

Conference on Common Frameworks: Event Report



FRIDAY 2 NOVEMBER 2018

Finance and Constitution Committee
Scotland's Futures Forum
The Royal Society of Edinburgh
Scottish Parliament External Experts Panel



Scotland's
Futures Forum
Fòram Alba air Thoiseach

BACKGROUND

As the UK leaves the European Union, it will no longer be subject to European legislation that sets legally binding frameworks in a series of policy areas.

UK Common Frameworks are the key mechanism by which the UK Government and devolved Governments might seek to develop and deliver a UK-wide approach in those key policy areas. As a form of intergovernmental relations, they will be a new way of working across the UK.

A framework analysis by the UK Government states that there are 24 areas in which legislative frameworks might be needed, in areas such as Agriculture, Fisheries, Food Safety, Environmental Quality and Recognition of Professional Qualifications.

Organised by the Scottish Parliament's Futures Forum in conjunction with the Finance and Constitution Committee, the Royal Society of Edinburgh and the Parliament's External Experts Panel, this half-day conference at the Royal Society of Edinburgh explored what these frameworks might look like and how they might work. It looked at the role of Parliaments and stakeholders such as business, voluntary organisations and the public sector in considering their development, implementation and delivery. It also considered what should happen if disagreements arise.

WELCOME AND INTRODUCTION

Dr Rebekah Widdowfield, chief executive of the Royal Society of Edinburgh, welcomed participants to the RSE. Following the decision by the UK to leave the EU, the RSE has been engaged in the debate on Brexit through our EU Strategy Group, chaired by Sir John Elvidge.

She also pointed to the [RSE's advice paper on Common Frameworks](#), which noted that there was not yet a unified approach on how Common Frameworks should be established, operated and monitored. Noting that establishing and agreeing Common Frameworks will be a significant complex exercise, Dr Widdowfield said the RSE was pleased to play its part in supporting that work, including by hosting this conference.

As chair of the event, **Bruce Crawford MSP**, convener of the Scottish Parliament's Finance and Constitution Committee, introduced the event. He welcomed participants, including members of the Scottish Parliament, House of Commons, House of Lords and National Assembly for Wales, as well as experts from academia, industry and the third sector from throughout the UK.

Mr Crawford noted that the conference would contribute to the Scottish Parliament's scrutiny of the Brexit process and form a key part of the [Committee's inquiry into Common Frameworks](#).

COMMON FRAMEWORKS: SCOTTISH GOVERNMENT APPROACH

Michael Russell MSP

Cabinet Secretary for Government Business and Constitutional Relations

The Cabinet Secretary opened his contribution by noting that, although the Scottish Government did not want and does not want Brexit to happen, he hoped that the Administrations throughout the United Kingdom can work together and find a way forward to make the process happen.

The Cabinet Secretary noted that the principles of Common Frameworks had been agreed, and there was now a need to test those principles against the reality of the different situations in which they would be needed. It is in these tests that the the importance of a dispute resolution comes in, as disagreements will inevitably happen.

The Cabinet Secretary suggested that one important issue is the need for a definition of the UK internal market, which had been proposed as a replacement for the EU single market. In doing this, Mr Russell pointed out, it is important to remember that there being differences between different parts of the United Kingdom is not a bad thing per se—indeed, those differences are inherent in a devolved system of governance.

There are already differences depending on level of autonomy of the governance structures in different areas, and this will automatically mean that businesses in different parts of the UK will operate from a slightly different basis regardless of other changes.

Mr Russell suggested that there need to be more active discussions on the devolution settlement. The Scottish Government had requested both a review of Sewel process, which is not seen as working, and a clearer understanding of the structure under which Common Frameworks would operate.

The Cabinet Secretary concluded by noting that there is lots of work to do but that there appears to be the will around the table to do it. However, Common Frameworks are an example of how Governments can negotiate agreements – and Mr Russell was very clear that the approach needs to be introduced by agreement and not by imposition, which would be against the founding principles of devolution.

Questions

After his speech, the Cabinet Secretary answered questions on the Joint Ministerial Committee process; the barriers to agreement, including the level of understanding of devolution within Whitehall and Westminster; and the representation of UK interests as compared with those of England.

COMMON FRAMEWORKS – OPTIONS FOR THE FUTURE

Professor Michael Keating

University of Aberdeen and the Centre on Constitutional Change

Professor Keating opened by noting that, although there was a consensus on need for Common Frameworks, there was no consensus on their operation, which presented a problem. He believed that, as always, it would be best to start by addressing and agreeing the broad principles before digging down into the detail, although he understood that, given the Brexit timetable, the detail of Common Frameworks will have to be considered too.

Like the Cabinet Secretary, Professor Keating referred to the principle that Common Framework's would provide for a UK internal market in place of the EU single market. He highlighted challenges with this approach, particularly as the EU internal market can be contentious. Public procurement regulations and the challenge to the Scottish Government's policy of minimum unit pricing for alcohol as examples of where the system has been less than straightforward.

In considering future options for Common Frameworks, Professor Keating focused on four key points:

- 1) What is needed is a better understanding of what Common Frameworks mean, which can then be translated into individual areas.
- 2) There are challenges in translating the European Union approach into the UK context, as the EU has a hierarchy of law, which assists with the operation of the single market, and mechanisms such as Qualified Majority Voting. The UK doesn't have such a system and, if there is no will to replicate it, what governance structures are needed?
- 3) Structures for intergovernmental relations in the United Kingdom vary a lot, and many mechanisms are ad hoc. A clearer system with a consistent procedural approach is required to underpin UK Common Frameworks. Indeed, the devolution settlement needs to be reviewed. As an example, the Sewel mechanism only worked if both Governments agreed; now there have been disagreements, it is clear that a new process is required.
- 4) The asymmetrical nature of devolution in the United Kingdom presents problems in relation to England, which currently doesn't have a voice separate from the United Kingdom. Although a federal structure is unlikely to be brought in overnight, it is important for there to be a distinct English perspective in discussions.

COMMON FRAMEWORKS – OPTIONS FOR THE FUTURE

Heather Roy

Secretary General of Eurodiaconia and former President of Social Platform

With great experience of engaging at supra and trans-national levels, Heather Roy focused on how the perspective of stakeholders such as civil society can be brought into the creation, development, implementation, evaluation and revision of Common Frameworks.

Ms Roy began by noting that, whatever people's views, they would probably agree that the Brexit process has not been optimal. She suggested that the fact that we are five months away with little idea of what that will look like or mean is disconcerting at best and irresponsible at worst, on all sides.

Ms Roy outlined the importance of Common Frameworks for third sector organisations, for example through the recognition of qualifications for health and care professionals, but that the third sector had not yet been engaged in the discussion. The focus has been on academic and structural issues, which although understandable, means care must be taken not to ignore the aimed-for political outcomes.

Noting that good policy can only be made by good engagement of all parties concerned, and reflecting on her experience of engaging at EU level, Ms Roy outlined what she saw as the prerequisites for good policy making.

- First, good policy making is not about consultation, it is about co-creation.
- Secondly, it is important for stakeholders and implementing institutions to build relationships outside of the direct policy making process, ensuring that there is common knowledge and understanding based on briefing, data and lived experience.
- Thirdly, there must be a realistic timeframe for discussion and development.
- Finally, there must be support for civil society to engage – whether this be financial or other resources which are unconditional on opinion.

Looking to the UK's future, Ms Roy suggested that there will not be one size that fits all for the creation of Common Frameworks: some policy areas will require greater legal structure than others. She also noted that some consideration will need to be given to what stakeholder engagement means in such a structure: is the participation of communities, individuals and third sector organisations subordinate to that of political institutions? Ms Roy also referred to the importance of power and trust, and that true power sharing required a culture change in the United Kingdom.

Ms Roy finished by noting that Common Frameworks represent step into unknown, and that they present the opportunity to do things differently. Whatever the structures ultimately are, we should ensure that they serve a purpose: better outcomes for people, for communities and for social, environmental and economic wellbeing.

COMMON FRAMEWORKS – OPTIONS FOR THE FUTURE

Dr Florian Keller

Zurich University of Applied Sciences

Dr Keller spoke about research conducted on behalf of the Finance and Constitution Committee on Common Frameworks, along with reflections on Frameworks are handled in Switzerland, where, he said, the question of which task or responsibility should be given to which level of government is a core question in the political system.

Dr Keller noted that the major findings from the research are that there is no one-size-fits-all model and that, as the situation changes over time, regular review of where decisions are made should be built in.

In Switzerland, the governments involved in these decisions try to follow the following principles:

1. Where possible, tasks should be allocated to a single level of government only
2. Decisions should be taken as close to the citizens as possible (subsidiarity)
3. Tasks should be always allocated together with the rights to regulate and to source tax funding (fiscal equivalence).
4. Cantons should have some flexibility to adapt the implementation of federal laws to local context (implementation federalism)

Evaluations are carried out every four years, with responsibility shifted from one level to another in response – although the process is political and not without its challenges.

In Switzerland, all cantons are treated equally, so that if a task is allocated to the cantonal level, all cantons get that task. Separately, Cantons can work together on issues through signing agreements called concordats. These agreements are very flexible: they can involve only two cantons or be binding on all cantons, and they can solve minor questions like the use of a prison facility or relate to bigger issues such as the regulation of primary schools.

There are therefore three different forms of Common Frameworks: federal law implemented by the cantonal governments, shared responsibilities; and concordats among the cantons not involving the federal government. In all, the question is the same: how much integration is actually needed and how much liberty can be given to the local context?

Solutions are not solely based on research but always have quite a bit of political interest in it. The allocation of tasks and building of Common Frameworks is a political process more than a scientific one.

COMMON FRAMEWORKS – OPTIONS FOR THE FUTURE

Clare Slipper

NFU Scotland

Clare Slipper opened by noting that, since the EU referendum, one of NFU Scotland's key priorities has been to support the development and delivery of a new system of agricultural support that genuinely fits the specific needs of Scottish farmers and crofters. Although not constitutional experts, NFU Scotland can communicate the concerns of its members, which are not necessarily about where the powers will sit after we leave the EU but about what will be done with them.

Ms Slipper noted that Scotland's farmers and crofters help maintain the agricultural patchwork that contributes to Scotland's USP as a producer of high quality food and drink. The fact that agriculture also keeps people on the land – in its remotest communities, stimulating rural economies, and managing the environment and landscapes – is why after Brexit it is crucial that a new agricultural support system for Scotland is developed.

Ms Slipper suggested that "Commonly agreed frameworks, with devolved delivery" has become somewhat of a mantra for NFU Scotland. After leaving the Common Agricultural Policy, she noted, common regulatory frameworks will be required across the UK to enable internal UK markets to function effectively via minimum common standards that enable the UK to enter into and implement new trade deals. Thereafter, Ms Slipper suggested, there must be flexibility for each devolved nation to develop and implement appropriate agricultural and rural policy measures.

'Commonly agreed frameworks, with devolved delivery' is not a new concept – it is how the UK has operated under the CAP ever since the advent of devolution.

Ms Slipper referred to the Agriculture Bill, which is currently going through the UK House of Commons. The Bill is enabling legislation, allowing Ministers the ability to develop new policies and tools to support agriculture after the EU exit, and there has been disagreement between the UK and Scottish Governments on the way forward.

Ms Slipper outlined that, while a solution will have to be found to allow future frameworks on policy and funding to be commonly agreed between the four nations of the UK, it is vital that the legislative vehicle to deliver a new Scottish agricultural policy after the transition period is bespoke to Scotland's needs. She asserted therefore that the UK and Scottish governments must cut through the politics and resolve the impasse over the Agriculture Bill.

Ms Slipper concluded by noting NFU Scotland's belief that the real prize from Brexit for Scotland's farmers and crofters is a future agricultural policy that fits the needs and profile of Scottish agriculture, and all it underpins - but that will only be achieved with trust, goodwill, consultation and agreement on all sides.

Questions

Various issues were raised in a post-presentation Q&A session, including:

- examples of where effective Common Frameworks have been delivered, the role of broad principles in underpinning Common Frameworks in order to deliver the thousands that will be required post Brexit,
- the extent to which Common Frameworks will set out detail or whether they will be delivered through an iterative process,
- the role of stakeholders, and the extent to which sub-state entities, such as Scotland and Swiss Cantons are involved in international treaties. This latter point was seen as particularly important given that any treaty on the future relationship between the UK and EU will be an international treaty in a way that the UK's current relationship with the EU is not.



Event chair Bruce Crawford MSP with the panel [left to right]: Florian Keller, Michael Keating, Heather Roy and Clare Slipper.

WORKSHOP GROUPS

The workshop groups were asked to consider the following 3 questions—

Question 1: What should be the role of Governments and Stakeholders in Common Frameworks and how should they be involved?

Question 2: What governance and enforcement mechanisms should Common Frameworks include?

Question 3: What should be the role of Parliaments in the negotiation, agreement and delivery of Common Frameworks?

Below is a summary of the key discussion topics from each workshop. Please note that not all participants can be presumed to agree with all the points made below.

Question 1: What should be the role of Governments and Stakeholders in Common Frameworks and how should they be involved?

Structure

First, there needs to be a shared understanding of what is meant by Common Frameworks and an agreed protocol to their development.

The current Inter-Governmental Relations structure in the UK does not work, and there is a need for a new approach. For example, it was suggested that the Joint Ministerial Committee is an archaic way of dealing with politics as it lacks legitimacy and transparency. Could we consider reforming the JMC and putting it on a statutory basis?

The representation of England within JMC and more generally was considered. It is difficult to discuss the practicality of Common Frameworks without good relationships and representation of different parts of the UK. There is a need to consider the representation of England: there needs to be a voice for England in this set-up.

Apart from the principle of parliamentary sovereignty, there is no strict hierarchy of decision-making in the UK. In order to work within the current system, it was suggested that new Common Frameworks should not introduce a hierarchy.

Once established, new Common Framework elements will come through from international treaties. Because of this, early input from the devolved Governments in negotiations on international treaties will be essential. The process of law making is responsive to regional levels, but this may not be the case in relation to other areas of international law.

Engagement

To help the Common Frameworks operate effectively, Governments and stakeholders must work together to build trust and relationships. Ideally, engagement in designing Common Frameworks needs to start right at the beginning, as it is better to have co-creation than

consultation. However, this was seen as complicated and potentially challenging in a fragile environment.

There is a need to be well informed before setting up Common Frameworks with proper mediation and governance mechanisms. As such, any new Inter-Governmental Relations structure should have considerable stakeholder engagement within it.

In considering who should be engaged, it is important to define a wide range of stakeholders, not just the usual suspects, and to take their views into account. A major issue will be to try to engage with people who may not respond to the usual Government initiatives (such as consultations) and to listen to stakeholders equally.

There is a need for transparency. There is a danger that the number of frameworks, especially non-legislative ones, will mean that decision-making will further disappear behind informal structures, damaging political engagement. To prevent any undermining of the legitimacy of the Scottish Parliament and other Scottish institutions, any agreement made on Common Frameworks should be transparent.

Flexibility

Common Frameworks should establish what the baseline is but provide flexibility to aim higher in devolved administrations. This already exists in how we deliver on some EU environmental standards, such as the Water Framework Directive.

There are different models of Common Frameworks for different cross-border issues. For example, there are agreements related to health care, to cover someone living close to the border receiving health care on the other side, for example. There is potential that we will add in complexity to systems that work, and we must aim to avoid that wherever possible.

Question 2: What governance and enforcement mechanisms should Common Frameworks include?

Overall approach

It is conceivable that a political compromise on UK frameworks can be reached, but the complexity of the regulatory detail means that this will be challenging.

The starting point should not be to replicate the governance style of the European Union in the United Kingdom. There are institutional issues in the EU with enforcement - perhaps we need to look to examples from before the UK was a member of EU for some of the solutions.

Common Frameworks need to tolerate divergence and recognise market distortion to avoid endless litigation. The Swiss model is not immediately receptive to the United Kingdom, but it might provide a useful model in relation to this.

There is a need for a mediation phase to broker agreements between the UK, Scottish and other Governments when there is a dispute. There is a general preference for diplomacy rather than legal recourse, but there needs to be a legal backstop to resort to for arbitration. Overall, we should focus on a model of accountability and incentive mechanisms, rather than starting with dispute resolution.

International comparisons

There was discussion of different examples from which the UK could draw on. One limitation in learning from federal systems is the question whether a federal system addresses the sovereignty and constitutional issues in the UK. How is federalism compatible with principles of sovereignty in devolution settlements?

There was some discussion of the system in Belgium, where there are nine levels of Government as well as language differences. When the Parliament of French-speaking Wallonia decided not to ratify the Comprehensive Economic and Trade Agreement between Canada and the EU, this raised the question of what incentives or requirements there are for devolved administrations to agree with Federal-level policy.

In Switzerland, the system seems to start from a position of trust, whereas in UK there is a more binary approach. Informality is an important part of the Swiss system, with constant exchanges. There is also more coalition Government, so there is generally representation from each perspective in a room. From a practical point of view, the Cantons have bases near the Federal building. It is in the Federal Government's interest to find out what the common view is.

There was some discussion of the 'trialogue' model of dispute resolution in the European Union, between the Council, the Parliament and the Commission. The process is about finding consensus, but in the UK such discussions can still be more about 'who wins'. It can appear that the political model in the UK is that 'somebody wins, they do what they want and then we hold them accountable for the consequences'. It will be important to bear that in mind when considering the governance of Common Frameworks.

These questions issue applied to the Government as well as Parliament, particularly given that the UK Secretary of States represent both the UK and England. To avoid the conflict in that role, there was the suggestion that Secretary of States could represent UK, with a separate Minister appointed for England.

Ideas

It was thought that some of the governance could fall within the ambit of expert groups. These would work out the detail, with politicians (including Ministers) being able to consider the political consequences. Under this system, the aim would be to leave political input for areas which are not resolved.

Examples given of this approach were the Roundtable on Environment and Climate Change report, the Local Governance Review, the First Minister's Standing Councils, the Office of Budget Responsibility, and the Migration Advisory Committee.

For environmental issues, it was suggested that the existing agencies could be used to enforce any new law. There could be an environmental court, with the regulatory bodies working under an umbrella body or by bringing them all together. They should have the resource and expertise to carry out that role.

Future

From a governance point of view, it was seen as vital that policy and budget discussions are not separate in Common Framework negotiations and agreements.

More generally, it was suggested that we may be able to do things differently within Common Frameworks – in a more consensus building way. However, it was thought that we would have completely to change our political system and traditions to do that.

Question 3: What should be the role of Parliaments in the negotiation, agreement and delivery of Common Frameworks?

Principle

The role of Parliaments in holding the Governments to account is vital, and the Parliament's main role in this work should therefore be to scrutinise Government decisions on frameworks.

That said, it is not unusual for Parliaments in other countries to give consent for intergovernmental frameworks. Should the Parliaments in the UK be required to give their consent to the new arrangements?

Joint working across the Parliaments in the UK will help this, as interparliamentary co-operation can help explore and reflect the differences in approach under the devolved administrations.

This work needs to be public facing, not just behind the scenes. The Scottish Parliament, for example, has a role to be the 'honest broker' in these discussions: listening, sharing, and questioning. This is a huge role, and doing it by broadening out of the traditional formats could be very powerful.

Practical

Parliamentary committees should have a key role in scrutinising the Common Frameworks. In the past, Scottish Parliament committees have not always had much engagement with what was going on in Brussels with, for example, agricultural or justice policy. The need to set up Common Frameworks could be an opportunity to make sure that they are more involved.

The involvement of parliamentary committees could also be a way of ensuring that stakeholders' views are fed into the Common Frameworks. As part of that, Committees should take evidence more often away from their buildings in London, Edinburgh, Cardiff or Belfast.

There are issues of capacity with all Parliaments, so it is worth exploring cross-scrutiny between the Parliaments. For example, joint committees between UK and devolved Parliaments for combined scrutiny of decisions could alleviate some capacity issues.

CLOSING REMARKS

Bruce Crawford MSP

Finance and Constitution Committee Convener

In finishing, Bruce Crawford MSP thanked the speakers for their presentations and the Royal Society of Edinburgh for hosting this event. Most importantly, he thanked all the participants for contributing their time, perspectives and ideas to the Committee's work on Common Frameworks.



Mike Russell MSP, Scottish Government Cabinet Secretary for Government Business and Constitutional Relations, addressed the conference.

Participant List

Name	Surname	Organisation
Mick	Antoniw AM	National Assembly for Wales Constitutional and Legislative Affairs Committee
Neil	Bibby MSP	Scottish Parliament Finance and Constitution Committee
Fergus	Boden	Friends of the Earth Scotland
Coree	Brown-Swan	University of Edinburgh and the Centre on Constitutional Change
Professor Charlotte	Burns	University of Sheffield
Matt	Byatt	House of Lords Constitution Committee
Michael	Clancy	Law Society of Scotland
Angela	Constance MSP	Scottish Parliament Finance and Constitution Committee
Ronnie	Cowan MP	House of Commons Public Administration and Constitutional Affairs Committee
Bruce	Crawford MSP	Scottish Parliament Finance and Constitution Committee
Ian	Davidson	Scottish Government
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Lord David	Hunt of Wirral	House of Lords Constitution Committee
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Eleanor	Kay	Scottish Land and Estates
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Gregor	Scotland	CBI Scotland
Professor Sarah	Skerrat	SRUC
Clare	Slipper	NFU Scotland
Elizabeth	Speakman	University of Birmingham
Professor Joyce	Tait	University of Edinburgh
Maddy	Thimont Jack	Institute for Government
Iain	Thom	Scottish Parliament Information Centre
Steve	Thompson	Office of the Secretary of State for Scotland
Professor Stephen	Tierney	University of Edinburgh
Ian	Vickerstaff	Scottish Courts and Tribunals Service
Daphne	Vlastari	Scottish Environment LINK
Lord James	Wallace of Tankerness	House of Lords Constitution Committee
Dr Rebekah	Widdowfield	Royal Society of Edinburgh
Jane	Williams	Scottish Parliament Finance and Constitution Committee
Gareth	Williams	National Assembly for Wales Constitutional and Legislative Affairs Committee
Rebecca	Williams	CLA Cymru (Country Land and Business Association)