

Agenda – External Affairs and Additional Legislation Committee

Meeting Venue:

Committee Room 2 – Senedd

Meeting date: 2 December 2019

Meeting time: 14.00

For further information contact:

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1 Introductions, apologies, substitutions and declarations of interest

(14.00)

2 Papers to note

(14.00–14.05)

2.1 Paper to note 1: Written evidence provided by Dr Jack Simson Caird in relation to the scrutiny of UK-wide common policy frameworks and the scrutiny of international agreements

(Pages 1 – 3)

2.2 Paper to note 2: UK–South Korea free trade agreement – Dr Ricardo Pereira

(Pages 4 – 9)

2.3 Paper to note 3: Response from the Counsel General and Brexit Minister to the Constitutional and Legislative Affairs Committee regarding Wales’ changing constitution – 27 November 2019

(Pages 10 – 13)

3 Motion under Standing Order 17.42(vi) and (ix) to resolve to exclude the public from the remainder of the meeting

(14.05)

4 Scrutiny of common frameworks – consideration of draft report

(14.05–14.25)

(Pages 14 – 36)



- 5 Scrutiny of international agreements – consideration of draft report**
(14.25–14.45) (Pages 37 – 52)
- 6 Follow-up work on Brexit preparedness – consideration of correspondence to the Counsel General and Brexit Minister**
(14.45–15.05) (Pages 53 – 59)
- 7 The Welsh Government's draft international strategy – consideration of draft report**
(15.05–15.25) (Pages 60 – 74)
- 8 Forward work programme**
(15.25–15.40) (Pages 75 – 78)

Agenda Item 2.1

Written evidence to the External Affairs and Additional Legislation Committee of the National Assembly for Wales

Dr Jack Simson Caird – Bingham Centre for the Rule of Law

1. I am writing in relation to the Committee's inquiries on *UK-wide common policy frameworks: scrutiny of non-legislative framework agreements and international agreements: a suggested approach to engagement and scrutiny*. In this submission I make a number of observations based my experience of analysing the Brexit process in the UK Parliament.
2. In order to scrutinise both non-legislative framework agreements and international agreements – it is vital that the National Assembly Wales develops bespoke procedures which are designed to address the specific challenges associated with each form of agreement. The major challenge is respect of both is that these are both new challenges for the National Assembly for Wales and there is limited experience to draw upon and so that makes it vital to engage with the experience of equivalent legislatures in other countries when devising the relevant procedures.
3. If Assembly Members are to influence the executive's approach to negotiations on both non-legislative framework agreements and international agreements, the National Assembly Wales' scrutiny structures must be in place well in advance of the relevant negotiations beginning.
4. Just as in the legislative process, the primary moment for substantive influence for Assembly Members is before the Executive's negotiating position has been finalised and anything has been formally presented. As a result, the scrutiny framework should ensure that it grants opportunities for the executive's position to be analysed well in advance of the relevant negotiations starting. The structure should ensure that there are opportunities for scrutiny and formal consent: before formal negotiations have begun, during the negotiations and after the negotiations have concluded and the final agreement has been published. The experience of the meaningful vote veto in the House of Commons highlights the value of having a scrutiny structure which front-loads the process so that it can established whether there is a majority on the executive's negotiating position at the early stages of the process.
5. For each of the different phases of the process, there is a difficult balance to be struck between formal veto powers for the legislature, for example for Assembly Members to approve or reject the executive's negotiating mandate, and informal scrutiny processes such as regular scrutiny sessions with the relevant minister. In my view, in both the contexts of scrutiny of non-legislative framework agreements and international agreements, it is vital that the National Assembly for Wales is granted formal veto powers in order to ensure that informal scrutiny mechanisms are effective. There are at least three formal veto powers that should be considered: a scrutiny reserve for relevant committees to clear the positions of the executive on negotiations on matters within their remit; a formal power for the National Assembly to approve or reject the executive's negotiating mandate; and a power to approve or reject any agreement after it has been concluded but before it has been formally adopted or ratified.
6. There will be understandable reluctance from the executive to agree to grant the National Assembly any of these legally binding veto powers. However, it should be stressed that if

these veto powers are built around a scrutiny framework which facilitates early engagement and consensus building, then some of these concerns can be assuaged. In fact it may be in the executive's interest to grant these veto powers to ensure that Assembly Members are engaged in the relevant negotiations and are then committed to the process of legislative implementation, which they are almost certainly going to be required to participate in.

7. The National Assembly for Wales will need legally binding veto powers in relation to some of the executive's positions on both non-legislative framework agreements and international agreements because otherwise it is unlikely that the informal scrutiny structures described in the committee's briefing documents will be effective. Written and oral questioning of ministers in relation to both non-legislative framework agreements and international agreements will be much more effective if the executive knows it is reliant on the consent of the National Assembly or a committee of the National Assembly in order to deliver its preferred outcome in the relevant negotiations.
8. Legally binding vetoes are particularly important for incentivising the executive to share information that can enable effective parliamentary scrutiny. In the absence of a legally binding veto, there is little incentive for the executive to share detailed information on its position at the early stages of negotiations. As part of any scrutiny framework, it is important that the National Assembly for Wales secures particular rights to be granted information in relation to the negotiations on both non-legislative framework agreements and international agreements. The European Parliament's right, set out in Article 218(10) of the TEFU that it 'shall be immediately and fully informed at all stages of the procedure' on negotiations agreements with non-Member States, is an example that the National Assembly could seek to replicate. That treaty right reflects the fact that there is political agreement within the EU that it is important the European Parliament is engaged in, and consents to, any agreement negotiated by the European Commission.
9. A broadly-framed right to be informed would be a good starting point for negotiating a detailed, and non-legally binding, framework to govern how and when the executive shares information with the National Assembly and its committees.¹ I would argue that such a framework is a necessary pre-condition for committees to efficiently organise and arrange effective subject-based inquiries that can inform and supervise the negotiations. As part of this framework, the National Assembly should specify exactly how the explanatory material it requests from the executive, should be presented and what issues it should address. To do this I would suggest that National Assembly agrees a list of standards which must be addressed by the relevant explanatory material.² For example, in the context of non-legislative frameworks, it may be important that any explanatory material specifies in detail

¹ I discussed the role of such a framework in the context of Westminster here: Oral evidence to [the Liaison Committee's inquiry on the effectiveness and influence of the select committee system inquiry](#) 8 May 2019; [written evidence on the effectiveness and influence of the select committee system inquiry: scrutinising Brexit](#) to the Liaison Committee 1 May 2019.

² For examples of the standards that could be specified and the debate around standards see: '[The Constitutional Standards of the House of Lords Select Committee on the Constitution](#)' Constitution Unit University College London (Third Edition) (2017) (with R Hazell and D Oliver); 'Public legal information and law-making in Parliament' in A Horne and G Drewry (eds) *Parliament and the Law* (2nd edition) (Oxford: Hart 2018); 'Parliament's Constitutional Standards' in A Horne and A Le Sueur (eds) *Parliament: Legislation and Accountability* (Oxford: Hart 2016) (with D Oliver).

the extent to which the frameworks will rely on legislation which is already in place and whether they will require legislation to be enacted in order to be effective.

10. Delegated powers to make secondary legislation are central to how Brexit is being managed and implemented by the UK Government.³ There are already a number of broadly framed powers on the statute book to legislate in areas formerly covered by the EU's competences. If the Withdrawal Agreement is ratified and a Future Relationship treaty is negotiated, the number of delegated powers in these areas is likely to increase through implementing legislation. The difficulties this presents for parliamentary scrutiny are well-established, however, the problems are particularly acute in the context of the role of the devolved legislatures in implementing non-legislative framework agreements and international agreements. It is a major technical challenge to analyse the substance of delegated legislation and evaluate its implications for non-legislative framework agreements, international agreements and how they relate to devolved competences. This sort of work is resource intensive and low-reward in the sense that by the time the secondary legislation has been proposed there is almost no chance to influence the policy to which they relate. The net result is that it is vital that the National Assembly, in relation to both non-legislative framework agreements and international agreements, focuses on acquiring powers that can ensure meaningful scrutiny at the early stages of the process where they can have meaningful input.

³ I have covered this issue in the Westminster context here: Written evidence to the House of Commons EU Scrutiny Committee – on [Post Brexit Parliamentary Scrutiny](#) 30 August 2019; Oral evidence to the House of Commons EU Scrutiny Committee – on [Post Brexit Parliamentary Scrutiny](#) 4 September 2019.

Agenda Item 2.2

UK-South Korea free trade agreement

Research carried out by: Dr. Ricardo Pereira, Senior Lecturer in Law, Cardiff University, Law School, under the Brexit Research Framework Agreement

Introduction

The 2011 EU-Korea Free Trade Agreement (FTA) is a post-Lisbon free trade agreement and covers most substantive areas of the EU common external commercial competencies such as trade in goods, services and IP rights. The agreement was provisionally applied from 1st July 2011 and came fully into force on 13th December 2015 following formal ratification. In 2019 the UK government has negotiated a FTA with the South Korean government to give continuity to the existing trade relations between the two countries post-Brexit.

Changes introduced to the 2019 UK-South Korea free trade agreement

There are some notable differences between the 2011 EU-South Korean FTA and the 2019 UK-South Korea FTA, although many of the provisions concerning the elimination of tariffs and non-tariff barriers remain unchanged.

The most significant changes relate to technical and transitional legal matters aimed at ensuring a smooth transition between a EU-wide trade regime to a UK-Korea bilateral trade regime.¹ This includes modifications introduced to the UK-South Korea FTA aimed at:

- removing and replacing references to the 'European Union' to reflect the fact that is no longer a party;²
- changing the territorial application of the agreement;³
- modifying to the composition of the institutions and committees established under the EU-Korea FTA. This was done to reflect the fact that that agreement will no longer apply to the UK post-Brexit;⁴

¹ See further, Department for International Trade, *Continuing the United Kingdom's Trade Relationship with the Republic of Korea Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Korea*, September 2019, available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/830134/UK-South_Korea_trade_agreement.pdf (accessed 1 November 2019)

² Ibid, para. 39.

³ See Article 15.15 of the 2019 UK-Korea FTA (Korea)

⁴ Department for International Trade, note 1 above, para. 44. For example Article 15.2 of the UK- Korea Free Trade Agreement removes reference to the Joint Customs Cooperation Committee established under the Customs Agreement between the EU and Korea No. 1 (2019), London 22 August 2019 (consolidated version), available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831988/UK_Korea_Free_Trade_Agreement_v1_pt1.pdf (accessed 1 November 2019).



- addressing amendment clauses and subsequent negotiations to be carried out by Trade Committee created by the agreement;⁵
- governing the entry into force and provisional application of the agreement in the event that the EU-Korea FTA ceases to apply to the UK after Brexit;⁶
- removing references to EU legislation that will cease to apply to the UK post Brexit;⁷
- inserting a review clause establishing that both Korea and the UK will commence a subsequent negotiation to build on this agreement no later than two years following the date of entry into force of this agreement.⁸

There were other significant substantive changes to the scope of the agreement as regards Tariff Rate Quotas ('TRQs'), Rules of Origin ('RO'), Technical Barriers to Trade ('TBT'), Intellectual Property ('IP') (including geographical indication); and government procurement concerning the operation of WTO's Government Procurement Agreement ('GPA').

TRQs allow a certain quantity of a product to enter the market at a zero or reduced tariff rate.⁹ To reflect the fact that the UK is a smaller importer and exporter than the EU28, TRQs administered by the UK and by FTA partners in 'continuity agreements' have been re-sized. The UK and Korean governments have agreed to set quotas to a sufficient level aimed at providing for continuity of almost all historical trade flows from UK exporters.

As regards rules of origin, as one of the EU member states all UK content is currently considered as "originating" in the EU and UK exports are designated as "EU origin." After Brexit goods originating in the UK will no longer be of 'EU origin. To address these implications and to provide maximum continuity for business, it has been agreed in the UK-Korea Free Trade Agreement that EU materials and processing can be recognised (i.e. cumulated) in UK and Korea exports to one another for 3 years after entry into force.¹⁰ However, after the first 3 years the UK would need to reach an agreement with South Korea in order to maintain existing tariff-free access for UK goods with significant EU components.¹¹

Although changes to the TBT provisions brought under the UK-Korea FTA have been limited to non-substantive technical changes with no trade impact, the UK Government added a side minute stating that the UK intends for a limited time to continue to accept Korean goods that meet EU regulatory requirements.¹² This is an interesting development given that UK government's official position is that it

⁵ See Article 15.5.2 of the UK-Kora FTA. See also, *ibid* para. 46

⁶ See Department for International Trade, note 1, paras. 47 and 51.

⁷ *Ibid* 58

⁸ *Ibid*, para. 60. See also, Article 15.5bis of the UK-Korea FTA.

⁹ *Ibid*, para. 65.

¹⁰*Ibid*, para. 75.

¹¹ See also, Jung-a, Rovnick, Giles, *South Korea agrees deal with UK for post-Brexit trade*, Financial Times 10 June 2019

¹²Department for International Trade, note 1 above, para 90.



wishes to maintain regulatory autonomy when negotiating FTAs with other countries post-Brexit.

Other more significant changes relate to the protection of intellectual property rights (particular artist resale), including geographical position,¹³ and public procurement. As regards the latter, the UK-Korea Free Trade Agreement has retained the commitments on public procurement that were set out in the EU-Korea Free Trade Agreement. Yet since the UK intends to accede to the GPA in its own right post-Brexit (see the Trade Bill 2017-2019),¹⁴ the UK-Korea Free Trade Agreement will rely on the UK's GPA Schedules once they come into force.¹⁵

However, arguably the most significant and remarkable difference between the EU-Korea and UK-Korea FTA is that the latter no longer includes legally binding provisions relating to environmental protection, human rights and labour standards, which appear instead in a non-binding *UK-Republic of Korea joint statement on shared values, ever growing partnership*.¹⁶ This difference is particularly notable given that the 'second wave' of EU FTAs negotiated with third countries from the mid 2000s (particularly developing countries) have tended to include clauses on environmental standards, labour rights and human rights.¹⁷ This significant reform under the UK-Korea FTA may be a reflection of three main interconnected factors:

- 1) the UK's weaker negotiating position when negotiating post-Brexit FTAs with its trading partners, given that the EU is a bigger market and holds a stronger bargaining position when negotiating FTAs
- 2) The short timeframe available for negotiation of the 'continuity' FTAs. This arguably has placed the UK in a weaker negotiating position.
- 3) A final factor is the current UK government's position in relation to environmental standards, labour rights and human rights (to be contrasted with the Labour Party's position which emphasises the importance of those standards both domestically and in the UK's external relations).

Yet as discussed above a review clause in the UK-Korea FTA foresees enables the parties to renegotiate their commitments under the agreement within two years from the entry into force of the agreement. Hence is possible that the clauses relating to environmental, labour and human rights standards in the EU-Korea FTA will be re-introduced into the UK-Korea agreement in future.¹⁸

In contrast, the EU-Korea FTA provisions on customs and trade facilitation,¹⁹ competition and subsidies,²⁰

¹³ Ibid, paras 98-99 and 101-102. See also Article 10.10. of the UK-Korea FTA.

¹⁴ <https://services.parliament.uk/bills/2017-19/trade.html> (accessed 1 November 2019)

¹⁵ 107-108

¹⁶ See *UK-Republic of Korea joint statement on shared values, ever growing partnership.*, in Department for International Trade, note 1 above.

¹⁷ Stephen Woolcock, 'EU Policy on Preferential Trade Agreements in the 2000s: A Reorientation towards Commercial Aims', *European Law Journal*, Vol. 20, No. 6, November 2014, 718-732

¹⁸ See Article 15.5.2

¹⁹ Department for International Trade, note 1, para. 85.

²⁰ Ibid, para. 111.



services²¹ (including audio-visual services),²² trade remedies,²³ sanitary and phytosanitary measures,²⁴ have largely been transitioned into the UK-Korea FTA with minor or no modifications.

It is also notable that the EU-Korea FTA does not contain an investment chapter,²⁵ unlike other post-Lisbon FTAs negotiated by the EU with third countries such as the EU-Singapore FTA. It is likely that the two parties will continue to rely on the investment protection provisions under the 1976 Korea – UK bilateral investment treaty (BIT), but it is also possible that they may wish to renegotiate the UK-Korea FTA for the purposes of inserting an investment chapter.

3. The impacts of UK-South Korea FTA in the UK and Wales

For the most part, the UK government's own assessments of the impacts of UK-Korea FTA have focused on the implications of not ratifying the agreement, rather than the impacts that the agreement – taking account of the modifications highlighted above - would have on the UK or the devolved administrations. It is expected that if the 'continuity agreement' with South Korea is ratified before Brexit, the status quo of the UK-Korea trade relations will be largely maintained, subject to any subsequent amendments to or renegotiations of the treaty. Yet since that the UK-Korea FTA does not include chapters on sustainable development, human rights or labour rights, this could lead to the lowering of those standards - in so far as the bilateral UK and South Korean trade relations are concerned - and hence to a race to the bottom.

According to the UK government's assessment, not being able to ratify the UK-Korea Free Trade Agreement would result in UK businesses losing the preferences negotiated in the EU-Korea Free Trade Agreement.²⁶ This would include the re-imposition of many tariffs, returning to Most Favoured Nation (MFN) treatment with Korea (that is, trading on WTO terms). This could lead to the reversal of the benefits derived from trading under preferences within the Free Trade Agreement, such as the increases in trade flows between the UK and South Korea since the adoption of the EU-Korea FTA.

Moreover, in relation to TRQs the UK government's own assessment suggests that without transitioning rules or any other mitigating actions, goods exported to Korea from the UK that are currently covered by TRQs in the EU-Korea Free Trade Agreement could face MFN tariffs.²⁷ The extent of this impact will depend

²¹ Ibid, para. 115-116

²² Ibid. para. 122-123

²³ Ibid. para. 54-55

²⁴ Ibid, para. 96

²⁵ Ibid, 125. However, Article 7.16 of the EU-Korea Free Trade Agreement provided for a review of the investment legal framework to begin no later than three years after the entry into force of this Agreement. These changes may be reflected in the UK-Korea Free Trade Agreement (see Article 15.5bis).

²⁶ Department for International Trade, note 1, para. 24.

²⁷ Ibid., 69.



on a number of factors, including existing trading patterns and the behavior and responsiveness of domestic consumers and businesses to the change in tariff.²⁸

In relation to the rules of origin, it should be noted that the UK-Korea FTA provides only for rules governing trade between the UK and Korea and does not contain provisions addressing either party's direct trade with the EU, including, for example, where UK and Korea-based exporters use content from each other in exports to the EU.²⁹ According to the UK Government, if cumulating EU content for the UK and Korea were not permitted under the UK-Korea Free Trade Agreement at entry into force, some UK and Korean based exporters might find themselves unable to access preferences as they are currently able to under the EU-Korea Trade Agreement.³⁰ UK exporters to Korea who rely on EU content might have to revert to paying MFN tariff rates, if they continued using EU content, or they might have to review and reassess their existing supply and value chains as a result of this immediate change to existing terms. According to the UK government, the impact of this would vary across sectors.³¹

Furthermore, the British government has estimated the impacts of the UK-Korea FTA in relation to some specific measures or sectors, such as agriculture. In relation to 'Agricultural Safeguard Measures,' under Annex 3 of the EU-Korea Free Trade Agreement they should gradually be reduced to zero over a number of years. These measures have been transitioned to the UK-Korea Free Trade Agreement and have been resized to reflect the fact that the UK is a smaller importer and exporter than the EU28.³² Although the UK government does not expect this change to have any impact, it may be pertinent for the Welsh Government and legislature to conduct further studies assessing the impacts of those changes to the bilateral trade relations in agricultural commodities between Wales and South Korea.

4. Concluding remarks

Although the UK-Korea FTA may mitigate some of economic impacts of Brexit as far as the bilateral trade relations between the two countries is concerned, there are still some areas of uncertainty, not least whether the agreement will be ratified by the British and South Korean Parliaments ahead of the anticipated Brexit date of 31st January 2020.

The UK-Korea FTA only introduces incremental solutions to transitional legal issues surrounding important areas such as TRQs and Rules of Origin, although these could have significant implications for UK/Welsh trade with South Korea. However, the most notable changes in the UK-Korea FTA relate to the transfer of the provisions on environmental protection, labour rights and human rights protection to a non-binding intergovernmental statement. This development could lead to the lowering of those standards and race to the bottom. However, the existence of the EU-South Korea FTA - and subject to the outcome of the current Brexit negotiations, a future UK-EU FTA – could mitigate concerns over a possible race to the bottom in the trade relations between UK and South

²⁸ Ibid

²⁹ Ibid, 79.

³⁰ Ibid, 78.

³¹ Ibid, paras. 71 and 78.

³² Ibid.



Korea as regards environmental, labour and human rights standards.

Finally, it should be noted that one of the impacts of the adoption of the UK-Korea FTA is that it can only lower tariffs between the two countries, and could not mitigate the impacts that a 'hard Brexit' may have in so far as the (MFN) tariffs applicable to EU-UK trade are concerned.





Llywodraeth Cymru
Welsh Government

Mick Antoniw AM
Chair of Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

27 November 2019

Dear Mick,

Thank you for your letter of 18 October and for welcoming the publication of my Written Statement on 18 September concerning the legal proceedings resulting from the prorogation of the UK Parliament. You also raised a number of important issues in connection with your inquiry into Wales' changing constitution.

You noted that the question of how "not normally" could be defined in the context of the Sewel Convention is covered in 'Reforming our Union: Shared Governance in the UK'. That policy document sets out the Welsh Government's views on this matter and we will continue to pursue it with the UK Government. I will keep you updated on progress. We would also welcome further discussion with the Committee about how the evidence you have received and the consideration you have given could inform the intergovernmental discussions.

You also asked seven specific questions, which I have reproduced below together with my answers:

Q1: Please could you clarify how the inter-governmental agreement has been the basis of ensuring the Assembly's consent has been integral to ensuring our statute book can function properly?

The Welsh Government invited the Assembly to consent to the European Union (Withdrawal) Bill in part on the basis that the Intergovernmental Agreement reiterated the UK Government's commitment to not normally use powers to amend domestic legislation in devolved areas without the agreement of the Welsh Government. Following the Assembly's decision to consent to the Bill, scrutiny of this arrangement was then enshrined in Standing Order 30C.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Furthermore, the Intergovernmental Agreement, and the collaboration which flowed from it, have ensured that the UK Government has not brought forward regulations under section 12 of the European Union (Withdrawal) Act to restrict the Assembly's competence. In our view, this represents a significant achievement given that, as you will recall, the original Bill would have prevented the National Assembly from legislating in any of the space relating to devolved competence previously occupied by EU law.

Q2. Why are intergovernmental agreements appropriate for dealing with primary legislation that is passed by legislatures?

Intergovernmental agreements are a transparent way to set out the principles and mechanisms by which governments intend to work together to implement primary legislation passed by legislatures. They reflect the interconnectedness of the responsibilities of the governments of the UK and the shared role of those governments in the governance of the UK.

Q3: In relation to the UK Agriculture Bill and our consideration of Welsh Government LCMs, the Cabinet Secretary for Energy, Planning and Rural Affairs explained that the Welsh Government had entered into an agreement with the UK Government. Our report on the second LCM, expressed concern at the approach adopted. In your view, should such agreements also be subject in the future to formal consent by the National Assembly?

Intergovernmental agreements are by their nature, and should remain, the responsibility of the relevant executives, and should not be subject to consent by legislatures. The Welsh Government enters into a range of agreements, both legally binding and non-legally binding, and it would not be constitutionally appropriate given the separation of powers for the Assembly to consent to those, although of course Members can and do scrutinise them.

Where intergovernmental agreements are linked to primary legislation for which the Assembly's consent is sought, we would anticipate that consideration of the relevant intergovernmental agreement would be part of the Assembly's consideration. Furthermore, we would anticipate ongoing Assembly scrutiny of the operation of intergovernmental agreements under the mechanisms agreed in the inter-institutional agreement between the Assembly and the Welsh Government.

Q4: What risks are associated with intergovernmental agreements given that they are not legally binding and how can the Welsh Government seek to protect the Welsh devolution settlement in the event of future, different governments overriding these agreements?

The devolution settlement is not affected by the use of intergovernmental agreements, as they operate within the existing settlement.. We consider that the use of intergovernmental agreements maximises our influence over decision-making so that we can protect Welsh interests, for which we are held accountable by the Assembly.

Q5: How sustainable are the use of intergovernmental agreements and common frameworks over the longer term? If non-legislative common frameworks can be overridden or discontinued by future, new governments, how is this an appropriate way forward? It would be helpful if you confirm that both legislative and non-legislative common frameworks are intended to be a long-term solution.

Since 2017, successive UK governments have consistently committed to Common Frameworks and there has to date been no reluctance to continue to engage. The premise of Common Frameworks is the clear recognition of the benefits of intergovernmental working in areas of shared interest. They build on long-term official level relationships

across the UK that have been established since devolution, but formalise and clarify these in relation to the new responsibilities emerging in the context of the UK's decision to leave the EU. Both legislative and non-legislative frameworks and framework elements are important parts of this long-term relationship. Frameworks are intended to be a long-term commitment with explicit provision and mechanisms by which they can be reviewed and updated, and future legislatures and governments should be able to initiate a process of renegotiation. The provisions for review and assessment, and for monitoring procedures will enable them to evolve and adapt to developing policy landscapes.

Q6. How does the use of intergovernmental agreements and common frameworks impact on the complexity of the devolution settlement for citizens?

Firstly it needs to be recognised that intergovernmental agreements and common frameworks of this kind are only intended to operate in a context where the UK has left the EU. Leaving the EU would of course increase the direct involvement of the Welsh Government and the Assembly in areas of law within devolved competence. In this context, intergovernmental agreements and common frameworks aim to provide clarity around the impact of the devolution settlement for citizens. Citizens receive a mix of devolved and non-devolved services in Wales, and in reality devolved responsibilities and non-devolved ones impact on each other. In this context, a clear, published and scrutinised approach to how the Welsh Government is working with the other governments of the UK on shared areas of interest which have an impact on citizens is a significant step forward. Intergovernmental agreements which use plain language, remove confusion and include mechanisms for avoiding disputes can help to simplify and demystify processes to aid citizens' understanding and engagement.

Q7: There are at least 20 occasions in which the UK Government has amended primary legislation in devolved areas by using subordinate legislation powers under the EU (Withdrawal) Act 2018, this being done (almost always) with the agreement of the Welsh Government, but without the formal consent of the National Assembly.

- (i) We would be grateful for your views on the implications of this approach for any future reform of the Sewel Convention.*
- (ii) How the approach adopted by the Welsh Government in not tabling appropriate statutory instrument consent motions is consistent with proposition 5 of Reforming our Union.*

As the First Minister explained in his letter to you of 23 August, although Standing Orders place no obligation on Ministers to table a motion in respect of a SICM, the Welsh Government has not changed our overall approach: in normal circumstances, it remains our intention to table motions for SICMs. However, in respect of Brexit-related SIs, there were practical issues of timing to consider.

The First Minister also explained that the context for the approach we took was the programme of corrections to the statute book, to make sure it continued to work after EU Exit. This was an unprecedented undertaking: the volume of correcting SIs coming our way, and the limiting timescales surrounding them, meant that our normal practice regarding the handling of SICMs was simply not a practical proposition. We developed a way of working which ensured that Brexit related SICMs would be dealt with in a timely manner, whilst also ensuring that they would be brought to the Assembly's attention. In deciding not to ourselves table SICMs in respect of these pieces of secondary legislation, we were very conscious that where any Member believed that a SICM should be debated by the Assembly, it would be open to them to table a motion.

We would expect any reforms to the Sewel convention in line with our proposals in 'Reforming our Union' to take into account the challenges we experienced in this context as well as the views of your Committee.

I trust that these responses are helpful. Please do let me know if there is anything further I can do to assist with your inquiry, including further meetings and/or technical briefings with my officials. The constitutional implications of new Welsh Government functions, increased intergovernmental working, and development of international agreements are significant and I know that both your Committee and the External Affairs and Additional Legislation Committee are giving careful consideration to the implications for Assembly and interparliamentary scrutiny, which I welcome.

I am copying this letter to the Chair of the External Affairs and Additional Legislation Committee and to the First Minister.

Regards,

A handwritten signature in black ink, appearing to read 'JM', with a stylized, cursive flourish.

Jeremy Miles AM

Y Cwnsler Cyffredinol a Gweinidog Brexit
Counsel General and Brexit Minister

Agenda Item 4

By virtue of paragraph(s) vi of Standing Order 17.42

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Agenda Item 7

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