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United Kingdom Internal Market Bill 2019-21

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The United Kingdom Internal Market Bill was introduced in the UK Parliament on 9 September 2020. This briefing examines the key provisions of the Bill from a devolved perspective.

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Contents

Key Points

1. An internal market is an agreement between different nations to allow unrestricted movement of goods and services between those nations, though in the context of the UK internal Market is seen by some as contested and confusing

2. Scotland currently sells a high volume of its exports to the rest of the UK. The most recent statistics indicate that Scotland exported goods and services to the rest of the UK to the value of £51.2 billion. This accounted for 60% of the value of all Scottish exports. Economic modelling carried out by by UK government suggests that increased regulatory barriers between the four nations could have a negative effect on GDP.

3. The UK Government published an internal market white paper in July 2020, which set out the proposed principles of mutual recognition and non-discrimination. The Scottish Government described the proposals as "fundamentally inconsistent with devolution" and argued they would lead to a lowering of standards. The Welsh Government also expressed its opposition and suggested the white paper was "fundamentally flawed and misleading".

4. Both the Scottish and Welsh Governments have suggested that common frameworks should be used to agree the provisions of an internal market.

5. However the UK Government says that the purpose of the Internal Market Bill is to "preserve the UK internal market, providing continued certainty for people and businesses to work and trade freely across the whole of the UK".

6. The Bill sets out what the principles of mutual recognition and non-discrimination mean for trade in both goods and services. The mutual recognition principle means goods and services which can be sold lawfully in one nation of the UK can consequently be sold in any other nation of the UK, even if they don't comply with another nation's regulatory standards. The non-discrimination principles means authorities across the UK cannot discriminate (directly or indirectly) against goods and service providers from another part of the UK.

7. On the face of the Bill, existing divergences in regulations are excluded (and so are allowed to continue). Schedule 1 of the Bill provides a list of other exemptions, this list being one that can be amended by the Secretary of State through secondary legislation (affirmative procedure).

8. The wording of the mutual recognition principle means that within their areas of legislative competence, the UK Government and the devolved administrations will retain the capacity to enforce their own requirements on goods produced in or imported into the relevant part of the UK. This means that local producers will have to continue to comply with the local regulation. In addition, there is no requirement proposed to ensure minimum standards are applicable across the UK.

9. On mutual recognition, academics have pointed to the size of the English market compared to the size of markets in the other three nations of the UK and suggested that this means English regulations will come to dominate in the internal market.

10. Part 3 of the Bill introduces a system for the recognition of professional qualifications across the United Kingdom internal market. This proposal will allow professionals qualified in one of the four United Kingdom nations to access the same profession in a different nation without needing to re-qualify.

11. Part 4 of the Bill proposes the creation of an independent Office for the Internal Market (OIM) within the Competition and Markets Authority (CMA). One of the functions of the CMA is to monitor and advise on the health and evolution of the Internal Market. However, under the proposals the CMA has no enforcement powers.

12. Part 5 of the Bill relates to the Northern Ireland Protocol, and has proved to be one of the most contentious and high profile areas of the Bill.

13. Clauses 46-47 of the Bill provide UK Ministers with "a single, comprehensive power to provide financial assistance in all parts of the United Kingdom" for many of the purposes previously covered by the EU structural funds and other EU funds. These include economic development, culture, sporting activities, infrastructure, domestic educational and training activities and exchanges, and international educational and training activities and exchanges.

14. The Bill also covers State Aid (which includes grants, loans and tax breaks). The Scottish Government argues that State Aid is not reserved, and therefore a matter for the devolved administrations. The UK Government has disagreed with this interpretation. Clause 48 would put this debate beyond doubt by modifying the list of reserved matters in the Scotland Act 1998.

15. The UK Government's proposals focusing on the Market Access Commitment appear to be based on the EU's Internal Market principles of mutual recognition and non-discrimination. However, the EU’s Internal Market is composed of more than just those two principles and includes level playing field provisions to ensure all Member States compete on an equal footing.

16. Crucially the EU's Internal Market and its system of governance ensures all Member States have a say in the rules and no one Member State can dominate. In addition, there is a system of enforcement to ensure all Member States obey the rules of the Internal Market.

Context

An internal market is an agreement between different nations to allow unrestricted movement of goods and services between those nations. That is, there are no tariffs between nations and no regulatory barriers to trade.

As the UK leaves the EU's Internal Market, all four governments of the UK have agreed that new arrangements are required to ensure the continued smooth functioning of trade across the four nations of the UK. However, there is disagreement on how those arrangements should be agreed, what the arrangements should be, and then, how they should be implemented. The Scottish and Welsh Governments have called for the new arrangements for an internal market to be agreed through the common frameworks process with the consent of all four governments. In contrast, the UK government has chosen to introduce primary legislation at Westminster to provide a statutory underpinning to the UK internal market.

The United Kingdom Internal Market Bill 2019-21 has attracted particular attention in relation to the operation of the Protocol on Ireland/Northern Ireland and the indication that provisions of the Bill would breach the UK's international law commitments. However, as Michael Dougan, Professor of European Law at the University of Liverpool has stated, the Bill also has an impact on devolution & the future governance of the entire UK.

This briefing provides some information on the UK's internal market before outlining the responses to the UK Government's initial white paper and then examining the key aspects of the Bill from a devolution perspective.

The UK Internal Market

What is an internal market?

Essentially an internal market is an agreement between different nations to allow for the unrestricted movement of goods and services between those nations. That is, there are no tariffs between nations and no regulatory barriers to trade. The exact parameters will be defined by the specific agreement. Internal markets typically feature common product standards and rules around monopoly powers and anti-competitive practices.

The idea of an internal market is however both "contested" (Royal Society of Edinburgh), as well as "confusing" (Professor Michael Keating). Professor Kenneth Armstrong , defines an internal market as

> " an economic space consciously created to facilitate economic activity between the territorial jurisdictions that comprise the internal market"
>
> Armstrong, 2020[1]

Professor Armstrong identifies two features of internal markets: the governance arrangements that aim to integrate distinct territorial markets (market integration), alongside the decision-making in the public interest between different jurisdictions (market regulation).

The EU Internal Market is one of the largest examples of an internal market and has developed and evolved since it was formally launched in 1993 after a six-year period of negotiation. After all this time, however, the EU Internal Market still does not fully cover services, where some barriers to cross-border trading still exist. More detail on the EU's Internal Market is provided later in the briefing.

Other examples include CARICOM (made up of 12 Caribbean nations) and the ASEAN Economic Community (which comprises 10 South-East Asian nations). There are also examples of internal markets operating within a single country, such as in Canada, Switzerland and the USA. The Scottish Parliament's Finance and Constitution Committee commissioned research into these single-country internal markets and the different ways in which they have evolved and operate.

Do we already have an internal market in the UK?

Opinions divide on the historical existence of an internal market in the UK. The UK Government states in its White Paper that a UK internal market has existed since the Acts of Union of 1706 and 1707, and this view is supported by some commentators . However, others disagree. Professor Michael Keating argues that to say that a UK internal market was created by the 18th Century Acts is "misleading and anachronistic". According to Professor Keating:

> " The concept of a single or internal market only makes sense in the context of a modern, interventionist, regulatory state. It represents one of the advanced stages in economic union, which starts with free trade and progresses through a customs union towards monetary union."
>
> Keating, 2020[2]

These issues are explored more fully in a House of Commons Library blog on the Internal Market.

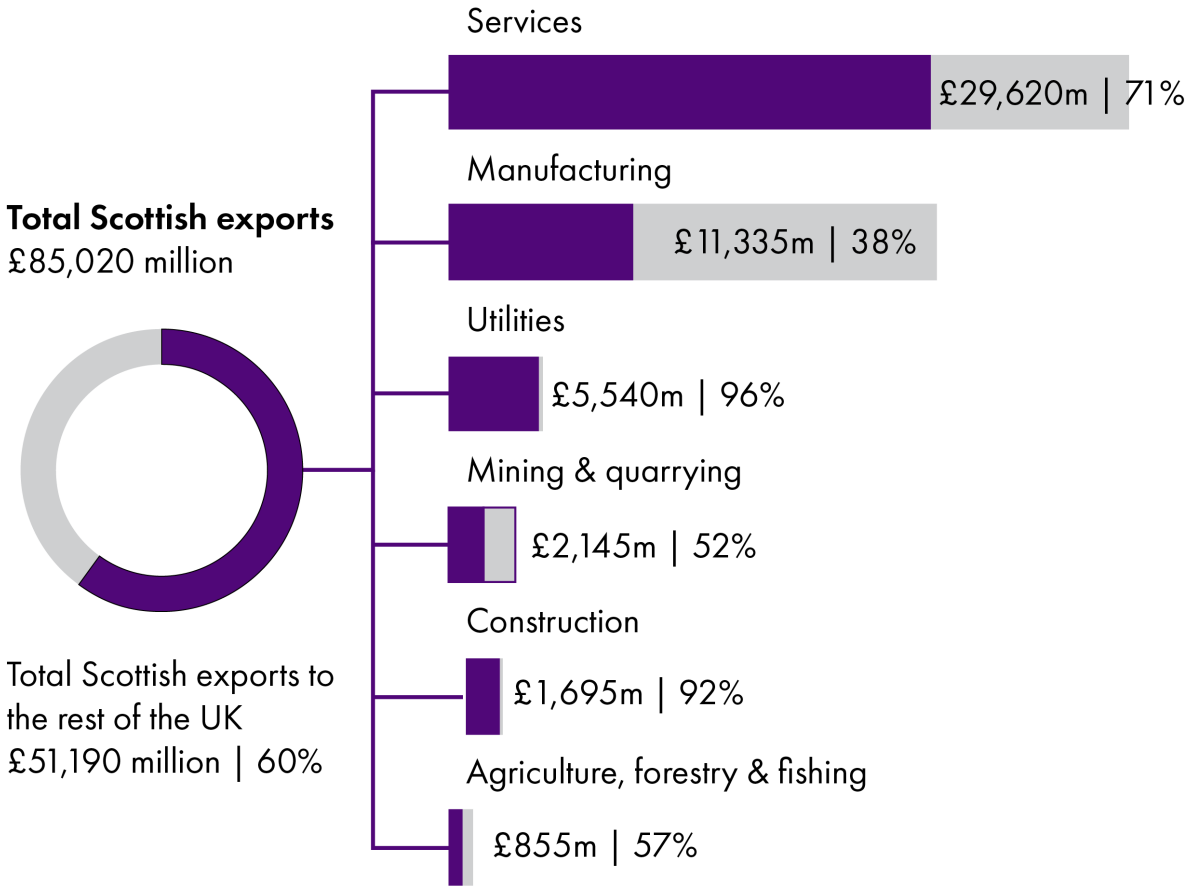
What is less contentious is that the UK has effectively had an internal market by virtue of its membership of the much larger EU Internal Market, as explained by Dr Emily Ludgate and Chloe Anthony of the University of Sussex:

> " Until Brexit, the UK internal market could be understood in terms of the rules and principles of the EU internal market which underpinned it. With few exceptions, the EU internal market provides for frictionless trade between EU Member States. For goods, this means that there are no tariff duties - or checks - and no need for Member States to undertake regulatory compliance or certification procedures beyond what they do domestically. The EU achieved this by harmonising a great deal of its Members' standards for product safety and public protection. Goods regulated by standards that are not harmonised circulate freely due to the principle of mutual recognition. Within this framework, UK nations upheld a system of divergence and harmonisation that safeguarded free movement of goods, with narrow exceptions (such as checks on live animals between Great Britain and Northern Ireland)."
>
> Ludgate, 2020[3]

Scotland and the UK internal market

Scotland currently sells a high volume of its exports to the rest of the UK. The most recent statistics from the Scottish Government indicate that Scotland exported goods and services to the rest of the UK to the value of £51.2 billion. This accounted for 60% of the value of all Scottish exports.

Scottish Exports destined for the rest of the UK (2018)

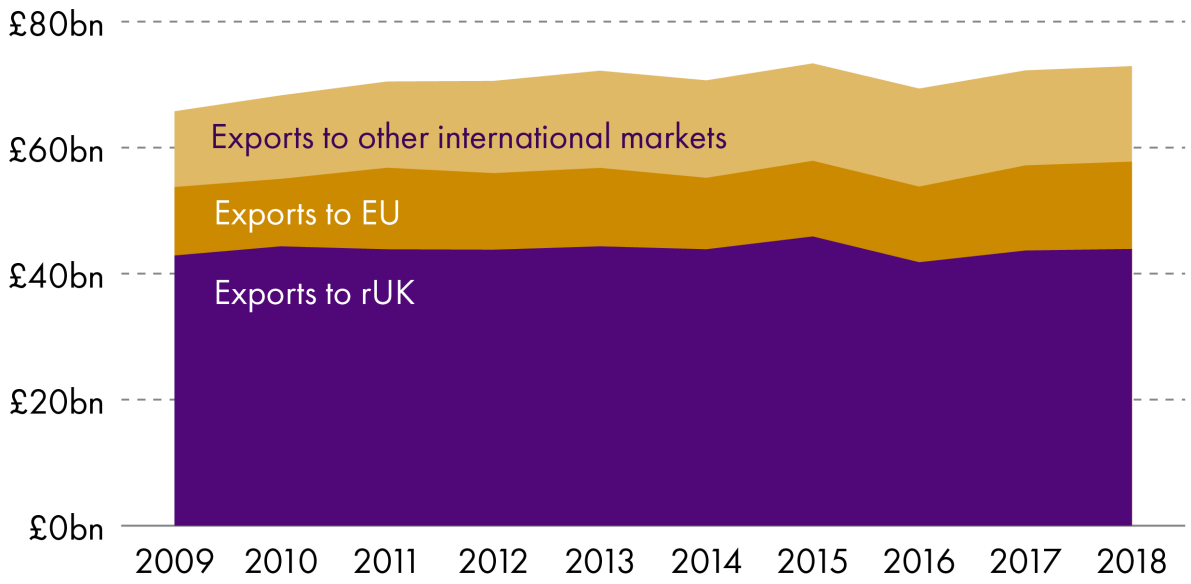


Exports Statistics Scotland 2018: Scottish Government (January 2020)

Over half of the value of Scottish exports to the rest of the UK was accounted for by trade in services (£29.6 billion). Of the trade in services, around a third (£10.5 billion) was financial and insurance activities.

The value of the UK internal market to Scotland has remained relatively stable in real terms over the last decade, with percentage growth in international export markets outstripping percentage growth in exports to the rest of the UK. However, as highlighted above, despite the stronger growth in international export markets, the rest of the UK remains Scotland's largest export market in value terms.

Value of Scottish Exports 2009-2018 (real terms)



Export Statistics Scotland 2018: Scottish Government (January 2020)

Further analysis of Scottish export statistics, including by industry and by destination, are available in this recent SPICe briefing (14/9/20).

The UK government's impact assessment

One of the, sometimes, less scrutinised documents to accompany a UK bill is the impact assessment. The UK government's Impact Assessment of the UK Internal Market Bill is however useful in setting out some of the underlying thinking and analysis on why maintaining an internal market in the UK is considered beneficial. For example, the assessment sets out the rationale for the legislation:

> " Without a substitute framework for the EU governance there is the risk of new regulatory barriers being erected that could bring significant disruption not just to the wider UK economy, but also to businesses in England, Scotland, Wales and Northern Ireland individually."
>
> Department for Business Energy and Industrial Strategy, 2020[4]

The assessment continues:

> " This bill seeks to mitigate against potential harmful effects caused by potential internal regulatory barriers that could arise in future. It places a legal requirement on administrations and competent authorities to mutually recognise certain types of regulatory requirements across the UK, and not to discriminate based on the origin of goods, services and professional qualifications. This will guarantee UK companies can trade unhindered in every part of the United Kingdom, respecting devolution – ensuring the continued prosperity of people and businesses across all four nations."
>
> Department for Business Energy and Industrial Strategy, 2020[4]

Where possible, impact assessments attempt to monetise the benefits (suggest a financial value), but this is not seen as possible in this case as "quantification would rely on inherently uncertain and hypothetical scenarios of separate regulatory regimes".

Nevertheless, the impact assessment does draw together some conceptual, qualitative and quantitative analysis, some of which is described below:

Modelling of the border effects in the UK

The Department for Business, Energy & Industrial Strategy (BEIS) carried out modelling (using a general equilibrium gravity model) to assess the impacts of borders on trade and trade costs within the UK. The model reported that trade between parts of the UK (the four nations of the UK) is 24% lower than trade within those parts once distance and other factors have been accounted for. It is reported that the equivalent measure for Germany, shows that interstate trade is 65% lower than within states.

> " The model was further used to simulate the impact of increasing trade costs, for example to the German level. If UK constituent part 'border effects' increased to German levels, the impact would be much larger in Scotland, Wales and NI than for the UK as a whole: Analysis shows that UK GDP could be reduced by 0.34%, while the reduction in Scottish [GDP] would be 1.18%, 1.61% in Wales and 0.70% in Northern Ireland. This reflects the current importance of intra-UK trade relative to international trade in these geographies. Applying these percentages to the most recent GDP figures for 2018 (ONS, 2019), this implies a loss in GDP of £7.3 billion for the UK as whole with a loss of £3.9 billion for England and £1.9 billion and £1.2 billion for Scotland and Wales respectively. If barriers exceeding those found in Germany were introduced the GDP loss could be greater."
>
> Department for Business Energy and Industrial Strategy, 2020[4]

Impact on retail and wholesale sectors of higher regulatory barriers

BEIS modelling also estimated the effects on trade flows arising from hypothetical scenarios of divergence, for example in the retail and wholesale sector. Some of the regulatory barriers are thought to include low-level differences in areas such as food hygiene, product packaging and labelling provisions, to more overtly discriminatory measures favouring local suppliers. The modelling suggests this could lead to a tariff equivalent cost ranging between 2.3% and 8.6%.

> " If such barriers were to arise between Scotland and the rest of the UK, Scotland's retail & wholesale sales to the rest of the UK could initially decrease by between 7% and 22%, or by £0.4 billion and £1.4 billion based on current annual trade volumes."
>
> Department for Business Energy and Industrial Strategy, 2020[4]

Qualitative engagement with business

The UK government engaged with 40 companies of "varying size" and "covering a wide range of sectors". The assessment concluded:

> " Overwhelmingly businesses recognised and reflected on the commercial benefits of operating within an integrated market with as little regulatory differences as possible. Businesses generally felt that any regulatory difference would result in the loss of efficiencies and undesirable additional costs, with implications for consumer choice if supply chain viability is reduced and consumer confidence if there is a lack of clarity about differences in standards across the UK. "
>
> Department for Business Energy and Industrial Strategy, 2020[4]

The impact assessment also points to **one of the "costs" of the legislation** being

“ the potentially reduced ability for different parts of the UK to achieve local policy benefits. While this legislation does not constrain the ability of different parts of the UK to introduce distinct policies, to the extent that those policies may be enforceable on a reduced number of businesses might make it harder to realise fully the benefits of those policies.”

Department for Business Energy and Industrial Strategy, 2020[4]

The internal market white paper

On 16 July 2020, the UK Government published its White Paper setting out its thinking on the nature of the UK internal market once the UK leaves the Brexit transition period at the end of this year [5] . In the introduction to the White Paper, the UK Government set out why it believed an Internal Market Bill was necessary:

> " While the Internal Market has been enshrined in British law for over three centuries, the UK's accession to the then-European Economic Community in 1973 saw European law take on a more direct role in providing the legislative underpinning of our economy. European directives and regulations, along with relevant judgements from the Court of Justice, replaced British law and took on an integral role in the legislative underpinning of the Internal Market."
>
> " As the UK leaves the Transition Period, and leaves the EU's legal order, we will need to legislate to maintain this centuries-old success story and guarantee the continued seamless functioning of the UK Internal Market. Avoiding the creation of new barriers is vital for our brilliant manufacturers, producers and service providers trading within the bounds of our nation; for our partners overseas as we seek to build ever richer trading relationships with other countries; and to secure the prosperity and the livelihoods of our people right across the United Kingdom. We will do this in a way that respects the devolution settlement, and ensures that the devolved administrations receive powers over many more policy areas than they currently hold as part of the EU, whilst ensuring that all intra-UK trade remains frictionless."
>
> UK Government, 2020[5]

Form a devolved perspective, the key elements of the White Paper were the UK Government proposals to legislate for a Market Access Commitment to enshrine in law two principles to protect the flow of goods and services in the UK's internal market:

- the principle of mutual recognition, and;
- the principle of non-discrimination.

The UK Government also used the White Paper to set out proposals for governance and oversight of the internal market and to reserve state aid/subsidy policy.

The Scottish Government published an initial assessment of the White Paper on 12 August:

> " The Scottish Government does not support these proposals and will oppose them if, after the brief consultation period, legislation is brought forward at Westminster. The proposals are neither necessary nor properly thought out. The UK's internal trading arrangements are already subject to an effective system of regulation which properly includes consideration of other policy matters which are necessary to achieve a balanced and proportional approach, and which are co-ordinated with powers held by the respective legislatures across the UK and by the UK Government and devolved governments. "
>
> Scottish Government, 2020[6]

The Scottish Government also used its response to the White Paper to suggest the UK Government's proposals are "fundamentally inconsistent with devolution" because:

> “ the approach in the paper centralises control in the UK Government and UK Parliament, cutting across devolved powers by imposing new domestic constraints on the exercise of these functions; the approach sees devolved decision-making as an obstacle or problem that needs to be bypassed through UK-wide legislation, rather than taking an approach which prioritises agreement by means of negotiation and consensus between different decision-making centres across the UK.”
>
> Scottish Government, 2020[6]

The Scottish Government also suggested that the non-discrimination and mutual recognition principles would facilitate a lowering of standards because:

> “ Scotland will be compelled to accept standards, set by the UK Government and Parliament for England (most probably using the English Votes for English Laws mechanism which will exclude MPs from Scotland), regardless of the views and decisions of the Scottish Government and Parliament, and regardless of whether they are appropriate for circumstances in Scotland.”
>
> Scottish Government, 2020[6]

The Welsh Government's response to the White Paper expressed concern that the UK Government's proposals presented a threat to the future of the United Kingdom. In the letter to the Secretary of State for Business, Energy & Industrial Strategy Alok Sharma, the Welsh Government's Counsel General and Minister for European Transition, Jeremy Miles wrote:

> “ The Welsh Government is concerned that the long-term survival of the United Kingdom is under great strain and that the approach taken in the White Paper will exacerbate those tensions in a way which, if not addressed, will accelerate the break-up of the Union. Our initial view was that the White Paper was fundamentally flawed and misleading – further analysis of the substance of your proposals has confirmed this view. ”
>
> “ We have already made clear that we are not opposed to an internal market for the United Kingdom, neither are we opposed to legislation being brought forward to support the functioning of a UK Internal Market. Wales’ interests, and those of the UK as a whole, are best served by ensuring smooth trading arrangements for businesses across all four nations. However, your proposals do not deliver this and in any case, this should be a collaborative piece of work in which all the governments within the UK have the opportunity to participate fully and on an equal basis. ”
>
> Welsh Parliament, 2020[7]

On the Market Access Commitment, the Welsh Government wrote:

> “ Our reading of the proposals is that the proposed legislation would prevent the Senedd or Welsh Ministers from imposing mandatory requirements relating to lawful sale of goods and services in Wales – even where there were justified by public health objectives, environmental concerns or any other public policy reason. This would represent a direct attack on the current model of devolution. The power – even if untouched – to regulate for goods and services produced in Wales would moreover be severely undermined, if not made completely impractical as in almost any sector, only a minority of good and services consumed in Wales are produced here. ”
>
> Welsh Parliament, 2020[7]

Both the Scottish and Welsh Governments expressed concern that the White Paper proposals did not take account of the views of the devolved institutions and that the approach of developing an internal market through common frameworks appeared to have been usurped by the UK Government's internal Market proposals.

The Scottish Parliament's Finance and Constitution Committee also responded to the UK Government's White Paper. In its response, the Committee said that it was necessary for all four governments and legislatures across the UK to work constructively together to seek a solution to this complex and challenging issue and that:

> “ This must be achieved through mutual trust and respect for the existing constitutional arrangements within the UK. In particular, as this Committee has emphasised on numerous occasions, the UK Government post-Brexit must respect the devolution settlement. ”
>
> Scottish Parliament Finance and Constitution Committee, 2020[8]

The Committee wrote that whilst it recognised the economic benefits to businesses across the four nations of the United Kingdom of having a set of rules which ensures there are no barriers to trading within the UK, it was important to recognise that:

> “ how this is achieved, monitored and enforced is highly complex, contested and must take account of the existing constitutional arrangements within the UK. At a minimum, this must be based on an inclusive dialogue with the devolved governments and parliaments as well as interested parties and the wider public and must not be imposed. ”
>
> Scottish Parliament Finance and Constitution Committee, 2020[8]

On the Market Access Commitment, the Committee compared the UK Government's proposals to the principles which underpin the EU Internal Market, in particular total harmonisation and minimum standards and concluded that:

> “ The Committee’s view is that, other than the principles of mutual recognition and non-discrimination, it is striking that there is no discussion within the White Paper about what other principles should underpin the design and operation of a UK internal market. Without such an approach, it is unclear how a commonality of approach to the internal market can be agreed across the four governments and legislatures within the UK. In particular, there is no discussion about how baseline standards or fundamental principles in relation to environmental policy can be achieved across the UK given that this is a devolved competence. ”
>
> Scottish Parliament Finance and Constitution Committee, 2020[8]

The Committee also expressed concerns about how the non-discrimination and mutual recognition principles would work in practice and how the governance arrangements and independent advice and monitoring functions would consider and take account of the devolution settlement.

The Scottish Parliament debated the UK Government's Internal Market White Paper on 18 August 2020. At the conclusion of the debate, the Parliament agreed the following motion by 92 votes to 31:

> " That the Parliament calls on the UK Government to withdraw its proposals for a UK internal market regime, which are incompatible with devolution and the democratic accountability of the Scottish Parliament; notes that the proposals would be detrimental to businesses, consumers and citizens across Scotland; agrees that they would fundamentally undermine legitimate devolved policy choices on a range of matters, including the environment, public health and social protections; these proposals would hinder the capacity to utilise state aid interventions, including public ownership, to generate locally-rooted economic development grounded in local democracy; notes that the consultation on the proposals was only four weeks long and almost entirely covered a period when the Scottish Parliament, the Welsh Parliament and the Northern Ireland Assembly were in recess, and that the Secretary of State for Business, Energy and Industrial Strategy refused an invitation to give evidence to the Finance and Constitution Committee; regards this as an unacceptable sign of contempt for the parliamentary process, and agrees that for the UK Government to proceed with legislation as proposed without the consent of the Scottish Parliament would be a clear breach of Section 28(8) of the Scotland Act 1998."
>
> Scottish Parliament, 2020[9]

Following a four week consultation process, the UK Government introduced the UK Internal Market Bill in the House of Commons on 9 September 2020 [10] .

The internal market and common frameworks

In many policy areas, EU laws have ensured that there is a consistent approach across the UK, even where these policy areas are devolved. This is because the UK and all of its governments have had to comply with EU law. In effect, this compliance has meant that the same broad policy approach has been followed.

After the end of the Brexit transition period, the possibility of policy divergence emerges because the UK Government and the devolved administrations within the UK will no longer need to comply with EU law. The UK and devolved governments agreed in October 2017 that in some areas there should be a coordinated approach taken across the UK. To deliver this coordination, the governments have been negotiating common frameworks.

A common framework is an agreed approach to a particular policy, including the implementation and governance of it. Common frameworks will be used to establish policy direction in areas where devolved and reserved powers and interests intersect. Developments in common frameworks will be one of the factors which determines how Scotland and the rest of the UK interact post EU exit.

Some common frameworks may be legislative but it is anticipated that the majority will be non-legislative. That means that they will be agreed through memorandums of understanding, concordats and so on, rather than being set out in primary legislation. SPICe has recently published a briefing providing information on common frameworks and an update on their development.

Both the Scottish and Welsh Governments have suggested that common frameworks should be used to agree the provisions of an internal market. The Scottish Government's initial assessment of the White Paper stated:

> “ The Scottish Government believes the UK internal market proposals are also completely unnecessary. We have participated in good faith in the common frameworks process since 2017, and believe that this process, which is designed to manage policy differences on the basis of agreement and is founded on respect for devolution, is not only all that is needed to manage the practical regulatory and Market implications of the UK leaving the EU, but is in fact the specific tool that was jointly designed by the devolved governments and the UK Government for that task. The new UK Government proposals wish to abandon that work despite the fact that it is near to completion. ”
>
> Scottish Government, 2020[6]

In a similar vein, the Welsh Government response to the UK Government's White Paper stated:

> “ Common Frameworks are expressly designed to allow for managed divergence in areas where all four Governments agree there is a need for this. In setting up the Common Frameworks programme, the UK Government identified the areas they considered may need a Framework to ensure the functioning of the UK Internal Market – these areas are supposed to cover all areas of returning powers. This would suggest, on the UK Government’s own analysis, that there are no other areas outside the Frameworks areas which require agreement on divergence. Since that exercise, and in good faith, policy areas have been considering to what extent any Frameworks are needed in specific areas based on the fact-specific circumstances of each Framework area. This work has been developed on the basis of collaboration and cooperation across the UK’s nations, in line with the Intergovernmental Agreement already agreed. ”
>
> “ The UK Government, through the proposals set out in the White Paper, now suggests that the Common Frameworks programme does not go far enough in protecting the integrity of the UK’s Internal Market. We have been clear that, while we agree that every aspect of the Internal Market is not covered by current Frameworks, this is not a justification for a heavyhanded piece of legislation which goes much further than areas covered by retained EU law.”
>
> Welsh Parliament, 2020[7]

The UK Government's has stated that common frameworks should be developed to support the functioning of the internal market, but that on their own they cannot guarantee the integrity of the internal market:

> “ Common Frameworks are designed to support the functioning of the Internal Market, the management of common resources and the UK’s ability to negotiate, enter into and ratify trade and other international agreements. ”
>
> “ Common Frameworks aim to protect the UK internal market by providing high levels of regulatory coherence in specific policy areas through close collaboration with devolved administrations to manage regulation. They do this by enabling officials to work together to set and maintain high regulatory standards. However, Common Frameworks on their own cannot guarantee the integrity of the entire Internal Market. As they tend to be sector specific, they do not address the totality of economic regulation or the cumulative effects of divergence, for example if the consequences of regulatory difference in one sector that affects other sectors. Finally, they do not fully address the question of how best to substitute the wider EU ecosystem of institutions and treaty rights had on the UK internal Market. ”
>
> “ There is thus a need to provide a cross-cutting complement to the Common Frameworks and wider internal market work, that can provide the guarantee needed by business, consumers, workers and the third sector in all parts of the UK. ”
>
> UK Parliament, 2020[11]

Purpose of the Bill

The United Kingdom Internal Market Bill 2019-21 was introduced into the UK Parliament on 9 September 2020. According to the UK Government, the purpose of the Bill is to:

> “ preserve the UK internal market, providing continued certainty for people and businesses to work and trade freely across the whole of the UK. ”
>
> UK Parliament, 2020[12]

With the UK's departure from the European Union and the end of the transition period at the end of December 2020, the regulatory framework provided by the EU across the UK will fall away. Whilst the UK was a member of the EU a definition of, and legislation for, the UK internal market was not needed even when devolution for Scotland, Wales and Northern Ireland was delivered in 1999. EU membership meant membership of the EU's Internal Market, which is established under Article 26 of the Treaty on the Functioning of the European Union (previously Article 14 of the Treaty establishing the European Community). Membership of the EU's Internal Market means common rules across all member states. This is discussed in more detail in the section on the EU Internal Market.

The UK Government has now chosen to introduce legislation to ensure a new legislative framework is in place across the UK to replace the EU's framework and to "ensure businesses can continue to trade freely across the UK as they do now". According to the Bill's explanatory notes, the Bill is driven by three overarching policy objectives [12] :

> a. to continue to secure economic opportunities across the United Kingdom;
>
> b. to continue to increase competitiveness and enable citizens across the UK to be in an environment that is the best place in the world to do business; and
>
> c. to continue to provide for the general welfare, prosperity, and economic security of all UK citizens.

Beneath these objectives, the white paper set out three 'supporting aims' [5] :

1. to maintain frictionless trade between all parts of the UK;
2. to maintain fair competition and prevent discrimination;
3. to continue to protect business, consumers and civil society by engaging them in the development of the market.

The Explanatory Notes set out the measures in the Bill which it states are designed to "create a coherent approach to market access and support for the UK internal market" [12] . These measures are:

- The principles of mutual recognition and non-discrimination of goods and services form the Market Access Commitment. These will allow people and businesses to trade as they do now, without additional barriers based on which nation they are in.
- Modifications to the market access commitment principles, alongside additional provisions prohibiting new NI-GB checks, will give effect to providing unfettered access of qualifying goods from Northern Ireland to Great Britain.

- The measures on the recognition of professional qualifications will allow professionals qualified in one of the four United Kingdom nations to access the same profession in a different nation without needing to re-qualify.
- The creation of the Office of the Internal Market within the Competition and Markets Authority (CMA) will be provided with new functions, including monitoring the health of the internal market. and advising and reporting on proposals and regulations and their potential or actual impact on the United Kingdom internal market.
- Measures which take steps to clarify specific elements of the Northern Ireland Protocol in domestic law, concerning tariffs, export procedures and state aid, to remove any ambiguity.
- The provisions to ensure a uniform approach across the UK to the application of EU State aid law under Article 10 of the Northern Ireland Protocol.
- The power to provide financial assistance will allow the UK Government to provide financial assistance for a number of priority purposes across the whole of the UK.
- Reservation of subsidy control to allow the UK Government to regulate the effects of distortive or harmful subsidies, whether that is in relation to international trade or the UK internal market.

In written evidence for the Scottish Parliament's Finance and Constitution and Europe and External Affairs Committees, Professor Michael Dougan said that as a result of Brexit decisions need to be made about how much regulatory difference should happen across the UK:

> “ However, the UK’s withdrawal from the EU now makes it important to decide how far regulatory differences across the constituent territories of the UK will impact upon internal trade in goods and services. ”
>
> “ On the one hand, the problem is most certainly genuine: in any state where autonomous regulatory competences are allocated to different territories, the resultant legislative divergences are capable of creating barriers to trade and distortions of competition that need to be addressed and managed. ”
>
> “ On the other hand, it is also true that the precise scale of this problem remains (for the time being) uncertain – not least given the novelty of the situation now facing the UK, in which the definition and functioning of the UKIM is only one of a number of relevant but open variables. ”
>
> “ However, there are sound reasons to believe that the issue of UK regulatory divergence, and the consequent need for internal market management, will indeed become a real and practical matter: after all, the UK Government has itself promised that Brexit will lead to a significant expansion in devolved competences; while the UK’s rejection of any close future relationship with the EU means that there will be no coherent external reference point for the future evolution of internal UK trade. ”
>
> Dougan, 2020[13]

A number of the proposals are discussed in the next section of the briefing examining what the Bill proposes.

What does the Bill propose?

Market access for goods

Part 1 of the Bill sets out arrangements to ensure the continued functioning of the internal market for goods in the UK. It does this by establishing the "United Kingdom market access principles" for goods across the UK. The market access principles are the principles of mutual recognition (clauses 2-4) and non-discrimination (clauses 5-9).

Mutual recognition

Clause 2 sets out the detail of the mutual recognition principle. It provides that goods that have been produced in, or imported into, one part of the United Kingdom and which can lawfully be sold in that part of the United Kingdom (because the goods comply with the relevant requirements that would apply to their sale), can then be sold in any other part of the United Kingdom without having to adhere to any relevant regulatory requirements in that other part.

The Explanatory Notes provide an example of how this approach might work in practice:

> " For example, a packet of crisps made in one part of the UK that met the relevant requirements in that part (for example on the composition of the crisps or the packaging) could be sold in any other part of the UK without having to meet any other relevant requirements that apply there. "
>
> UK Parliament, 2020[12]

Clause 3 defines "relevant requirement" for the purposes of the mutual recognition principle for goods as it applies in relation to any sale of goods in a part of the UK. Clause 3(2) states that a relevant requirement is a statutory requirement in a part of the UK that prohibits the sale of goods or results in their sale being prohibited if an obligation or condition is not complied with and which is within the scope of the mutual recognition principle.

A statutory requirement is defined in clause 3(10) as an obligation, a condition or a prohibition (however described) imposed by legislation (including legislation imposing mandatory terms into contracts for the sale of goods).

Clause 3(4) provides the types of statutory requirements that fall within the scope of the mutual recognition principle – it must relate to any one or more of the following:

> (a) characteristics of the goods themselves (such as their nature, composition, age, quality or performance);
>
> (b) any matter connected with the presentation of the goods (such as the name or description applied to them or their packaging, labelling, lotmarking or date-stamping);
>
> (c) any matter connected with the production of the goods or anything from which they are made or is involved in their production, including the place at which, or the circumstances in which, production or any step in production took place;

(d) any matter relating to the identification or tracing of an animal (such as marking, tagging or micro-chipping or the keeping of particular records);

(e) the inspection, assessment, registration, certification, approval or, authorisation of the goods or any other similar dealing with them;

(f) documentation or information that must be produced or recorded, kept, accompany the goods or be submitted to an authority;

(g) anything not falling within paragraphs (a) to (f) which must (or must not) be done to, or in relation to, the goods before they are allowed to be sold.

Clause 3(7), (8) and (9) provide that the Secretary of State may amend the lists of what is included and excluded from the scope of relevant requirements by adding, varying or removing a paragraph within the list in clause 3(4). Before making regulations, the Secretary of State must consult the devolved administrations (i.e. the Scottish Ministers for Scotland)..

Clause 4 provides for the exclusion of certain existing requirements from the scope of mutual recognition in areas where different regulatory requirements will exist in different parts of the UK on the day before this clause comes into force. The House of Commons Library briefing on the bill summarises the exclusions from the mutual recognition principle as follows: [14]

Existing diverging regulations

Existing regulations (in place before this part of the Bill comes into force) that already diverge across the UK will be outside of the scope of mutual recognition. If substantive changes are made to such existing regulatory requirements they will then be brought into scope of mutual recognition.

Sales for a public function

The way in which a sale is defined in the Bill (clause 13) excludes sales which are not made in the course of business or are for performing a public function. In general, this means that sales made by public bodies or authorities are excluded from the mutual recognition principle.

Schedule 1 of the Bill (introduced by clause 10) sets out other policy areas that are excluded under the mutual recognition principle. Clause 10 allows the Secretary of State to alter the excluded areas through secondary legislation, subject to the affirmative procedure. There is no requirement to consult the devolved administrations.

The wording of the mutual recognition principle means that within their areas of legislative competence, the UK government and the devolved administrations will retain the capacity to enforce their own requirements on goods produced in or imported into the relevant part of the UK. This means that local producers will have to continue to comply with the local regulation.

In addition, there is no requirement proposed to ensure minimum standards are applicable across the UK. The UK Government's White Paper instead committed to continued high standards in the UK:

> “ The UK’s exceptionally high standards will underpin the functioning of the Internal Market, to protect consumers and workers across the economy. These high standards are neither dependent on EU membership nor on what is agreed in Free Trade Agreements we sign with other countries. They are domestic standards. In many cases, the UK either goes beyond EU standards or is the first mover to improve standards before the EU. We will maintain this world-leading position moving forward.”
>
> UK Government, 2020[5]

Ahead of the publication of the White Paper, the Cabinet Secretary for Constitution, Europe and External Affairs wrote to the Chancellor of the Duchy of Lancaster expressing concern about the principle of mutual recognition. The Cabinet Secretary suggested that the proposals could lead to a reduction in standards because:

> “ a reduction in standards in one part of the UK would have the effect of pushing down standards elsewhere in the UK, in direct contradiction of the preferred approaches of stakeholders and decisions taken by the devolved parliaments.”
>
> Scottish Parliament, 2020[15]

The Scottish Government's analysis of the White Paper added that:

> “ The White Paper proposals also create the perfect conditions for greater, unmanaged and competitive regulatory divergence in a “race to the bottom”.”
>
> Scottish Government, 2020[6]

Academics have pointed to the size of the English market compared to the size of markets in the other three nations of the UK and suggested that this means English regulations will come to dominate in the internal market. For example, in written evidence to the Finance and Constitution and Europe and External Affairs Committees, Professor Michael Dougan from the University of Liverpool wrote:

> “ In the context of the post-Brexit UKIM, the overriding and undeniable feature that needs to be recognised and addressed is, of course, the relative size of the English population and economy; as well as the political and constitutional dominance of the Westminster Parliament over other parts of UK. Principles that might work well in an internal market such as the EU will simply not operate in the same manner in the context of the UK. ”
>
> “ For example: an extensive system of mutual recognition (wide scope of application, limited scope for derogations) means that – whatever the competences of the devolved institutions on paper – the ability of English goods and services freely to access the markets in Scotland or Wales will make it much more difficult in practice for the devolved institutions to adopt or enforce different / higher regulatory standards of their own. Such standards will effectively disadvantage domestic producers / suppliers; while the potential scale of English imports would, in many circumstances, simply negate any prospect of Scotland or Wales delivering on their desired public interest objectives. ”
>
> Dougan, 2020[13]

Professor Nicola McEwen has suggested that whilst the devolved administrations will still be able to make laws within their own areas of competence, the effectiveness of those laws may be undermined. Professor McEwen gave the example of Scottish Parliament legislation to tackle obesity:

> “ Let’s assume, for example, that the Scottish Parliament passed a law to introduce a series of measures designed to tackle obesity. Such a law might require producers to reduce the sugar content of food and drink or have bolder labelling on recommended daily intakes and the harmful effects of excessive sugar consumption, or perhaps restrict certain marketing activities of service providers. ”
>
> “ The Market Access rules would not prevent such a law from being passed. But these rules would not apply to goods or service providers entering the Scottish market where these had already satisfied the (hypothetically less strict) regulations set in other parts of the UK. Given the likelihood that imported products would make up the bulk of the market, the ability of the Scottish policy to have the desired health benefits would be reduced.”
>
> McEwen, 2020[16]

Professor McEwen suggests the proposals in the Bill, particularly in relation to the Market Access Commitment may limit the ability of legislatures in the devolved nations to introduce market interventions to promote policy goals:

> “ It is easy to see how a wide range of market interventions to promote policy goals in one of the UK’s territories could be curtailed by rules that prevent them from being applied to goods, services or professional practitioners from other parts of the UK. Existing regulatory divergences, such as minimum unit pricing for alcohol, are exempt from the new rules but only so long as they remain substantially unchanged.”
>
> McEwen, 2020[16]

A further factor to consider in relation to the mutual recognition principle is the UK Government's ability to negotiate trade agreements. The wording of clause 2 permits goods imported into, one part of the UK and which can lawfully be sold in that part to then be legally sold in other parts of the UK. This means that the UK Government can ensure goods that potentially might be imported to the UK under a trade deal (for example chlorinated chicken from the United States) meet legal requirements for sale in England. This would mean such goods could be sold legally across the whole of the UK.

Non-discrimination

Clauses 5-9 of the Bill provide for the detail of a non-discrimination principle in the UK internal market. The non-discrimination principle is defined in clause 5(1) of the Bill as:

> “ the principle that the sale of goods in one part of the United Kingdom should not be affected by relevant requirements that directly or indirectly discriminate against goods that have a relevant connection with another part of the United Kingdom. ”
>
> UK Parliament, 2020[10]

Importantly, clause 5(3) says that if a relevant requirement in a part of the UK is directly or indirectly discriminatory against incoming goods, it will have no effect for those goods to the extent that it is discriminatory.

Clause 6 defines “relevant requirement” for the purposes of the non-discrimination principle for goods as it has effect in relation to a part of the UK. Clause 6(2) provides that a relevant requirement is a statutory provision (defined in clause 6(8) as a provision

contained in legislation) that applies in relation to a part of the UK to, or in relation to, goods sold in that part and is within the scope of the non-discrimination principle.

Clause 6(3) defines when a statutory provision is within the scope of the non-discrimination principle — it must relate to any one or more of the following:

> (a) the circumstances or manner in which goods are sold (such as when, by whom, to whom, or the terms on which they may be sold);
>
> (b) the transportation, storage, handling or display of goods;
>
> (c) the inspection, assessment, registration, certification, approval or authorisation of the goods or any similar dealing with them;
>
> (d) the conduct or regulation of businesses that engage in the sale of certain goods or types of goods.

The Secretary of State may amend clause 6(3) by regulations to add, vary or remove a paragraph of that subsection. The Secretary of State must consult the devolved administrations (i.e. the Scottish Ministers for Scotland) before making such regulations.

Clauses 7 and 8 define direct and indirect discrimination.

Clause 7 defines direct discrimination. The Explanatory Notes describe direct discrimination as:

> “ where relevant requirements apply to incoming goods in a way that they do not apply, or would not apply, to local goods and that puts the incoming goods at a disadvantage compared to local goods.”
>
> UK Parliament, 2020[12]

Clause 7(2) provides that an incoming good would be put at a disadvantage if it is more difficult or less attractive to sell or buy the goods, or do anything in connection with their sale.

Clause 8 covers indirect discrimination. Clause 8(1) provides that a relevant requirement indirectly discriminates against incoming goods if it does not directly discriminate, would apply to the incoming goods in such a way as to put them at a disadvantage, has an adverse market effect and cannot reasonably be considered a means of achieving a legitimate aim.

Clause 8(2) states that goods are put at a disadvantage "if it is made in any way more difficult, or less attractive, to sell or buy the goods or do anything in connection with their sale than if the requirement did not apply".

Clause 8(3) defines what an adverse market effect means. The Explanatory Notes state that :

> “ a requirement has an adverse market effect if it puts incoming goods at a disadvantage but does not put comparable goods with a relevant connection to the destination part (or comparable goods with a relevant connection to another part of the UK) at that disadvantage and as a result, it causes a significant adverse effect on competition of those goods in the United Kingdom.”
>
> UK Parliament, 2020[12]

Clause 8(4) provides the meaning of comparable goods as “like goods” or interchangeable goods. "Like goods" are defined as:

> “ goods that are alike the incoming goods in all respects, or otherwise have characteristics closely resembling those of the incoming goods. ”
>
> UK Parliament, 2020[14]

Interchangeable goods are defined as:

> “ goods that, from the point of view of a purchaser of the goods, could reasonably be said to be interchangeable with the incoming goods.”
>
> UK Parliament, 2020[14]

A legitimate aim is defined in clause 8(6) as one, or a combination, of the aims of the protection of the life or health of humans, animals or plants; and the protection of public safety or security.

Clause 8(7) contains a power allowing the Secretary of State by regulations to add to, remove from, or vary the list of legitimate aims, allowing them to react to new circumstances which have not yet been envisaged. There is no requirement to consult the devolved administrations.

As with the mutual recognition principle, there are exclusions to the non-discrimination principle covering existing regulations. The exemption for existing regulatory differences appears to mean that minimum unit pricing for alcohol would be exempt from the non-discrimination principle unless it is in future substantively changed..

Schedule 1 of the Bill sets out other policy areas that are excluded. As with the mutual recognition principle, the Secretary of State may alter the excluded areas listed there in relation to the non-discrimination principle through secondary legislation, subject to the affirmative procedure. There is no requirement to consult the devolved administrations.

In its initial analysis of the White Paper, the Scottish Government expressed concern about the operation of the non-discrimination principle and that it might threaten the ability of the Scottish Parliament to legislate:

> “ Again there is little detail on the principle of non-discrimination and how it will operate in practice, including the central issue of identifying and enforcing indirect discrimination. The Scottish Government is concerned that initiatives such as the smoking ban could have been challenged (and could still be) as discriminating against businesses in Scotland when compared to their counterparts elsewhere in the UK. The abolition of tuition fees for Scottish domiciled students could be challenged as discriminatory against students from elsewhere in the UK. The effect of the proposals is therefore to construct a test or challenge for decisions of the Scottish Parliament that are clearly within devolved competence but might be argued to affect in some way the internal market, preventing the Scottish Parliament and Scottish Government from exercising leadership in, for example, tackling the harm caused by alcohol abuse, which it has done in the past with no impact on the proper functioning of the European Internal Market. ”
>
> Scottish Government, 2020[6]

The Scottish Government also suggested that Scotland's public procurement rules which require public bodies to consider social and environmental benefits and not just take the lowest bid on offer, could be challenged under non-discrimination rules

Schedule 1

Schedule 1 sets out certain types of legislation that will be excluded from the the mutual recognition and non-discriminations principles for goods and the requirements needed for these exclusions to apply.

Permitted exclusions include

- Threats to human, animal or plant health where an exclusion from mutual recognition would be deemed necessary.
- Chemicals - strictly in relation to REACH regulation (Registration, Evaluation, Authorisation and Restriction of Chemicals). This exclusion is limited to Authorisations and Restrictions.
- Taxation - any legislation that has an impact on the imposition of any tax, rate, duty or similar charge.

As noted above, the Secretary of State may alter the excluded areas through secondary legislation, subject to the affirmative procedure. There is no requirement to consult the devolved administrations.

The Welsh Government's analysis of the White Paper was critical of the exclusions and exemptions from the mutual recognition and non-discrimination principles:

> “ The list of exclusions from mutual recognition and non-discrimination within the White Paper is very limited... ...The proposed exclusions do not reflect the current position in EU law which allow derogations for public policy reasons, neither are they consistent with similar arrangements in other countries such as Canada.”
>
> Welsh Parliament, 2020[17]

On the possible exclusions from the principles of mutual recognition and non-discrimination, Professor Nicola McEwen highlighted the lack of exemptions compared to EU Internal Market rules:

> “ Permissible exemptions from similar EU internal market rules, including public health, morality, environmental protection, or protection and promotion of local heritage, do not appear to be exempt from the proposed UK internal market rules. Except in a narrow range of areas, including threats to human, animal or plant health, unfettered market access is given priority. EU principles of proportionality and subsidiarity are also excluded.”
>
> McEwen, 2020[16]

Market access for services

In addition to the Bill facilitating market access for goods through Part 1, Part 2 provides for market access for services (clauses 15-21). Again this is based on the two principles of mutual recognition and non-discrimination.

According to the Explanatory Notes:

> " The Provision of Services Regulations 2009 ("the 2009 Regulations") established a principles based framework for the regulation of services in the UK. Amongst other requirements, the 2009 Regulations establish a principle that an authorisation to provide a service in any part of the UK applies to the whole of the UK (unless an overriding reason related to the public interest can be shown). "
>
> " The UK Internal Market Bill will introduce similar rules complementing those found in the 2009 Regulations, with a focus on ensuring the continued free flow of services between the four constituent parts of the UK. "
>
> UK Parliament, 2020[12]

Mutual recognition

The principle of mutual recognition set out in the Bill will replace the part of the 2009 Regulations which establishes that an authorisation to provide a service in any part of the UK applies to the whole of the UK.

Clause 17 prohibits a services regulator from requiring an additional authorisation if the service provider already has an authorisation from another part of the UK.

There is an exemption for a service regulator to impose an authorisation requirement to the extent that it can be reasonably justified as a response to a public health emergency.

Among the services that have been exempted from the mutual recognition rules by Part 1 of Schedule 2 of the Bill are legal services. This recognises the historic differences in the legal systems of the different parts of the UK. Schedule 2 is considered in more detail further below.

Non-discrimination

Clauses 18 and 19 establish the principle of non-discrimination in the regulation of services across the UK.

According to the Explanatory Notes:

> " The non-discrimination rules will prohibit a services regulator from imposing directly or indirectly discriminatory requirements on a service provider. Direct discrimination would be based explicitly or obviously on where a provider is from in the UK, whereas indirect discrimination would not seek to explicitly discriminate against providers from any part of the UK, but would have the effect of putting them at a disadvantage compared to a comparable service provider from another part of the UK."
>
> UK Parliament, 2020[12]

Clause 18 provides that a regulatory requirement that directly discriminates against a service provider is of no effect in relation to that service provider.

A regulatory requirement directly discriminates against a service provider where it has, or would have, the effect of treating the service provider less favourably than other service providers, and the reason for that less favourable treatment is the service providers' relevant connection, or lack of relevant connection, to a part of the United Kingdom (clause 18(2)).

Again, there is an exemption for regulatory requirements that can be reasonably justified in response to a public health emergency.

Clause 19 provides that a regulatory requirement that indirectly discriminates against a service provider is of no effect in relation to that service provider. This occurs where the regulatory requirement does not directly discriminate, would apply to a service provider in such a way as to put the service provider at a disadvantage in the part of the UK in which the requirement applies, has an adverse market effect and cannot reasonably be considered a means of achieving a legitimate aim (clause 19(2)).

Clause 19(3) of the Bill states:

> " A service provider is put at a disadvantage in a part of the United Kingdom if it is made in any way more difficult, or less attractive, to provide services in that part than if the requirement did not apply. "
>
> UK Parliament, 2020[14]

Clause 19(4) defines what an "adverse market effect" is, which is a part of the test for indirect discrimination as under subsection (2). It states:

> " A requirement has an adverse market effect if, because it— "
>
> " (a) puts a service provider who provides services in a part of the United Kingdom but does not have a relevant connection to that part at a disadvantage (as well as putting other service providers who provide those services in that part without a relevant connection (if any) at a disadvantage), but "
>
> " (b) does not put at a disadvantage (at all or to the same extent) some or all service providers who provide those services in that part and— "
>
> " (i) do have a relevant connection to that part, but (ii) do not have a relevant connection to another part of the United Kingdom, "
>
> " it causes a significant adverse effect on competition in the market for those services in the United Kingdom. "
>
> UK Parliament, 2020[14]

Clause 19(6) defines what could be considered a "legitimate aim". A legitimate aim is defined as one, or a combination of the following:

> (a) the protection of the life or health of humans, animals or plants;
>
> (b) the protection of public safety or security;
>
> (c) the efficient administration of justice.

If it can reasonably be considered that a measure which would otherwise be considered indirectly discriminatory is necessary to meet one of the aims listed above, it is not prohibited under these rules.

Clause 19(7) contains a power allowing the Secretary of State by regulations to add to, remove from or vary the list of legitimate aims, allowing them to react to new circumstances which have not yet been envisaged. There is no requirement to consult the devolved administrations.

Definition of regulator under Part 2

Clause 20 defines the concept of “regulator” and provides examples of regulatory functions. Reference to a regulator includes the Scottish Ministers but not the Lord Advocate when exercising any function in connection with the prosecution of offences or the investigation of deaths in Scotland;.

Schedule 2

Parts 1 and 2 of Schedule 2 (introduced by clause 16) set out what services will be excluded from the the mutual recognition and non-discriminations principles.

Exclusions permitted from the mutual recognition principle as listed in Part 1 are:

- Audiovisual services
- Debt collection services
- Electronic communications services and networks, and associated facilities and services
- Financial services
- Gambling services
- Healthcare services
- Legal services
- Private security services
- Services of temporary work agencies
- Services provided by a person exercising functions of a public nature or by a person acting on behalf of such a person in connection with the exercise of functions of a public nature
- Social services relating to social housing, childcare, adult social care and support of families and persons permanently or temporarily in need
- Transport services

Part 2 of Schedule 2 lists the services to which the non-discrimination principle does not apply:

- Audiovisual services
- Debt collection services
- Electronic communications services and networks, and associated facilities and services
- Financial services
- Gambling services
- Healthcare services
- Postal services
- Private security services
- Services connected with the supply of natural gas through pipelines or production or storage of natural gas
- Services connected with the supply or production of electricity
- Services of a statutory auditor within the meaning of Part 42 of the Companies Act 2006
- Services of temporary work agencies
- Services provided by a person exercising functions of a public nature or by a person acting on behalf of such a person in connection with the exercise of functions of a public nature
- Social Services relating to social housing, childcare, adult social care and support of families and persons permanently or temporarily in need
- Transport services
- Waste services
- Water supply and sewerage services

Clause 16(2) provides that the Secretary of State may amend the services exclusions in Schedule 2 through secondary legislation, subject to the affirmative procedure (clause 16(3)). There is no requirement to consult the devolved administrations.

Clause 16(4) permits the Secretary of State to make regulations under subsection (2) subject instead to made affirmative resolution procedure during the period of three months beginning with the day Part 2 comes into force.

Parts 3 and 4 of the Schedule are intended to avoid unforeseen consequences of the UK internal market services rules on unrelated areas of government activity, namely taxation and the rules on private international law. Part 3 covers mutual recognition and Part 4 covers non-discrimination.

Mutual recognition of professional qualifications

Part 3 of the Bill introduces a system for the recognition of professional qualifications across the United Kingdom internal market.

The House of Commons Library briefing on the Bill provides some background information on the approach to professional qualifications and why mutual recognition is important.

Mutual recognition of professional qualifications

Some professions, such as a pharmacist, an architect, or an accountant, are regulated by laws, regulations or administrative provisions. A professional is allowed to practice only if in possession of a professional qualification, but requirements for that, such as specific educational degrees or relevant training, may vary between territories. Through a process of mutual recognition of professional qualifications, a professional that complies with regulation to access a certain profession in one territory, can have access to that profession in another territory.107 Sometimes the recognition is automatic. For example, for most healthcare professions, including doctors, dentists and nurses, there is a UK-wide system of professional regulation. This common approach and set of UK-wide standards facilitates the mobility of professionals across the UK. [14]

The Explanatory Notes explain that:

> " There is currently no overarching system or consistent approach for the recognition of professional qualifications between the nations making up the UK internal market. Therefore, if professional divergence increases across the UK, professionals could have greater limitations on their ability to practise across the UK than exists currently. "
>
> UK Parliament, 2020[12]

Clause 22 makes provision to allow professionals qualified in one of the four United Kingdom nations to access the same profession in a different nation without needing to re-qualify. According to the Explanatory Notes, these provisions will only apply in relation to professions for which new qualification or experience requirements are introduced, or existing ones changed, in any part of the UK [12] .

Clause 23 sets out when an individual is considered a 'qualified' UK resident for the purposes of being able to rely on automatic recognition principle.

Clause 25 provides an exclusion from the mutual recognition of professional qualifications in relation to Scotland, for the profession of advocate, solicitor, notary, conveyancing practitioner, executry practitioner or commercial attorney;

Governance and oversight of the internal market

Part 4 of the Bill confers new functions on the Competition and Markets Authority (CMA) to allow in effect for the creation of an Office of the Internal Market (OIM) within the CMA.

The Bill proposes that the CMA should carry out two functions:

- Monitoring and advising on the health and evolution of the Internal Market
- Capturing business and consumer insight into the development of the Internal Market

According to the Bill's Explanatory Notes these functions will provide all administrations, legislatures, and external stakeholders with published reporting on developments in the UK internal market.

The Bill requires that the CMA must, no later than 31 March 2023 and at least once in every relevant 12-month period, prepare a report on—

> (a) the operation of the internal market in the United Kingdom, and
>
> (b) developments as to the effectiveness of the operation of that market.

The CMA is also required to report by 31 March 2023 and at least every five years on the effectiveness of the provisions on the market access for goods and services and the mutual recognition of professional qualifications as provided for in the Bill. It must also report on the impact of these provisions on the operation and development of the internal market in the United Kingdom.

Reports prepared by the CMA must be laid in all four legislatures of the UK.

Clause 30 makes provision for the CMA to advise on a regulatory proposal prior to it being passed or made in law. If the administration of one part of the UK wishes to do so, it may request non-binding advice from the CMA on an approach to regulation it or any other person proposes to make in the relevant part of the UK.

The key conditions which must be met for a request to me made to the CMA are:

> (a) the regulatory provision to which the proposal relates would fall within the scope of this Part and be within relevant legislative competence, and
>
> (b) the proposal should be further considered in the light of the significance of its potential effects on the operation of the internal market in the United Kingdom.

It is not clear whether this provision could allow a UK Government Minister to request a non-binding assessment from the CMA of a regulatory proposal being considered by the Scottish Parliament. Likewise, it is not clear whether it would permit a devolved administration to make a similar request of the CMA in relation to a piece of legislation being considered in the UK Parliament.

Clauses 31 and 32 provide for further powers for the CMA to provide reports to a regulatory authority covering the following matters:

- a report on the impact on the effective operation of the internal market in the United Kingdom of a regulatory provision made or enacted after this Part of the Bill comes into force and where it is within the scope of this Part (Clause 31).
- a report on the economic impact of a regulatory provision passed or made after the day on which this section comes into force, where the regulatory provision falls within the scope of this Part, and the requesting authority considers that the operation of the

> regulatory provision is, or may come to be, detrimental to the effective operation of the internal market in the United Kingdom.

Reports produced under Clause 32 must be laid in the Scottish Parliament along with the other legislatures of the UK.

Clauses 36 to 38 provide the CMA with information gathering powers including the provision of enforcement and penalties for failure to comply.

The White Paper stated that governance arrangements:

> " will seek to build on the existing collaboration between the UK Government and devolved administrations, ensuring a strong basis for political decision-making, oversight, and dialogue in relation to the Internal Market."
>
> UK Government, 2020[5]

The Bill does not provide any detail on how the UK Government will work with the devolved administrations to ensure a strong basis for the operation of the internal market.

In its analysis of the White Paper, the Scottish Government suggested there was no need for an oversight body, particularly if such a body does not have power over reserved areas:

> " The Scottish Government does not believe the case has been made for the establishment of an oversight body. Even if one were to be established it could not have a meaningful role unless it also had power over reserved matters, which cover most issues within the European Single Market (for example, company law, competition law, employment law). It is difficult to see what justification there would be in establishing a market surveillance body whose functions were limited to devolved matters yet there is no proposal to affect reserved matters at all, and could not be given the claimed sovereignty of the UK Parliament."
>
> Scottish Government, 2020[6]

The Welsh Government's analysis of the White Paper pursued a similar theme questioning what role there will be for the devolved legislatures in any new system created to manage the UK internal market adding that as:

> " any new system would impact the whole of the UK, this is wholly unacceptable"
>
> Welsh Parliament, 2020[17]

Speaking in the Scottish Parliament debate on the internal market on 18 August 2020, Jackie Baillie MSP welcomed the Welsh Government's perspective:

> " I commend the suggestions of my Welsh colleagues that any plans for a UK internal market post-Brexit must include an independent oversight framework and a dispute resolution mechanism. However, once again, I do not see any sign of those suggestions manifesting themselves. That creates further uncertainty in a situation in which certainty and confidence are a must. Having a proper UK-wide and independent dispute resolution mechanism would go a long way to providing the protection and reassurance needed by devolved Administrations that is currently missing from the white paper."
>
> Scottish Parliament Official Report, 2020[18]

Whilst the Bill proposes a number of powers for a newly created OIM within the CMA, it does not provide the CMA with enforcement powers. As a result, disputes over the operation of the UK's internal market are likely to be resolved through judicial mechanisms.

Power to provide financial assistance, including in devolved areas

Clauses 46-47 of the Bill provide UK Ministers with:

> " a single, comprehensive power to provide financial assistance in all parts of the United Kingdom"
>
> UK Parliament, 2020[12]

for the purposes of: economic development, culture, sporting activities, infrastructure, domestic educational and training activities and exchanges, and international educational and training activities and exchanges.

The Explanatory Notes recognise that "[t]hese purposes fall within wholly or partly devolved areas under the Scotland Act 1998". And that:

> " This [power] creates a means for the UK Government to provide funding across a range of largely devolved areas that would sit alongside any funding provided by the devolved administrations in those areas."
>
> UK Parliament, 2020[12]

Professor David Bell in his briefing to the Finance and Constitution Committee commented that:

> " The UK Government is giving itself wide powers over who might receive funding... The intention may be to make arrangements that circumvent the devolved governments, say by providing funding direct to local authorities. The so-called "City Deals" are perhaps a partial model for this approach, though they generally involve some Scottish Government funding. Direct funding to local government may provide greater recognition for the role of UK Government in funding projects, but it is difficult to see that the lack of consultation and cooperation between different levels of government will lead to an efficient use of public money."
>
> Bell, 2020[19]

Some powers for the UK Government to spend in specific devolved areas already exist and these are highlighted in the Bill's Explanatory Notes. A further discussion of this issue is available in the House of Commons Library blog, Can the UK Government spend in areas devolved to Scotland?

The UK Government's plans for this power is not explicitly stated in the Explanatory Notes. However it is taken that this power is to allow the UK Government, if it chooses, to replicate some of the EU funding programmes that exist in the policy areas listed. A press release from the UK Government's Scotland Office provided more explicit details:

> “ The Bill will also enable the UK Government to provide financial assistance to Scotland, Wales, and Northern Ireland with new powers to spend taxpayers’ money previously administered by the EU... The proposals will allow the UK Government to meet its commitments to deliver replacements for EU programmes, such as a UK Shared Prosperity Fund, replacing bureaucratic EU structural funds and at a minimum match the size of those funds in each nation.”
>
> UK Government, Office of the Secretary of State for Scotland, 2020[20]

The list of policy areas where financial assistance may be provided also appear to cover EU programmes such as Erasmus+ and Creative Europe.

Since 2017, the UK Government has promised to replace EU structural funds with a so-called UK Shared Prosperity Fund (UKSPF). However plans for this fund have been delayed and beyond a written statement in 2018 from the then Secretary of State for Housing, Communities and Local Government, James Brokenshire, very little detail on the UK Government's intentions has emerged. [21] Implementing a replacement fund before the end of the year now appears impracticable.

Professor Bell chairs the Scottish Government's steering group on replacement of the EU structural funds in Scotland. He commented that the steering group has consulted, produced an initial report and has been considering implementation issues:

> “ The work of the group has been based on the assumption that the Scottish Government would be a responsible body to receive and distribute UKSPF funding. This is consistent with Mr Brokenshire’s assurance that the UKSPF would respect the devolution settlement. However, the contents of the UK Internal Markets Bill are not reassuring in respect of that settlement, although the BEIS note does commit to the quantum of funding available to the devolved nations being at least as great as that previously being available under EU Funding.”
>
> Bell, 2020[19]

Professor Bell also noted that:

> “ Past EU funding has respected the principle of “subsidiarity”, namely that spending decisions should be allocated at the lowest possible level of government. There is no equivalent principle, explicit or implicit, in the UK Internal Market Bill. ”
>
> Bell, 2020[19]

State Aid

State aid rules for the UK are currently set at the level of the European Union. At the end of the transition period, the UK will be able to set its own State Aid rules, however this is subject to various existing international agreements. The harmonisation of State Aid rules is also one of the key issues under discussion in the EU-UK future relationship negotiations.

The Scottish Government argues that State Aid is not reserved, and therefore a matter for the devolved administrations. The UK Government has disagreed with this interpretation. Clause 48 would put this debate beyond doubt by modifying the list of reserved matters in the Scotland Act 1998. The Bill’s explanatory notes state:

> “ This Bill will reserve to the UK Parliament the exclusive ability to legislate for a UK subsidy control regime once the UK ceases to follow EU State aid rules at the end of the Transition Period. ”
>
> “ This legislation means the UK Parliament can legislate for a UK wide regime to regulate the effects of distortive or harmful subsidies, whether that is in relation to international trade or the UK internal market. Any future regime will be subject to Article 10 of the Protocol on Ireland/Northern Ireland in the withdrawal agreement whilst it applies to the UK.”
>
> UK Parliament, 2020[12]

On 9 September, the UK government indicated that the future UK wide State Aid regime will "follow World Trade Organisation (WTO) subsidy rules and other international commitments, replacing the EU State Aid laws, from January 1". [22] The announcement also indicated that the UK Government:

- intended to legislate to repeal the current EU regime at the end of the transition period
- will publish guidance on WTO rules before the end of the year applicable to the devolved administrations
- will consult on "whether the UK should go further than its international commitments, including on the need for further legislation".

Implications for the Ireland and Northern Ireland Protocol in the Withdrawal Agreement

Part 5 of the Bill relates to the Ireland and Northern Ireland Protocol, and has proved to be one of the most contentious and high profile areas for debate. A House of Commons Library briefing covers the issues in more detail, and a summary of the main points, drawn from that briefing, is set out below.

The Ireland and Northern Ireland Protocol is an integral part of the Withdrawal Agreement and sets out how goods will be traded between Northern Ireland and Great Britain after the transition period ends. It applies the EU’s customs code (the rules on how goods are traded in and out of the EU) to Northern Ireland. The Protocol includes a principle of *unfettered* market access for goods moving from NI to GB, the application of the customs code nevertheless means that certain checks and processes will be required when moving these goods (such as export declaration forms).

Part 5 of the Bill empowers UK Government Ministers to prevent the application of, and unilaterally re-interpret and disapply parts of the Protocol, as well as ignore their legal obligations under both domestic and international law to enact the Protocol. Specifically, Part 5 does this by:

- Restricting UK authorities from using their powers after the transition period in a way that might result in the introduction of checks, controls or administrative processes for goods moving from Northern Ireland to Great Britain (Clause 41).

- Giving a power to Ministers to make regulations to change how exit procedures for goods operate when moving from Northern Ireland to Great Britain (Clause 42).

- Giving the Secretary of State an enabling power to make regulations that can interpret Article 10 of the Protocol, and further disapply and modify its effects, including disapplying it entirely. Article 10 applies EU State Aid rules to 'measures which affect that trade between Northern Ireland and the EU' (so not just subsidies given in NI). (Clause 43)

- Stating that only the Secretary of State may notify the European Commission of State Aid or proposed State Aid, and give information about it, if this is required by Article 10 of the Protocol (Clause 44).

Clause 45 deals with the incompatibility with domestic law and international law that might arise from the inclusion and exercise of powers under clauses 42 and 43. It does this through what the Commons Library describes as a series of extraordinary measures that build upon one another. The Clause

- States that the powers given to Ministers under Clauses 42 and 43, as well as Clause 45 itself will be regarded as legally effective notwithstanding any incompatibility or inconsistency with "*any* relevant international or domestic law".

- Picks apart the foundations of how the Withdrawal Agreement is given supremacy and direct effect in domestic legislation through the EU (Withdrawal) Act 2018.

- Ensures domestic courts would still have to give full force and effect to these regulations made even if those regulations were in conflict with all relevant domestic and international laws, *and international law as a whole.*

- Restricts and potentially precludes entirely domestic judicial review of section 42 or 43, a so called "ouster clause".

Legislative consent

The legislative consent process originated from the Sewel Convention, named after the Scottish Office Minister who led the Scotland Bill, which established the Scottish Parliament, through the House of Lords in 1998. It is a constitutional convention that the UK Parliament " will not normally legislate with regard to devolved matters without the consent " of the devolved parliaments. Since May 2016 this has been set out in section 28(8) of the Scotland Act 1998. However, in its consideration of the Sewel Convention in January 2017, the UK Supreme Court ruled that this rule was a political convention which could not be enforced legally through the courts.

The Sewel Convention applies when legislation does one of the following:

- changes the law in a devolved area of competence.
- alters the legislative competence of a devolved legislature.
- alters the executive competence of devolved Ministers.

The UK Government has sought the legislative consent of the Scottish Parliament to a number of Brexit-related bills. The UK Parliament enacted the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020 despite the fact that the Scottish Parliament withheld legislative consent for the bills that became those Acts.

The Explanatory Notes to the Internal Market Bill set out that the Bill requires the consent of all three devolved legislatures for the clauses in each Part of the Bill.

The Scottish and Welsh Governments have already indicated that they do not expect to recommend to the Scottish and Welsh Parliaments respectively that consent to the Bill should be given. For example, in his letter to Secretary of State Alok Sharma, Welsh Government Minister Jeremy Miles wrote that:

> " I cannot emphasise strongly enough that, in our view, the model of primary legislation envisaged in the White Paper is unnecessary, unworkable, heavy-handed, and will not secure legislative consent from the Senedd. "
>
> Welsh Parliament, 2020[7]

On a similar note, the Scottish Government's Cabinet Secretary for the Constitution, Europe and External Affairs told the Parliament's Finance and Constitution Committee that:

> " The Scottish Parliament voted against the draft bill and the Welsh Parliament will vote against the bill—I am sure that neither we nor Wales will give legislative consent to the bill. "
>
> Scottish Parliament, 2020[23]

Protected status

The proposals in the Bill change the existing boundaries of devolution and are potentially very significant in shaping how devolution will operate.

According to the Explanatory Notes:

> " The Bill's provisions create a new limit on the effect of legislation made in exercise of devolved legislative or executive competence", and that any requirements passed by the devolved legislatures "that would impede operation of the UK internal market will have no effect."
>
> UK Parliament, 2020[12]

As mentioned earlier, the Bill will also modify the list of reserved matters in the Scotland Act 1998 with the reservation of a UK subsidy control regime once the UK ceases to follow EU State aid rules (clause 48).

In addition, the Act (i.e. the Bill as enacted) would itself become a "protected enactment". This means that it would be protected from modification by the devolved legislatures (clause 49).

Effect on devolution?

Following publication of the Bill, both the Scottish and Welsh Governments criticised the contents of the Bill. In a news release, the Cabinet Secretary for the Constitution, Europe and External Affairs said:

> “ This is not a genuine partnership of equals and we couldn’t recommend consent to a Bill that undermines devolution and the Scottish Parliament, and which, by the UK Government's own admission, is going to break international law.”
>
> “ This is a shabby blueprint that will open the door to bad trade deals and unleashes an assault on devolution the like we have not experienced since the Scottish Parliament was established. We cannot, and will not, allow that to happen.”
>
> “ It will open the door to a race to the bottom on food standards, environmental standards and will endanger key public health policies such as minimum unit pricing. It will also deliver a hammer blow to the Scottish economy by making it harder for the UK Government to conclude Free Trade agreements if other countries think the UK won’t meet its obligations.”
>
> Scottish Government, 2020[24]

In a written statement providing an update on the latest meeting of the Joint Ministerial Committee (European Negotiations) on 3 September, the Welsh Government's Jeremy Miles Counsel General and Minister for European Transition outlined the message he fed back to the UK Government on the Internal Market Bill:

> “ Finally, I reiterated the Welsh Government’s view of the negative impact the Internal Market Bill would have on the devolution settlements – not least in the area of spending powers - and the Union. I pressed for immediate sight of the Bill in draft, but without receiving assurances that this would be forthcoming. This is completely unacceptable for legislation with potential to upend the devolution settlement.”
>
> Welsh Government, 2020[25]

Writing for the Institute for Government, Jess Sargeant reflected the UK and devolved governments different attitudes to the Bill:

> “ While the UK government argues that it is simply replacing similar guarantees that exist in EU law, the Scottish and Welsh governments say these principles would place an unacceptable constraint on their ability to exercise devolved powers. Under the Sewel Convention – the topic of an upcoming Institute for Government paper – the devolved legislatures will be given the opportunity to vote on whether to consent to all the clauses of the bill. As it stands, both the Scottish and Welsh Parliaments look set to refuse.”
>
> Sargeant, 2020[26]

Professor Nicola McEwen writing for the Centre on Constitutional Change suggested that the proposals in the Bill indicate a recentralisation of power within the UK Government:

> “ In its current form, however, the Bill suggests a significant recentralisation of power. It reserves competence over state aid/subsidies to the Westminster parliament. It gives the UK Government new spending powers in devolved areas. These could potentially be used to bypass the devolved governments and fund organisations directly to support UK-wide priorities and ‘promote the UK’s shared values’. ”
>
> McEwen, 2020[16]

Professor McEwen also suggested that in relation to the UK Government's proposals making up the Market Access Commitment:

> “ These rules would not prevent the devolved parliaments from making laws within their areas of competence, as they do now. But they are likely to affect the extent to which these laws could make a difference. ”
>
> McEwen, 2020[16]

Professor Michael Dougan suggested that the proposals in the Internal Market Bill make no attempt to provide for reforms to the UK's overall governance structure:

> “ And again unlike the EU system: there is no attempt to combine the new UKIM principles with reforms to the UK’s overall governance structures, e.g. so as to create more independent and impartial fora for decision-making and dispute resolution between the constituent territories. ”
>
> “ Conversely, the conferral of direct legal enforceability upon the core market access principles contained in the Bill can only serve to render its potential impacts and problems even more potent in practice – certainly compared to a system wherein the management of internal trade barriers might indeed be reserved to a system of inter-institutional dialogue and dispute resolution. ”
>
> “ So on paper, devolution might continue to look the same. Indeed, it might even look more extensive (as the UK Government has repeatedly promised after Brexit). But in practice, the operation of the UKIM has real potential to limit the capacity of the devolved institutions to pursue different economic or social choices from those made in London. ”
>
> Dougan, 2020[13]

Jess Sargeant has suggested that in addition to agreeing exclusions from the mutual recognition principle with the devolved governments, the UK government should also agree to make a firm commitment to agree a common framework on standards and the review of the intergovernmental relations should be completed before the Bill is passed.

A comparison with the EU Internal Market?

The UK Government's proposals focusing on the Market Access Commitment appear to be based on the EU's Internal Market principles of mutual recognition and non-discrimination. However, the EU's Internal Market is composed of more than just those two principles.

The EU's Internal Market comprises "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured" . To govern this market, the EU has the competence to establish the competition rules necessary for the functioning of the Internal Market (Article 114 of the Treaty on the Functioning of the European Union). This allows the EU to establish common rules and standards to facilitate the workings of the Internal Market in areas such as employment and social policy, environmental policy and common rules on competition. This is the establishment of level playing field rules applicable across all 27 EU member states.

The EU Internal Market also involves the regulation of harmonised goods . This means it ensures minimum common standards are met for goods such as chemicals and electric equipment. This harmonisation allows relevant goods to be sold across all EU member states.

For non-harmonised goods , the EU operates a system of mutual recognition. This means that if a good meets the required standards of one Member State then it is deemed to be fit for sale across the EU. In addition, national rules on these products are subject to a notification procedure that ensures they do not create undue barriers to trade.

Finally, EU law prohibits discrimination on grounds of nationality. This is underpinned by Articles 34 and 35 of the Treaty on the Functioning of the European Union which prohibit qualitative and quantitative restrictions on imports between member states. This means for example, goods produced in one member state should not face unnecessary barriers to their sale in another member state.

The competition rules and the rules for harmonised goods are established by EU law in the form of directives and regulations. In the case of directives, member states are responsible for implementation in domestic law.

The EU's standard law-making procedure is the 'Ordinary Legislative Procedure'. This means that the Council of the European Union (the 27 Member State governments) are responsible for agreeing the details of the directives and regulations whilst the directly elected European Parliament can consider, seek to amend and then finally approve the legislation. The European Commission is responsible for proposing and monitoring compliance with the legislation.

In the event a Member State is deemed to be acting in contravention of the EU's Internal Market rules, a case may be brought before the Court of Justice of the European Union.

Writing in The Scotsman newspaper, Stephen Phillips, a partner and member of the Brexit Group at law firm CMS, suggested the EU's Internal Market and its system of governance ensured all Member States have a say in the rules and no one Member State can dominate:

> “ In the EU system, no member state is powerful enough to dictate standards and there is a complex oversight system involving the EU Commission, Council of Ministers, national governments, and the European Parliament to create broad consensus. The same cannot be said of the UK system, due to the disproportionate strength of the English market and likely unwillingness of the Westminster Government to agree to a consensual system involving the devolved administrations. Practically, this could potentially result in lower standards, agreed by Westminster to secure global trade deals, being forced on devolved nations. ”
>
> Phillips, 2020[27]

In its analysis of the white paper, the Welsh Government directly compared the UK Government's proposals with the EU's arrangements for the Internal Market:

> “ Whilst the principles of mutual recognition and non-discrimination are well established elements of the architecture of the EU Single Market, they are balanced by a commitment to subsidiarity and proportionality, a baseline of minimum standards and by the recognition that certain public policy concerns, for example in terms of environmental protection or public health, can in certain circumstances over-ride these principles. This is not reflected in the UK Government’s proposals within the White Paper. It is also widely recognised by academics that there is a big difference between what is being suggested by the UK Government and how the EU Single Market works, and the context of the UK is key. By legislating in this way, the UK Government would be imposing a model of mutual recognition and non-discrimination on the three other nations of the UK, whereas the EU Single Market is a result of Member States voluntary coming together to negotiate and agree a set of rules to which they are all bound.”
>
> Welsh Parliament, 2020[17]

Professor Michael Keating suggests that whilst the UK Government's Internal Market Bill imports the approach of the EU's Internal Market into the UK devolved system, it is based on decisions being made in the centre:

> “ The Internal Market Bill imports this logic into the UK devolved system, except that the decision-maker will not be a body representing the nations but UK Ministers and the Westminster Parliament. It gives ministers powers to regulate a potentially wide range of otherwise devolved matters in the name of the internal market, a concept which the UK Government itself will define and elaborate, with the assistance of the Competition and Markets Authority, which it appoints.”
>
> Michael, 2020[28]

Jess Sargeant writing for the Institute for Government suggested that a key difference between the UK Bill's approach to the mutual recognition principle compared to the EU's approach are the exclusions. She suggests the UK devolved governments need to work together to resolve this issue:

“ A key difference between principles of mutual recognition as it exists in EU law and that proposed in the UKIM Bill are the exclusions to the principle. While the EU allows for laws that prohibit or restrict the sale of goods on a number of grounds such as public policy, public security and even public morality, the UKIM bill allows for only a few – taxation, threats to animal and human health, and chemical regulation. Michael Russell, the Scottish constitution minister, claimed that UK government had given assurances that there would be further exclusions, but these did not appear in the final draft.”

“ The devolved administrations argue that the bill would prevent them from being able to implement the types of successful public health and environmental policies that they have been able to introduce under EU law, for example minimum alcohol pricing or a ban on some single-use plastics. The UK government contests these claims, but the UKIM Bill inevitably will place greater limits on devolved competence than present arrangements. This could also impede key benefits of devolution ‘as a policy lab’, allowing new policies to be tried in one jurisdiction before being adopted elsewhere.”

“ The need for frictionless trade should be balanced against the ability for democratically elected governments to pursue their legitimate policy aims. The UK government and devolved administrations should work together to agree a list of exemptions and exclusions to ensure the principles in the UKIM Bill are no more restrictive than the EU principles they replace.”

Sargeant, 2020[26]

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