of framework, Section 4: Practical next steps and related issues; and Concordat.

This broad approach to formulating the common framework is followed (with some variations) by all the common frameworks in under scrutiny in this inquiry. It should be noted however that the common frameworks within this group and more generally 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. An example of the lack of uniformity between the frameworks is the use of different diagrams to illustrate the decision making and dispute avoidance/resolution structures.

2. Do the frameworks only cover areas previously governed at an EU level, or do they also include matters not previously governed at an EU level?

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.

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.

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>

3. Do the frameworks set any measures for assessing whether divergence will be acceptable? By, for example, committing governments to maintaining certain standards.

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 environmental common frameworks fit with the United Kingdom Internal Market Act 2020 and the role of the Office for the Internal Market (OIM). We consider that the UK 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 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.

Both the common frameworks on radioactive substances and chemicals and pesticide are accompanied by a concordat. It appears that each of these frameworks does respect the devolved competence in as much as each government within the UK agreed to the measures relevant to each of the sectors covered by the frameworks.

The common frameworks on air quality and ozone depleting substances and fluorinated greenhouse gases may be considered in a group. 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.

Provisions in the best available techniques framework indicate that it has been produced 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).

4. The processes set out in frameworks will be used for the governments to decide when to align and when to diverge.

- **Are these processes clear?**
- **Are the right people involved in decision making?**
- **Is there a role for stakeholders?**

Please see our comments at Q3.

5. Do the frameworks propose any significant changes to policy?

We have no comment.

6. How will the framework change decision-making processes in the policy area in comparison to pre EU exit?

The change from decision-making within the well-established EU structures involving 28 states and a series of formal procedural stages to the much less formalised process for intra-UK discussions represents a major change and it will take time to establish appropriate new working patterns. These must include early opportunities for stakeholder involvement and parliamentary scrutiny before key elements have been determined.

7. Are the decision making processes set out in the frameworks transparent? By, for example, being subject to reporting requirements.

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.

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

Legal challenges are expressly ruled out, for example, “*This Concordat is not intended to be legally binding or enforceable*” Best Available techniques Framework (page 20, paragraph 3). 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)*”.

8. Do the frameworks provide opportunity for ongoing stakeholder engagement, including in any review and amendment process?

We have no comment.

9. Do you have any views on how parliament should monitor the functioning of common frameworks?

We consider that this could be done in a number of ways, for example:

A. have Common Frameworks within a Minister's remit as a standing item for questions whenever that Scottish Minister is asked to provide evidence to the Parliament,

B. actively review Common Frameworks every 6/8 months, and/or

C. when Common Frameworks Reports are published by UK Ministers, invite the relevant UK Minister to attend the Committee and provide comments on the report.



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