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Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA-P-CG-1216-19

David Rees AM
Chair
External Affairs and Additional Legislation Committee

24 May 2019

Dear David,

Thank you for your letter of 7 May and its annex. I attach responses to the questions you have raised.

I believe many of these issues were discussed during the Committee's technical briefing session with Welsh Government officials on 20 May. There has been strong progress in the Frameworks programme and in governance issues generally. Frameworks are the most advanced area of inter-governmental policy development for leaving the EU, but there remain some fundamental issues to be resolved before individual Frameworks can be subject to wider consultation and discussion and then brought to completion. In many cases, critical factors will be the terms on which we will be exiting the European Union and the extent to which we will be committed in the longer term to 'dynamic alignment' with the rules and regulations of the EU.

I look forward to speaking to the Committee on 3 June.

Yours sincerely,

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

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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.

Annex: Questions arising from consideration of the UK Government's Revised Frameworks Analysis

General

- 1. Can you please confirm that the Welsh Government is content with the analysis as published? For example, are you content that the policy areas have been framed appropriately?*

In April 2019 the UK Government released its revised analysis on the Framework areas. This put each policy area into one of four categories:

- those possibly needing a Framework underpinned by legislation;
- those requiring a non-legislative Framework;
- those needing no further action; and
- a fourth group which the UK Government considered to be reserved.

- 2. Does the categorisation of policy areas in the document reflect the Welsh Government's position in all cases?*

We broadly accept the allocations between these categories. We do not however agree with certain areas the UK Government classifies as reserved (see answer to Question 9). Two key areas – Agriculture and fisheries – are of such complexity and regulatory significance they have, from the beginning, been earmarked for legislation and related Bills are currently before Parliament. The UK Government has committed that new functions emerging from exiting the EU may eventually being covered by Frameworks as appropriate.

Policy areas where **no further action to create a common framework is required**

- 3. In relation to the 27 areas that intersect with Welsh devolved competence that have been identified as requiring no further action, can you please describe (for each area):*
 - how the Welsh Government arrived at its decision to agree that no further action is required;*
 - how cooperation between Governments will be managed in the future, in the absence of a framework; and*
 - the level of Welsh policy flexibility compared to that available under EU arrangements.*

Our approach in considering policy matters currently devolved but operating with the framework of EU law has been to preserve and expand the competence of the National Assembly in devolved areas wherever possible. Our default position has therefore been to assume that Frameworks are not necessary, except where there is a clear case that they are. In general terms, we therefore agree for the 27 areas no Frameworks are needed.

Where coordination with other UK administrations is regarded as potentially advantageous or necessary, we expect it to continue between officials on a day to day basis. The creation of Ministerial fora at a portfolio level also provides an additional platform for issues or information to be shared.

*Policy areas where the UK Government thinks that common rules or ways of working will be needed and it expects to implement this **through a non-legislative common framework agreement***

4. In relation to the 22 areas that intersect with Welsh devolved competence that have been identified as requiring non-legislative Frameworks, can you describe how the Welsh Government arrived at its decision in each of these areas?

5. Whilst we understand that you are currently unable to offer certainty on the forward programme for Common Frameworks, due to the situation in Westminster, are you able to give a broad indication of the likely timeframe for engagement on these Frameworks and whether there are certain areas that are being prioritised?

We note that the revised Frameworks analysis document suggests that broader engagement will start 'from March 2019'.

The work programme for developing Common Frameworks has five phases.

The First phase (October 2017 - March 2018) focused on principles and proof of concept for a programme of joint work between the four UK administrations (Deep Dives) culminating in the UK Government publishing the first Common Frameworks Analysis in March 2018. This set out 153 areas where EU law intersected with devolved competence including:

- 24 areas where legislation may be needed in whole or in part;
- 82 areas where non-legislative Frameworks may be required; and
- 49 areas where no further action was identified.

Although the categorisation was established by the UK Government, the allocation was broadly seen as a useful basis for further work to clarify whether, in each policy area, the allocation is correct.

The second and current phase running from April 2018 has focused on clarifying the scope for each potential framework including whether a legislative or non-legislative approach is required, identifying relevant operational detail and looking at proposed governance arrangements.

Phase Two has also produced early thinking on the internal market, recognised a level of inter-dependency with the review of intergovernmental relations (IGR) and attempted to agree an approach on the Devolved Administrations involvement in trade negotiations

This work clearly demonstrates Common Frameworks form only one part of a much broader change which is needed in the way the governments of the United Kingdom work together. The Welsh Government document Brexit and Devolution (2017) makes a clear case for the sort of changes needed to strengthen the constitutional settlement: the need to build new working relationships between the national governments of the UK.

As explained in the recent technical briefing my officials gave the Committee, Phase 2 has taken longer because of the recent strong focus from all administrations to progress no deal preparations and the complexities of individual Frameworks areas. While no deal remains a possibility, this will continue to impact the long-term development of Common Frameworks.

Any engagement is likely to be undertaken in Phase 3 of the Frameworks programme which is intended to provide a period of review, consultation and more detailed policy development. It has been broken down into the following workstreams:

Workstream 1: Framework Development

- Policy teams to develop outputs in light of the further guidance on the UK internal market, governance and dispute resolution, and approach to Northern Ireland commissioned by JMC(EN);
- Explore in detail the interaction with the Future Economic Partnership and identify related timescales for implementation;
- Continue to explore further dependencies including the DA role in the negotiation of international obligations;
- Central teams and Ministers to consider the constitutional implications, consistency and compliance with the Frameworks principles of outputs as they are developed further;
- Further bilateral stakeholder engagement by individual administrations.

Workstream 2: Stakeholder Engagement

- Policy teams to test initial outputs through informal multilateral stakeholder engagement in specific policy areas without prejudice to Ministerial views and other stakeholder engagement as appropriate.

Workstream 3: Seeking Agreement

- Completed framework outlines submitted to policy Ministers and endorsed through relevant collective agreement processes and JMC(EN)

Phase 4 will cover preparation and implementation of final framework proposals. It includes:

- Collaborative work to prepare implementing legislation and non-legislative elements of individual Frameworks, including formal scrutiny of proposals
- Formal stakeholder consultation on proposals as appropriate;
- Take final framework proposals through primary legislation (where not already in train) and non-legislative mechanisms; and
- Communication of final Frameworks to stakeholders on a bilateral and multilateral basis as appropriate.

Phase 5 will comprise any post-implementation arrangements from December 2020 onwards. Final Frameworks themselves will go live, alongside any arrangements for review, ongoing operation and development.

6. Can you identify the policy areas where legislative action has occurred, or is planned, to make 'consistent fixes' to retained EU law? Where applicable to a policy area, please provide details of the legislation that has been used to make the 'consistent fixes' referred to.

It is not yet clear whether the Frameworks areas identified as potentially requiring legislation will in fact do so. It is expected that most of the Frameworks in these areas are likely to be underpinned by a Memorandum of Understanding or Concordat rather than legislation.

However, this will depend on key developments in the Brexit area, particularly the terms on which we exit the EU.

7. Can you provide an assessment of the level of Welsh policy flexibility compared to that available under current EU policy frameworks?

We continue to work with the UK Administrations on ensuring policy flexibility under a Frameworks regime and in many cases, depending on the UK's ongoing relationship to the EU's legislative and regulatory framework, the policy discretion of the Devolved Administrations will increase.

The October 2017 JMC EN principles on which the Frameworks programme is based states:

'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;
- lead to a significant increase in decision-making powers for the devolved administrations'.

Policy areas where future legislation may be needed

8. In relation to the 21 areas that intersect with Welsh devolved competence that have been identified as requiring legislation, can you please (for each of these areas):

- *describe how the Welsh Government arrived at its decision to agree the need to legislate;*
- *identify any legislative actions that have been taken to date to prepare for the establishment of legislative Frameworks e.g. through EU Exit statutory instruments, UK Bills or other legislative means;*
- *provide details of any future legislative means that have been identified for the establishment of legislative Frameworks e.g. future Assembly Bills, UK Bills, or other legislative means; and*
- *an assessment of the level of Welsh policy flexibility compared to that available under current EU policy Frameworks.*

Please see answer to question 6.

Policy areas that the UK Government believes are reserved

9. What is your position on legislative competence in relation to the policy areas listed on page 40 of the Revised Frameworks Analysis?

State Aid and Food Geographical Indications are policy areas of particular interest to us.

We do not believe State Aid or Food Geographical Indications are reserved areas. The discussion on these points is ongoing with the UK Government. We agreed that these are matters where there is a strong case for a common UK approach but this does not mean that it is conceded that these areas are reserved. Rather, collaborative arrangements should be established to facilitate the development and implementation of that common approach.

Crosscutting issues

10. What progress has been made to develop:

- governance arrangements for future Frameworks, including decision making and dispute resolution mechanisms;*
- a shared understanding of the UK internal market, including underpinning principles and governance structures which could be applied;*
- an understanding of the intersection between the work on Frameworks with EU negotiations, involvement in future free trade agreements, and international obligations; and*
- the evidence base to underpin the need for Frameworks.*

Each Common Framework area will require clear, robust governance structures between the four UK administrations which include effective decision-making arrangements, dispute resolution procedures, and a review and updating mechanism. This will be implemented through a three tier governance structure:

- Policy level coordination (official level) and oversight of specific policy and technical matters.
- Portfolio level (official and Ministerial level) where individual framework areas closely interrelate at a departmental level and require political oversight.
- Cross-government plenary level (Ministerial) oversight of intergovernmental issues.

Within the Environment, Energy and Rural Affairs portfolio, where the majority of Common Framework areas reside, we have already formally established an Inter-Ministerial Group between the Devolved Administrations and Defra. This group will oversee the development of governance arrangements and consider other portfolio-wide matters including the development of a UK wide position for further international and EU discussions.

We are seeking to progress similar arrangements in other portfolio areas, to formalise and increase the range and frequency of ministerial quadrilaterals and wider inter-ministerial discussions to deal with the implications of Brexit, including oversight of frameworks and other inter-governmental relationships.

At the cross-government level, the current JMC system needs strengthening so it is capable of decision making on substantive inter-governmental matters. The Inter-Governmental Relations Review is underway but progressing slowly with this matter due to be discussed at the next JMC (EN).

Economic regulation in devolved areas has to date been made in the context of EU membership. Brexit raises the question of the need and objectives of economic cooperation and coordination across the UK after exiting the EU, the link between domestic economic policies and the UK-EU negotiations on the future economic partnership, and the governance required to enable this.

The discussion on the meaningfulness and implications of the concept of a UK 'internal market' is also relevant in the context of trying to secure Welsh interests in UK-wide economic policy matters and the interaction between devolved and non-devolved policy.

The proposed Ministerial Quadrilateral on Business and Industry is an important step in moving towards a coherent cross-UK discussion of national economic objectives.

Although the process is being managed through clear and agreed project management disciplines, in reality the development of Frameworks is emerging as a complex ongoing intergovernmental process with significant impacts and dependencies. These include EU negotiations, involvement in future free trade agreements, and international obligations as well as the developing Ministerial Quadrilateral groups and the Internal Market.

Relationships and commitment to the process across the four UK governments remains clear, and we are working together to ensure our engagement with external stakeholders is proactive and coordinated.

In terms of the evidence base for the necessity of a particular framework, Ministers will only enter into a framework – through Legislation, a Memorandum of Understanding or Concordat, or other means - if it can be demonstrated that they are necessary in order to secure Welsh interests.

Scrutiny

We are currently considering a possible model for Assembly scrutiny of Frameworks, and hope to consult on this soon.

11. In the meantime, what discussions have taken place within the Welsh Government, and with the other governments in the UK, about how intergovernmental work on legislative and non-legislative Frameworks can be opened for scrutiny by the UK's legislatures?

As part of the phased work programme for the development of Common Frameworks, we will continue to work with the other three UK Administrations through the Frameworks Project Board to consider the appropriate time and approach for legislatures to have the opportunity to scrutinise this work. The Board is due to report to the JMC (EN) before summer recess on key issues in the Frameworks programme.

