

UK-wide common policy frameworks: discussion paper

August 2019

Chair's foreword

Throughout our consideration of the implications for Wales of exiting the European Union, we have engaged with the discussion around the need for UK-wide common policy frameworks to replace some areas currently governed by EU-wide common policies.

Through our scrutiny of the Welsh Government, and my work on the Interparliamentary Forum on Brexit, we have sought to gain a clearer picture of what the governments of the United Kingdom envisage these frameworks might look like so that we can identify what the Assembly might need to do to prepare for scrutinising them as they emerge.

Following the publication of the UK Government's *Revised Frameworks Analysis* in April 2019, we decided to look at this programme of work in more detail.

We did this by putting questions to the Counsel General and Brexit Minister in writing and at a committee meeting followed by a session with experts from across the UK to obtain some external perspectives.

Additionally, we have benefitted from informal discussions with Welsh Government officials and the work of our own officials in piecing together the information available.

To draw together what we had found over the course of the past few months, we considered a paper at our meeting on 17 June 2019.

I then presented this paper to the Chairs' Forum on 3 July 2019 where it was discussed with the Llywydd and the Chairs of the Assembly's committees.

Whilst this paper was drafted as an internal document, we have decided to publish it as a report of the External Affairs and Additional Legislation Committee.



We agreed to do so on the basis of making a contribution to the ongoing dialogue around what these frameworks might look like and how we, in the Assembly, might go about scrutinising them.

In publishing this paper, we hope to progress discussion of this area of work and welcome observations or responses as we continue to refine our understanding of this new and significant change to UK-wide governance and the scrutiny challenge it poses us and the other legislatures across the UK.

Our work on developing options for the future scrutiny of frameworks continues, and we hope to issue a subsequent report in the autumn.

I would like to record my thanks to the Counsel General and Brexit Minister and his officials for their constructive engagement with the Committee to date on this area of work.

I also thank Professor Jo Hunt, Professor Michael Keating, Hedydd Phylip and Akash Paun for their contribution to our session on 17 June 2019.

David Rees AM

Chair of the External Affairs and Additional Legislation Committee

*Should you wish to respond to this paper, then please contact us at:
SeneddEAAL@assembly.wales*

Overview

UK-wide common policy frameworks are a new scrutiny challenge emerging from the Brexit process.

But what exactly are these frameworks? And why do Assembly committees need to consider them?

This paper aims to provide an overview of what frameworks are and what Assembly committees might need to consider in terms of scrutiny.

Summary

Why do we need UK-wide common policy frameworks?

1. After Brexit, to prevent any barriers to trade emerging between the nations of the UK, and to allow the UK to offer a degree of certainty to potential future

trading partners, the governments of the UK are seeking to create UK-wide common policy frameworks to replace some of those currently set by the EU.

What will frameworks look like?

2. Frameworks will be a complex weave of legislative and non-legislative outputs that could include Bills, subordinate legislation, memorandums of understanding, and/or concordats.

What are the implications for scrutiny?

3. There is a need for a centralised oversight function, to ensure that the meta-implications of multiple and complex interrelationships developed by the frameworks process are understood.

4. Individual policy and legislation committees are best placed to scrutinise the detailed implications of the establishment of frameworks within their remits and associated questions of intergovernmental decision-making.

What needs to be done?

5. Assembly committees might wish to start work to map framework activity in their areas of responsibility.

6. The External Affairs and Additional Legislation Committee and the Constitutional and Legislative Affairs Committee might wish to develop thinking on a scrutiny approach.

1. Why do we need frameworks?

7. A significant range of policy areas, from agricultural payments to hazardous substances, that are currently devolved in the UK, sit within EU legislative frameworks to ensure that policies in Member States do not diverge to the extent that they create distortions in the common market and agreed standards.

8. If you like, these frameworks are there to ensure a level playing field whilst allowing a degree of policy discretion to meet local circumstances.

9. Since the advent of devolution, devolved policy areas covered by these EU frameworks have operated within the parameters set in Brussels. This has allowed policy divergence across the UK's constituent nations, but within a consistent set of common rules.

- 10.** On leaving the EU, following the end of the transition period, these EU frameworks will cease to apply in the UK.
- 11.** To prevent any barriers to trade emerging between the nations of the UK, and to allow the UK to offer a degree of certainty to potential future trading partners, the governments of the UK have agreed to explore creating UK-wide common policy frameworks to replace those currently set by the EU.
- 12.** Initially, the UK Government sought the means to impose these frameworks on Northern Ireland, Scotland and Wales through the EU (Withdrawal) Bill (now the EU (Withdrawal) Act 2018). In the face of considerable opposition, the UK Government amended the Bill in a way that provided a mechanism for freezing areas of devolved competence using subordinate legislation made by UK Ministers, accompanied by an intergovernmental agreement signed by the Welsh and UK Governments designed to assist in developing frameworks where necessary.
- 13.** It is important to reflect that whilst the Scottish Government has engaged with the intergovernmental programme of work to develop UK-wide common policy frameworks, the Scottish Parliament refused to grant consent for devolved aspects of the EU (Withdrawal) Act 2018 and the Scottish Government is not a signatory to the intergovernmental agreement.
- 14.** Since October 2017, intergovernmental work on developing frameworks has been progressing. A set of principles to underpin the approach have been agreed by the governments and progress reports, as required under the EU (Withdrawal) Act have been issued by the UK Government in November 2018 and March 2019. In April 2019 a Revised Frameworks Analysis was published.

The principles

- 15.** The governments of the UK have agreed 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;
 - ensure compliance with international obligations;
 - ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
 - enable the management of common resources;

- administer and provide access to justice in cases with a cross-border element; and
- safeguard the security of the UK.¹

16. Additionally, the governments have agreed that 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; and
- lead to a significant increase in decision-making powers for devolved administrations.

2. What will frameworks look like?

17. One of the more difficult aspects when considering frameworks is attempting to conceptualise what they might look like. This is because they will vary in their construction.

18. There will be frameworks that require legislation, frameworks that are established through non-legislative means, and frameworks that require elements of both approaches.

19. In terms of legislation, this could be primary legislation – either made concurrently in the respective legislatures or in Westminster using the legislative consent convention.

20. Secondary legislation could also be used, including regulations made under section 109A of the Government of Wales Act 2006 (as introduced by section 12 of the EU (Withdrawal) Act 2018) to temporarily “freeze” areas of devolved competence.

21. In terms of non-statutory frameworks, or aspects of frameworks, these will be written intergovernmental agreements in the form of concordats or memorandums of understanding. They would include detail of decision-making

¹ The principles were agreed at the JMC EN meeting on 17 October 2017.

arrangements, dispute resolution procedures, review and updating mechanisms, and official and political-level structures for this governance of the Framework.

22. So the answer to the question of “what will frameworks look like?” is that they will be a complex weave of legislative and non-legislative outputs i.e. Bills, SIs, memorandums of understanding and/or concordats.

23. There is a framework, recently closed for consultation, on carbon pricing. It is available [on the UK Government’s website](#).

24. A further [update on frameworks was published by the UK Government on 3 July 2019](#). This included an [outline framework relating to Hazardous Substances Planning](#).

25. The UK Agriculture Bill and Fisheries Bill both contain provisions that could be considered to contain elements of frameworks, or provide powers that would enable legislative aspects of frameworks to be provided through secondary legislation.

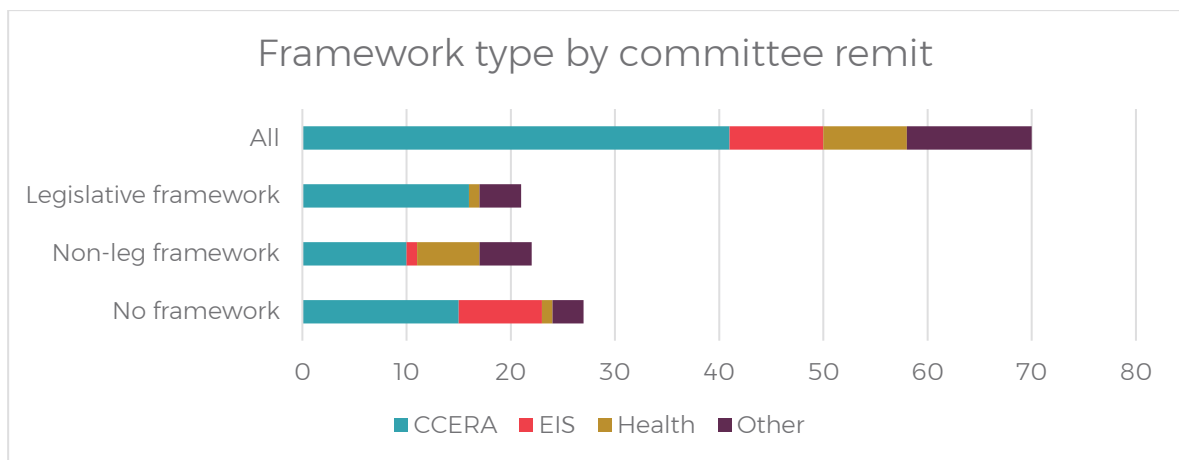
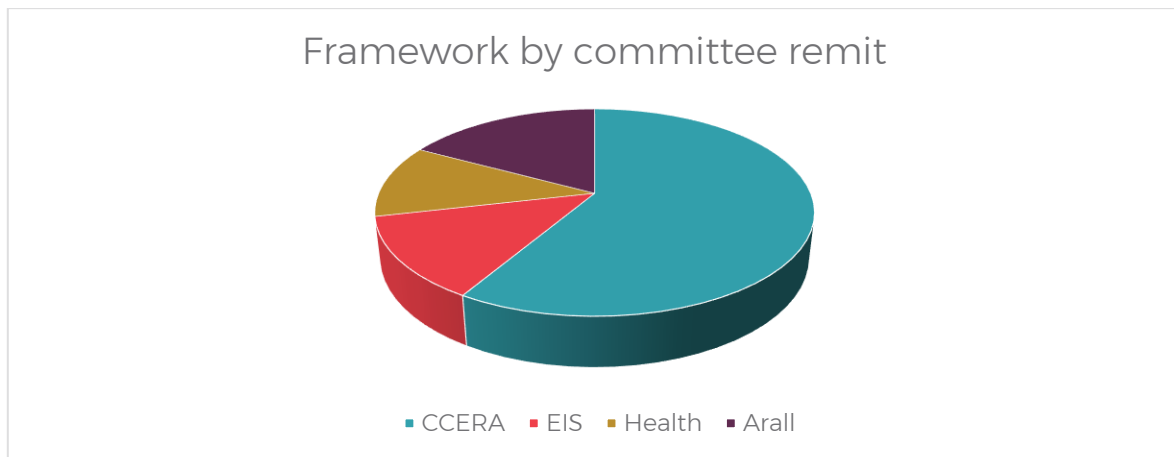
3. What policy areas will frameworks cover?

26. Currently, in relation to the Welsh devolution settlement, 70 policy areas have been identified as potentially requiring frameworks.²

27. Of those, 27 areas have already been identified as not requiring a formal framework, 22 have been identified as needing a non-legislative framework and 21 have been identified as requiring a legislative framework.

28. From an Assembly committee perspective, the majority of the frameworks fall within the remit of the Climate Change, Environment and Rural Affairs Committee – around 60 per cent.

² UK Government, [Revised Frameworks Analysis](#), April 2019.



29. A full list of the policy areas is provided at annex A.

30. There are also a range of cross-cutting issues that are being developed within or alongside the frameworks programme, including:

- the legislative programme;
- governance arrangements (including the review of intergovernmental relations);
- UK internal market discussions (through a new Ministerial Quadrilateral on Business and Industry); and
- funding.

³ “EIS” refers to the Economy, Infrastructure and Skills Committee and “CCERA” refers to the Climate Change, Environment and Rural Affairs Committee.

4. The issues for the Assembly

Impact on devolution

- 31.** Agreeing to frameworks will, as a minimum, limit the Welsh Government's options within the area of policy covered. The extent to which this limitation reflects that currently established by EU frameworks will need to be considered.
- 32.** In the case of legislative frameworks, the Assembly's legislative competence could be curtailed.
- 33.** Such fundamental decisions will require Assembly scrutiny and, in the case of legislative frameworks, the Assembly's legislative consent.

Transparency and accountability of intergovernmental decision-making

- 34.** Current Joint-Ministerial Committee (JMC) structures, alongside newly formalised Ministerial Forums, provide the Ministerial level structure for the discussion, agreement and future governance of the frameworks.
- 35.** Each framework will be underpinned by a memorandum of understanding or concordat that provides the terms of the framework, its operation and the means for resolving disputes.
- 36.** To date, the process of developing these frameworks has been opaque and difficult to scrutinise.
- 37.** There is a possible tension between the more centralised programme oversight role being played by the JMC (EN) and the more diffuse approach to the development of frameworks at portfolio level through Ministerial quadrilaterals (recently formalised as Ministerial forums).
- 38.** The Assembly needs to consider how it can shine the light of scrutiny on these decision-making processes.
- 39.** The Assembly also needs to consider how it balances the need to delve into policy detail whilst maintaining an eye on the overall impact of the frameworks programme for the devolution settlement and governance within the UK more generally.

Financial implications

- 40.** There may be costs attached to the development and maintenance of framework arrangements, and implications for the discretion the Welsh Government has to spend and/or tax in certain areas.
- 41.** More broadly, the question of replacing EU funding streams across a range of policy areas remains a point of negotiation between the governments of the UK.
- 42.** Little progress is expected on this until the next UK Spending Review.

Interdependencies

- 43.** The frameworks will be interdependent on a range of as yet unknown developments, including:
- the UK's future relationship with the EU, other nations, and trading blocs; and
 - the future of the Union and any revision of the mechanisms for intra-UK intergovernmental relations.

Future operation of the frameworks

- 44.** Once established, the frameworks will contain mechanisms for agreeing revisions and to resolve disputes, should they arise.
- 45.** Policy and legislation will then be brought forward under these frameworks.
- 46.** The Assembly will need to consider how it monitors such changes and scrutinises the resolution of disputes as and when they arise, and the implementation of policies and legislation under these frameworks.

5. What could scrutiny look like?

Oversight of the programme

- 47.** There is a need for a centralised oversight function, to ensure that the meta-implications of multiple and complex interrelationships are understood. Under the current committee structure, either the Constitutional and Legislative Affairs or EAAL Committees could adopt this responsibility.

Detailed policy and legislative scrutiny

48. Individual policy and legislation committees are best placed to scrutinise the detailed implications of the establishment of frameworks within their remits and associated questions of intergovernmental decision making.

49. As with EU scrutiny, this work does not fall evenly across portfolios. Under the current committee structure, a majority of frameworks fall within the CCERA Committee's remit.

Informal and formal scrutiny

50. From a scrutiny perspective, there is merit in considering the balance between informal scrutiny (i.e. left entirely to the discretion of committees) and formal scrutiny (i.e. with underpinning procedures and possibly an Assembly-Welsh Government agreement to support it).

51. The UK and Welsh Governments describe a five-phase process for the development of frameworks⁴:

The Five Phases

Phase 1: Establishing principles and proof of concept	
Status	Completed
Timescale	October 2017 to March 2018
Phase 2: Developing and refining the programme	
Status	Nearing completion in most areas
Timescale	April 2018 onwards
Phase 3: Review, consultation and detailed development	
Status	Recently commenced in a few areas
Timescale	March 2019 onwards
Phase 4: Preparation and implementation	
Status	Not commenced
Timescale	Autumn 2019 to end of any transition period i.e. end of 2020, 2021 or 2022
Phase 5: Post-implementation arrangements i.e. frameworks go live	
Status	Not commenced
Timescale	From the end of the transition period i.e. end of 2020, 2021 or 2022

⁴ UK Government, **Revised Frameworks Analysis**, April 2019.

52. Most of the framework areas are nearing the end of the second phase or now entering the third phase. Phase three includes: governance development, stakeholder engagement and, at the end of this phase, Ministerial agreement.

53. Frameworks that are in the third phase of development should be developed enough for Assembly committees to consider scrutinising them with a view to influencing their final shape. However, the form they appear in for scrutiny is likely to vary. There appears to be limited benefit in formalising scrutiny arrangements for this stage as it is akin to the publication of a Green Paper or a policy consultation. Early engagement will offer the best opportunity for influencing the final outputs.

54. Once frameworks progress to the fourth phase, the case for a more formalised scrutiny mechanism strengthens.

55. At this stage, there will be fully formed outputs available for scrutiny. Where these are legislative in nature, the Assembly has procedures in place to manage their scrutiny.

56. Where outputs are non-legislative (e.g. memorandum of understanding, concordat etc.), there is currently no Assembly procedure in place.

57. Given the potential significance of these agreements, the Assembly might wish to consider the case for a more formalised approach to scrutiny. This could be through amending Standing Orders, seeking a written agreement with the Welsh Government, or a combination of the two.

58. There will be cases where there are both legislative and non-legislative elements to a framework. If there are robust scrutiny procedures in place for both elements, and coordination steps included (e.g. a role for the Business Committee) then this should be manageable.

59. Once a framework is in place, the monitoring of the framework and its implementation would again lend itself more towards a less formal mode of scrutiny – similar to post-legislative scrutiny or inquiry follow-up work. As with these examples, the informal nature of the scrutiny does not diminish its importance.

Grey areas

60. Policy developments, legislation (primary and secondary) and intergovernmental commitments that are made may in fact form part of a Framework without this being explicitly acknowledged.

61. Means of ensuring that the Welsh Government clearly communicates this when such developments occur (or have occurred) will significantly aid the transparency of this process. For example, requiring explanatory material to indicate when legislation interacts with (or is made under) a Framework.

Interparliamentary relations

62. The frameworks represent a new tier of UK-wide governance. Scrutiny of each of the governments by their respective legislatures is vital. However, cooperation across legislatures could offer a better coordination of efforts and ensure that each chamber benefits from the work of the others.

63. As with the structure of intergovernmental mechanisms, and the proposals for Assembly committee scrutiny, there appears to be a need to consider a central oversight mechanism to monitor the meta-implications of this new tier of UK governance and more focused, subject-specific, scrutiny at a portfolio level.

64. The Interparliamentary Forum on Brexit has been considering this balance and other Assembly committees might wish to start considering their relationships with the other UK legislatures given the potential need for closer interparliamentary working to tackle the scrutiny challenge posed by the emergence of the frameworks.

6. Timescales

65. Frameworks need to be in place **by the end of any transition period**.

66. Under the Withdrawal Agreement as drafted, this is **by the end of 2020**, though the transition period could be extended once by a further one or two years. In the event of a “no deal” scenario, the Welsh Government has stated that “bare bones” frameworks will be in place as a consequence of the programme of work to retain and correct EU law. However, it is possible that work to develop frameworks would accelerate in some areas under a “no deal” scenario.

67. The frameworks are progressing at different speeds. As with any policy intervention, **engaging as early as possible offers the best opportunity for influence**. Some of the frameworks are already emerging for consultation. This might provide an opportunity to familiarise committees with the programme and prepare them for more formalised scrutiny in the future.

68. If **procedural changes** are considered desirable, these will need to be made in time for the first frameworks to reach the fourth phase of their progression. This could be **sometime in the autumn of 2019**.

Annex A: List of policy areas considered for frameworks relating to Wales

This list has been compiled from the framework areas identified and published in the **Revised Frameworks Analysis** in April 2019

Policy areas where no further action to create a common framework is required, and the UK Government and Welsh Government will continue to cooperate

1. Carbon capture and storage
2. Environmental law concerning energy industries
3. Onshore hydrocarbons licensing
4. Renewable energy directive
5. Environmental law concerning energy planning consents
6. GEO-Blocking
7. Voting rights and candidacy rules for EU citizens in local government elections
8. Flood risk management
9. Management of waste from extractive industries
10. Water quality
11. Water resources
12. Forestry (domestic)
13. Land use
14. Noise directives
15. Aviation - compensating PSO air routes
16. Bus franchising rules
17. Electronic road toll systems

18. Elements of harbours (marine environment issues)
19. Maritime – public service contracts/obligations, and financial assistance for shipping services which both start and finish within Scotland/to, from and within Wales
20. Maritime – ports services and port reception facilities, including for ship-generated waste
21. Road infrastructure safety management
22. Charging of HGVs
23. Trans European Transport Network
24. Implementation of cross-border healthcare rights to treatment and reimbursement
25. Equal treatment legislation
26. EIA Directive
27. Energy performance of buildings Directive

Policy areas where non-legislative framework agreements might be needed

1. Efficiency in energy use
2. Radioactive substances
3. Public procurement
4. Statistics
5. Air quality
6. Biodiversity – access and benefit sharing of genetic resources (ABS)
7. Marine environment
8. Spatial data infrastructure standards
9. Natural environment and biodiversity
10. Waste management

11. Intelligent transport systems
12. Elements of the regulation of tobacco and related products
13. Good laboratory practice
14. Nutrition health claims, composition and labelling
15. Blood safety and quality
16. Organs
17. Public health (serious cross-border threats to health) (notification system for pandemic flu, Zika etc.)
18. Tissues and cells (apart from embryos and gametes)
19. Control of major accident hazards
20. Genetically modified micro-organisms contained use (i.e. rules on protection of human health and the environment during the development)
21. Hazardous substances planning
22. SEA Directive

Policy areas where future legislation might be needed

1. Implementation of EU Emissions Trading System (EU ETS)
2. Mutual recognition of professional qualifications (MRPQ)
3. Services Directive
4. Agricultural support
5. Agriculture - GMO marketing and cultivation
6. Agriculture - Zootech
7. Fisheries management & support
8. Ozone depleting substances and F-gases
9. Animal health and traceability

- 10.** Animal welfare
- 11.** Chemicals
- 12.** Waste packaging and product
- 13.** Pesticides
- 14.** Plant health, seeds and propagating material
- 15.** Food compositional standards
- 16.** Food labelling
- 17.** Chemicals Regulation (including pesticides)
- 18.** Agriculture - organic farming
- 19.** Agriculture - fertiliser regulations
- 20.** Reciprocal Healthcare
- 21.** Food and feed safety and hygiene law