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Dear Clare

Congratulations you on your appointment as Convener of the Constitution, External Affairs and Culture Committee. I thought it would be useful to provide a brief update on the current constitutional context, and about the common frameworks programme before my committee appearance on 2 September.

*The Constitutional Consequences of EU Exit*

The people of Scotland decisively rejected leaving the EU in the 2016 referendum.

Nevertheless the UK Government chose to take Scotland out of the EU, against its will and at the height of a global pandemic, a reckless decision that that is causing significant economic and social damage to Scotland, and indeed the whole of the UK.

EU exit also means a fundamental change in the UK's constitutional arrangements. The challenge for devolved governments and legislatures is how that change will recognise and respect their roles and responsibilities under the devolution settlements and legislation. Some of the challenges come in the new structures that are being created following EU exit. These new systems of governance for the UK post EU membership include:

- the agreement of Common Frameworks;
- the impact of the Internal Market Act;
- the implementation of the Trade and Co-operation Agreement, including the involvement of devolved institutions;
- and the scope for Scotland to remain aligned with the EU in devolved areas.

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Other challenges have arisen from the pressures that the process of EU exit have placed on the existing systems of UK governance and the devolution settlement.

The process of EU exit has demonstrated the limits of the protection of the devolution settlement within the UK constitution, and that it is liable to be changed unilaterally by the UK Government and Parliament should they wish.

For example, since 1999 UK governments of various complexions scrupulously observed the Sewel Convention that the UK Parliament would not normally legislate for devolved matters or adjust the competence of the Scottish Parliament without its consent. That is no longer the case.

Since the EU referendum there have been four separate occasions where the UK Government has overridden this convention and passed legislation despite an explicit refusal of consent by the Scottish Parliament, most notably with the UK Internal Market Act.

The Internal Market Act is the single most important factor in the changed context. As you are aware the Scottish Government remains resolutely opposed to the Act, and the Welsh government is challenging the legality of some of its provisions in relation to the Government of Wales Act. What are in effect extensive new constraints on the exercise of devolved powers have been imposed without consent, and without any of the exemptions for wider policy aims that applied when the UK was subject to EU rules. For example, the sensible and proportionate exemptions from European Single Market rules – on the grounds of, for example, public health or environmental protection – do not exist under the UK Government's imposed regime.

The Act also confers new powers on UK Ministers to further alter the powers of the Scottish Parliament without its consent: delegated powers in the Act mean that devolved policy areas can be brought within – or excluded from – the scope of the market access principles by UK Ministers alone, without the agreement of the Scottish Parliament.

Work is ongoing to fully map out and understand the Act's impact: it will take time to fully grasp its implications for the devolution settlement. However it is clear that the increased complexity and uncertainty introduced by the Act presents unprecedented challenges for the exercise of the committee's scrutiny function – something brought out well in the committee's legacy report.

Your committee will, for example, have to address complex new questions around competence, as the entire Act has been placed in Schedule 4 of the Scotland Act and therefore beyond any amendment by the Scottish Parliament. The policy effect of proposed devolved legislation may also in many cases be difficult to gauge, as the unqualified application of the Act's market access principles will lead to situations where rules set elsewhere in the UK will automatically apply in Scotland regardless of decisions taken by the Scottish Parliament.

The spending powers in the Act allow the UK Government to act in areas exclusively devolved to the Scottish Parliament. Spending is only one aspect of coherent policy design, so it is unclear how the UKG will ensure its decisions in these areas will support wider devolved policy objectives.

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It is also unclear how this spending will be funded, that is whether there will be additional funding for devolved activity in Scotland, or whether UKG will bypass the Barnett process and effectively reduce the devolved budget.

### Common Frameworks

An update on frameworks delivery is included as an annex to this letter.

In many respects work on common frameworks is a positive example of co-operation between the four nations of the UK. Work on the programme is informed by a set of principles agreed by JMC Ministers October 2017 (see Annex A).

Those principles recognised that new arrangements might be needed to reflect the UK's changing trading relationships after EU exit, or to ensure the functioning of the UK's internal market (while acknowledging the legitimacy of policy divergence).

Crucially the principles also state that frameworks must respect devolution and the democratic accountability of the devolved legislatures, and that they will afford at least equivalent flexibility to tailor devolved policy as was the case under EU law.

As you can see from the annex progress has been made on agreeing provisional frameworks which have been operating since the start of this year.

However, four nations agreement is needed in relation to a number of important cross cutting issues, including around operational interaction with the Northern Ireland protocol – in particular how the intra-UK policy divergence required under the protocol will be addressed through common frameworks – and how reserved matters such as international relations will be addressed in policy issues covered by a common framework, in line with the commitment to close working on these matters in the JMC frameworks principles.

Frameworks' interaction with the UK Internal Market Act remains the biggest challenge, and the Act makes the finalisation and implementation of common frameworks significantly more difficult. As matters stand, policy divergence agreed through a framework would, in almost all circumstances, be undermined by the automatic requirement under the Act to accept standards set elsewhere in the UK.

Late in the Bill's parliamentary passage, UK ministers offered a concession in response to widespread criticism regarding the Act's impact on common frameworks: a mechanism that would allow for UK ministers to use delegated powers under the Act to exclude policy areas from the Act's effect, where divergence has been agreed through a common framework. UK ministers assured Parliament at the time that:

*In those cases, the Secretary of State would be able to bring to the House a statutory instrument to exclude from the market access principles a specific agreed area of divergence. This would follow consensus being reached between the UK Government and all the relevant parties that this is appropriate in respect of any specific defined topic within a common framework<sup>1</sup>.*

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<sup>1</sup> Lord Callanan, Parliamentary Under Secretary of State, BEIS, House of Lords, 15 December 2020. <https://hansard.parliament.uk/lords/2020-12-15/debates/30D48FC1-D74D-4627-8045-405C01172EAA/UnitedKingdomInternalMarketBill>

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Officials from the four nations are developing a process that, if adopted, would allow for policy divergence agreed through common frameworks to be excluded from the Act, in a manner that gives effect to the assurances offered by UK Government ministers in Parliament, and in line with the JMC (EN) frameworks principles. It is extremely regrettable that the UK Government did not take the opportunity to amend the Bill last winter to ensure that policy divergence managed by agreement through common frameworks would not be caught by the Act. If frameworks are to operate as intended, a clear exclusions process is needed that is supported by an unequivocal political commitment to ensure that where policy divergence has been agreed through a common framework, UK Ministers will exercise their delegated powers and grant an automatic exclusion from the market access principles set out in the Act. This work is ongoing and I hope to be able to provide a further update in the coming weeks.

The Scottish Government is fully aware of the role effective parliamentary scrutiny must play in the development and implementation of common frameworks, and of the need to properly address the cross-cutting issues that bear on frameworks before effective scrutiny can be undertaken. My officials have been in regular contact with parliamentary clerks, and I can assure the committee that the Scottish Government is doing all it can to progress these matters with the UK Government.

While a commitment from UK Ministers to exempt policy divergence covered by a common framework from the market access principles in the Act would be welcome, it would not address in any way the fundamental damage the Act is doing to the devolution settlements: for as long as it is in force it will act as an insurmountable barrier to more equitable, respectful and productive relations between the governments of the UK.

### Inter-governmental relations

Responsibility for intergovernmental relations in the Scottish government sits with the Deputy First Minister but I wanted to say a little about the approach that the Scottish Government is taking to relations with the UK government and the other devolved governments.

As you know, the Scottish Government firmly believes that independence within the EU is the best way to secure Scotland's future and to protect and enhance the powers of the Scottish Parliament. But for as long as Scotland remains part of the UK the Scottish government is committed to working within the current constitutional framework. We will continue to make clear our principled opposition to the decision to leave the EU and work hard to mitigate, where possible, the economic and social damage it is causing. We will also continue to resist and overcome the damage to the powers and responsibilities of Scottish Ministers and the Scottish Parliament being wreaked by the Internal Market Act.

We will support cooperative working with the UK Government and other devolved governments in an equal partnership and by consensus to secure Scotland's interests.

The committee is interested in the Intergovernmental Relations Review. It is instructive that discussions have been underway since March 2018. The detail of progress made in work in line with the remit *to ensure existing intergovernmental structures were fit for purpose in light of the UK's exit from the EU* was set out in a UK government publication shortly before the

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Scottish election<sup>2</sup>. Discussions between officials continue, but I am clear that while improved structures and processes would be of some value, what is needed is a fundamental change of attitude and behaviour by the UK government if there is to be a meaningful improvement in inter-governmental relations. I understand that the Chancellor of the Duchy of Lancaster intends to write to his counterparts in devolved governments early next month about the detail of the review – either myself or Mr Swinney would be happy to provide a further update to the committee after that.

I hope this information is useful to the committee and I look forward to seeing you at next Thursday's meeting.

Best wishes,



**ANGUS ROBERTSON**

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<sup>2</sup> <https://www.gov.uk/government/publications/progress-update-on-the-review-of-intergovernmental-relations>  
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## **ANNEX A: Common Frameworks: Definition and Principles (agreed at JMC (EN) October 2017)**

### **Definition**

As the UK leaves the European Union, the Government of the United Kingdom and the devolved administrations agree to work together to establish common approaches in some areas that are currently governed by EU law, but that are otherwise within areas of competence of the devolved administrations or legislatures.

A framework will set out a common UK, or GB, approach and how it will be operated and governed. This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued. Frameworks may be implemented by legislation, by executive action, by memorandums of understanding, or by other means depending on the context in which the framework is intended to operate.

### **Context**

The following principles apply to common frameworks in areas where EU law currently intersects with devolved competence. There will also be close working between the UK Government and the devolved administrations on reserved and excepted matters that impact significantly on devolved responsibilities.

Discussions will be either multilateral or bilateral between the UK Government and the devolved administrations. It will be the aim of all parties to agree where there is a need for common frameworks and the content of them.

The outcomes from these discussions on common frameworks will be without prejudice to the UK's negotiations and future relationship with the EU.

### **Principles**

1. 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;
  - safeguard the security of the UK.

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2. 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.
  
3. Frameworks will ensure recognition of the economic and social linkages between Northern Ireland and Ireland and that Northern Ireland will be the only part of the UK that shares a land frontier with the EU. They will also adhere to the Belfast Agreement.

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## ANNEX B: Update on Frameworks Delivery.

This note provides an overview of frameworks delivery as at 16 August 2021.

This update follows up on the previous update on frameworks delivery that the former Cabinet Secretary for the Constitution, Europe and External Affairs' provided in [his letter to the Finance and Constitution Committee of 8 February](#).

### Full frameworks and frameworks that have undergone formal scrutiny

Three frameworks have undergone formal scrutiny by the Scottish Parliament:

- **Hazardous Substances Planning** – scrutinised by the former Local Government and Communities Committee, with [recommendations sent to the Scottish Government on 13 January 2021](#).
- **Nutrition Labelling, Composition and Standards** – scrutinised by the former Health and Sport Committee, with [recommendations sent to the Scottish Government on 22 December 2020](#).
- **Food and Feed Safety and Hygiene** – scrutinised by the former Health and Sport Committee, with [recommendations sent to the Scottish Government on 16 February 2021](#).

The Hazardous Substances Planning framework was finalised and received final JMC (EN) approval from all four administrations in late March 2021.

Work to finalise the Nutrition Labelling, Composition and Standards and the Food and Feed Safety and Hygiene frameworks is on-going.

### Provisional frameworks

Most remaining frameworks were approved as provisional frameworks by portfolio Ministers of all four administrations by the end of 2020 or in early 2021. They had also been approved by JMC (EN) Minister from the Scottish, Welsh and UK governments. However, in February 2021, these frameworks still lacked provisional JMC (EN) approval from the Northern Ireland Executive.

The following five provisional frameworks received provisional JMC (EN) approval from the Northern Ireland Executive shortly before the start of the Scottish and Welsh pre-election periods:

- Food Compositional Standards and Labelling
- Blood Safety and Quality
- Organs, Tissues and Cells Safety and Quality
- Public Procurement
- Public Health Protection and Health Security

The first four of these have also been laid in the UK Parliament and published on [UK Government's webpage](#). All administrations agreed that formal scrutiny is not meant to start at this point and legislatures were informed that they will receive updated versions of these

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provisional frameworks for formal scrutiny once all administrations agree that the relevant frameworks have been sufficiently developed.

Since then, JMC (EN) Ministers from all four nations have agreed a revised clearance process for frameworks. According to this revised process, portfolio ministers agree individual provisional frameworks on behalf of their administrations. This is carried out through Inter-Ministerial Groups (IMGs) where these have been established. So as to ensure continued adherence to JMC (EN) Principles and consistency, individual frameworks will be continue to be reviewed and signed off by the UK Common Frameworks Project Board before they are agreed by portfolio ministers. This means that, while the JMC (EN) Ministers retain strategic oversight for UK Common Frameworks, all provisional confirmation agreement of individual frameworks is entrusted to portfolio ministers.

This had the effect that the remaining provisional frameworks, which had been signed off by portfolio Ministers across all administrations and by all JMC (EN) Ministers except for JMC (EN) Ministers in the Northern Ireland Executive, are now considered to have been confirmed as provisional frameworks.

The 21 provisional frameworks that are operational but have not yet been sent to legislatures for scrutiny, therefore, are:

- **Food Compositional Standards and Labelling\***
- **Blood Safety and Quality\***
- **Organs, Tissues and Cells Safety and Quality\***
- **Public Procurement\***
- **Public Health Protection and Health Security**
- **Emissions Trading System** – it should be noted that extensive scrutiny of the legislation associated with the framework has already been undertaken.
- **Radioactive Substances**
- **Resources and Waste**
- **Ozone-depleting Substances and F-gases**
- **Air Quality**
- **Industrial Emissions – Best Available Techniques**
- **Chemicals and Pesticides**
- **Agricultural Support**
- **Animal Health and Welfare**
- **Zootechnics**
- **Plant Health**
- **Plant Varieties and Seeds**
- **Fisheries Management and Support\*\***
- **Fertiliser Regulations**
- **Late Payment (commercial transactions)**
- **Organic Farming**

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\* *These provisional frameworks have been published.*

\*\* *The Fisheries framework is in three parts, including a short administrative arrangement building on existing working arrangements (e.g. the UK Fisheries Monitoring Centre agreement) and a provisional approach. The main part of the framework to ensure delivery of international obligations and joint management of a common resource is the Joint Fisheries Statement and further detailed in Fisheries Management Plans, as set out in the UK Fisheries Act. This has a statutory consultation and legislative scrutiny process as set out in Schedule 1 of the Act.*

As outlined in the former Cabinet Secretary for the Constitution, Europe and External Affairs' previous communication to the Finance and Constitution Committee, all provisional frameworks have undergone collaborative policy development, testing of policy conclusions, peer review and, where appropriate, external sector-specific engagement.

While we consider these provisional frameworks to be robust and fit for purpose, the impact of the UK Government-EU Trade and Co-operation Agreement, the implementation of the Northern Ireland Protocol and the passing of the UK Internal Market Act mean that it has been necessary to review the terms of a number of provisional frameworks. This work is on-going. Provisional frameworks will not be finalised as full frameworks until such development, necessary stakeholder engagement and formal scrutiny by all four legislatures have taken place.

## **Further frameworks in development**

There has also been agreement at official level to reconsider the need for frameworks for **Mutual Recognition of Professional Qualifications**, and **Services Directive**, which had previously been expected to move to no further action. What progress can be made in these areas is dependent on a number of factors, in particular the impact of the UK Internal Market on these policy areas. Discussion around the potential need for frameworks in these policy areas are on-going.

## **'No framework required' areas**

In 2020, a reclassification exercise was undertaken jointly by the UK Government and the devolved governments to determine where frameworks should be reclassified as 'no framework required' (this classification was previously referred to as 'no further action'). This classification means that the UK Government and devolved governments are in agreement that the impact of divergence across the UK is low and that there are alternative opportunities for future joint ways of working, meaning that a formal framework agreement is not required. This exercise has resulted in fewer frameworks requiring development than was previously published in the UK Government's [revised frameworks analysis in 2020](#).

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## **Parliamentary Scrutiny**

Parliamentary scrutiny is an essential part of the frameworks development process. It is important to ensure that the Scottish Parliament is suitably informed about, and is able to comment, on proposed frameworks.

The Scottish Government and the Scottish Parliament's former Finance and Constitution Committee had previously agreed a robust and flexible process for scrutiny, which was set out in a [letter of 24 February 2021 from the former Cabinet Secretary for the Constitution, Europe and External Affairs to the former Committee](#). The former Committee agreed to this process in [its letter of 5 March 2021](#). This process emphasises the importance of policy leads responsible for individual frameworks engaging with relevant committee clerks to plan for and take forward formal scrutiny. The Scottish Government intends to continue to follow this process. A flowchart of this process, accounting for the above-mentioned change to the clearance process of provisional frameworks that has been agreed by all four governments, is included in **Annex C**.

Lead scrutiny committees at the Scottish Parliament received a summary or update of each provisional framework before the end of 2020.

We hope the remaining provisional frameworks will be able undergo formal scrutiny by the Scottish Parliament from autumn 2021 onwards. However, achieving this aim will depend on further progress being made on the resolution of cross-cutting issues, particularly around the UK Internal Market Act exclusion process and on standardised text on international relations and trade.

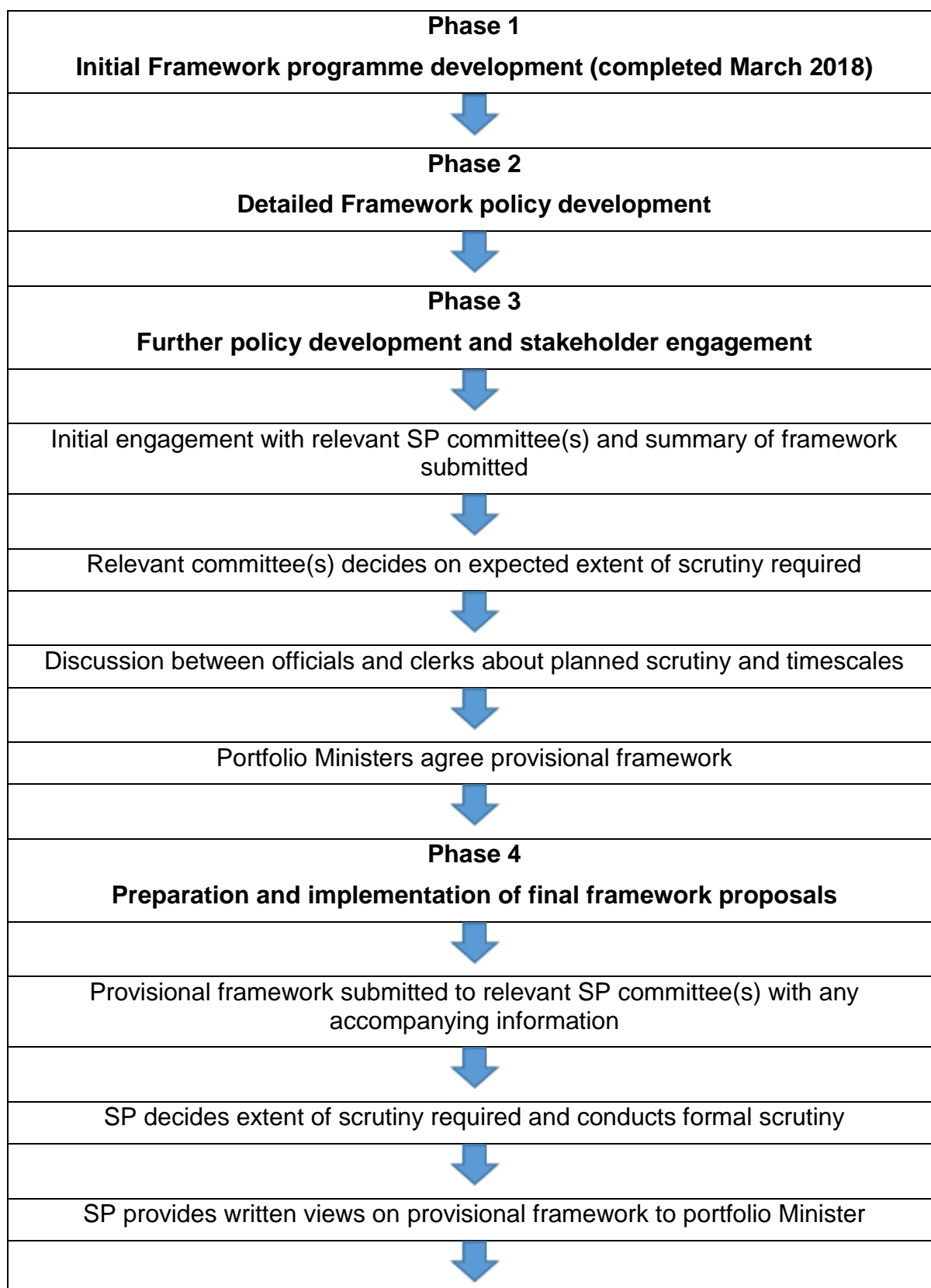
## **Stakeholder engagement**

The JMC(EN) agreed that all administrations should seek out opportunities to jointly engage with the stakeholder community where Ministers agree that it would be appropriate.

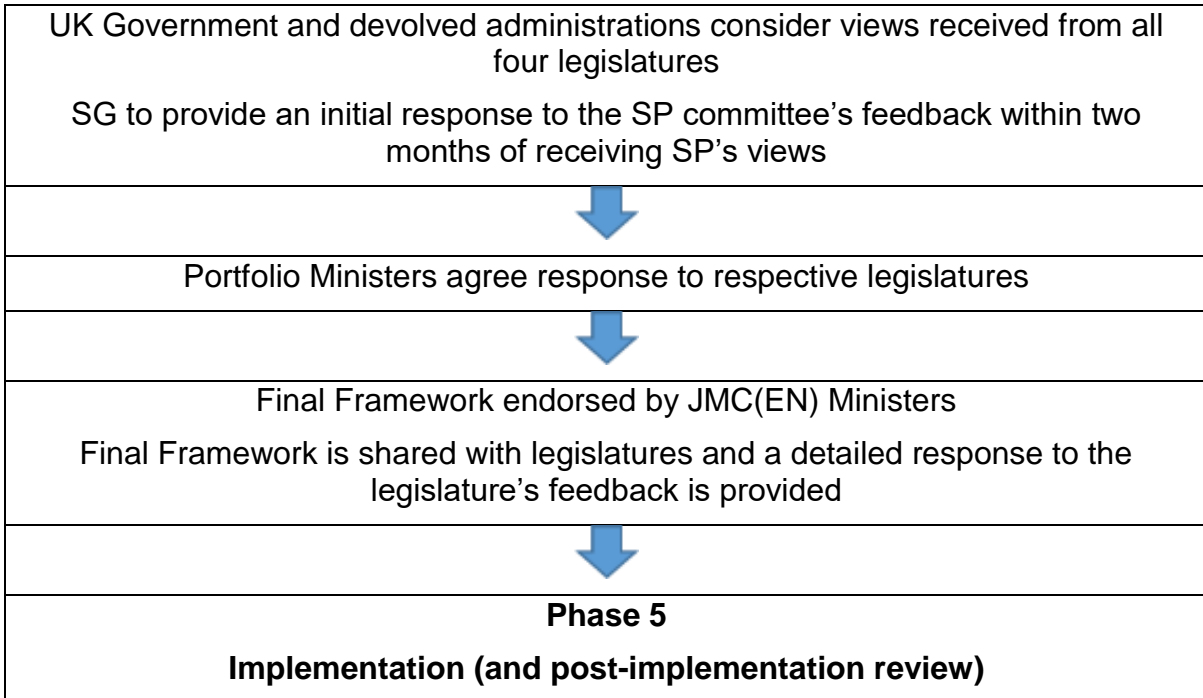
A stakeholder engagement plan was agreed by the UK Frameworks Project Board and has been used to inform stakeholders about frameworks. Due to the pandemic and a lack of clarity regarding key cross-cutting considerations, stakeholder engagement on a number of provisional frameworks was not concluded before the end of the Transition Period. The pandemic has also impacted on how effective stakeholder engagement can take place. The on-going lack of resolution of cross-cutting issues has further delayed stakeholder engagement on some frameworks. We remain committed to ensuring that the required stakeholder engagement on all framework policy areas has taken place before they are finalised as full frameworks.

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## ANNEX C: The parliamentary scrutiny process mapped against phases of framework development



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