

## **Agenda Supplement – External Affairs and Additional Legislation Committee**

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Meeting Venue:

Video conference via Zoom

Meeting date: 1 October 2020

Meeting time: 14.00

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### **– Supplement**

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Please note the documents below are in addition to those published in the main Agenda and Reports pack for this Meeting

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#### **3.3 Paper to note 3: The Constitutional Implications of the UK Internal Market Proposals – 29 September 2020**

(Pages 1 – 20)

Attached Documents:

The Constitutional Implications of the UK Internal Market Proposals – 29 September 2020



# The Constitutional Implications of the UK Internal Market Proposals

29 September 2020

## Introduction

This paper has been produced by Professor Dan Wincott and Professor Jo Hunt of the Wales Governance Centre for this Committee and the Legislation, Justice and Constitution Committee.

It considers the constitutional implications of the UK Internal Market Bill and associated work on intergovernmental relations and common frameworks. It sets out the history of the proposals; considers the key provisions of the Bill and their interaction with the devolution settlements; how the Bill interacts with the EU Withdrawal Act 2018 and wider intergovernmental work on constitutional issues post-Brexit.



## THE CONSTITUTIONAL IMPLICATIONS OF THE UK INTERNAL MARKET PROPOSALS

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In this briefing paper we consider the significance of the Internal Market Bill<sup>1</sup> for devolution. We do not cover the Ireland/Northern Ireland Protocol and the international law dimensions in any detail, but instead focus on the constitutional implications of the proposals as they affect powers held by the Senedd and Welsh Government.

### **1. Constitutional framing**

Although it has explicitly constitutional aspects, as first published the UK Internal Market Bill was not presented as legislation designed to make basic changes to the UK's constitutional arrangements. The Bill is presented as a means of maintaining a *status quo* – defined as an already established or pre-existing UK Internal Market.

The Bill defines itself as a 'protected statute', one that cannot be amended or overwritten by devolved legislation including in areas that otherwise fall within devolved legislative competence. This provision is the Bill's explicitly constitutional aspect.

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<sup>1</sup> *United Kingdom Internal Market Bill 177 58/1*  
<https://publications.parliament.uk/pa/bills/cbill/58-01/0177/20177.pdf>

There are, however, reasons to believe that the Bill has potential to make significant changes to the UK's territorial constitution. Although presented in the White Paper<sup>2</sup> as a venerable concept dating back to the origins of the Anglo-Scottish Union, the 'UK Internal Market' term is of relatively recent provenance. Until this Bill, no clear legal definition of a domestic Internal Market existed. The Bill provides a new legal framework for it, one which is likely to place significant practical constraints on devolved policy competence. The choice to putting legislation in place for the UK Internal Market which does not contain explicit constitutional protections for devolution and before developing a clear structure for other Common Frameworks or a new framework for intergovernmental relations (IGR) has constitutional implications. As well as very broadly defined concepts of Mutual Recognition and Non-Discrimination, the UK Internal Market Bill also reserves State Aid policy to the UK Government and gives it new financial powers including for matters for which policy competence is devolved.

More broadly, in itself, Brexit has constitutional implications for the operation of devolution.<sup>3</sup> Although the UK formally left the EU at the end of January 2020, until the end of the 'Transition Period' it remains within the broad framework of EU rules. EU membership is written through the statutory framework for devolution. The framework of EU rules has also provided a kind of internalised scaffold holding the UK together through economic regulation and in a range of other EU policy areas. The UK's domestic IGR framework, principally the Joint Ministerial Councils (JMCs), is notoriously underdeveloped, underused and ramshackle. The EU framework allowed the UK to multi-level operate despite the limited and weak quality of its IGR.

How should the balance be struck between UK-wide and devolved policy competences after Brexit? The UK Government has not yet addressed this central territorial constitution question directly. UK Government communications have described Brexit as a 'power surge' for devolution, since some EU powers 'returning' to the UK will come to devolved governments and legislatures. However, this Bill does not make those

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<sup>2</sup> *UK Internal Market CP278 July 2020*

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/901225/uk-internal-market-white-paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901225/uk-internal-market-white-paper.pdf)

<sup>3</sup> Daniel Wincott *Brexit is re-making the UK's Constitution under our noses*

<https://blogs.lse.ac.uk/brexit/2018/09/17/brexit-is-re-making-the-uks-constitution-under-our-noses/>

changes. The UK Internal Market Bill is the Johnson administration's first major piece of legislation that governs devolution. If passed into law in its current form it will have a significant, largely centralising, impact on the balance of the UK territorial constitution.

## **2. The Internal Market Concept**

The concept of an Internal Market is primarily associated with the European Union and the process of European integration. It is a framework developed to prevent rules and regulations from creating unnecessary barriers to trade within a territory. Developed to facilitate integration within the (then) European Economic Community, the Internal Market proved to be a powerful policy tool to facilitate closer economic integration among political units that enjoyed high levels of mutual trust, while putting protections in place to prevent the policy capacity of the participating units from being undercut. The concept was taken up in a number of other multi-level systems, both federal states and multi-state organisations.

At the heart of the Internal Market concept is the idea that a product or service that is lawfully marketed in any one of its parts can, without any additional requirements, also be marketed across the Internal Market. Mutual Recognition of each other's rules and regulations – trusting that they are effective and serve similar purposes – is critical to the idea of an Internal Market. Equally, Internal Markets typically include a clear set of public policy objectives that can justify exceptions to Mutual Recognition. Moreover, Internal Markets typically also involve the harmonisation of some rules – sometimes for minimum or maximum regulatory standards.

An Internal Market is best understood as a framework of rules that govern economic activity across jurisdictions or territorial policy regimes, rather than the condition of a friction-free economy (or an economy market by minimal friction). Typically, the aim of an Internal Market is to minimise economic friction, subject to other valued policy objectives. It is also sometimes used in a much looser, non-technical way, to describe an economically integrated territory. There is potential for confusion if these two uses are not distinguished clearly from one another.

The UK Internal Market proposals aim to prevent the emergence of a hypothetical threat to UK economic prosperity – new regulatory frictions that could undermine economic

performance. The threat is hypothetical or counterfactual<sup>4</sup> in the sense that its possible future realisation is dependent on actions that have not yet taken place. New devolved regulation is presented as the main potential source of this new friction. Since the devolved economies are also described as bearing a disproportionate brunt of the costs of new friction, it is hard to see why the devolved governments would introduce it, without good reasons for doing so.

For the economy, less is usually regarded as better than more friction. Frictionlessness does not, however, necessarily equate to economic success. The UK Government's UK Internal Market White Paper provides us with an illustration of the difference. For illustrative purposes, it models the impact of increasing internal frictions within the UK to the levels that currently exist in Germany,<sup>5</sup> and finds a change of this kind would have significant costs. Several points might be made here. If EU law allows for greater economic friction within a member state than exists currently in the UK, that might suggest the devolved governments have relatively little appetite for friction of that kind. On the other hand, German performance might suggest that internal friction is not necessarily inimical to economic success in the way the White Paper argues.

There is little doubt that the Anglo-Scottish Union was motivated, in significant part, by the aim of closer economic integration between Scotland and England. Not all processes of economic integration, however, have taken the form of an Internal Market. To date the UK Internal Market back to 1707 and the Anglo-Scottish Union is to use a loosely informal definition of an internal market, not a legally precise one. It is implausible to describe the creation or operation of the United Kingdom of Great Britain and Northern Ireland before Brexit as driven by an Internal Market logic of integration.

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<sup>4</sup> *Impact Assessment, UK Internal Market Bill* September 2020 p. 2

<https://publications.parliament.uk/pa/bills/cbill/58-01/0177/UK%20Internal%20Market%20Bill%20Impact%20Assessment%2008092020.pdf>

<sup>5</sup> *UK Internal Market* CP278 July 2020, p. 36 para 85

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/901225/uk-internal-market-white-paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901225/uk-internal-market-white-paper.pdf)

### 3. UK Government activity on a UK Internal Market 2016-2020

The issue of the UK internal market became a focus of UK government activity in early 2017. The first official reference to the impact of withdrawal on internal domestic trade came in the White Paper preceding the EU (Withdrawal) Act. The White Paper did not yet use the language of the UK's single or internal market. It references the 'importance of trade within the UK to all parts of the Union' and sets out that the government's 'guiding principle will be to ensure that – as we leave the EU – no new barriers to living and doing business within our own Union are created'.<sup>6</sup> The White Paper outlined that this would involve 'maintain[ing] the necessary common standards and frameworks for our own domestic market'<sup>7</sup> but didn't go further in detailing how these standards and frameworks would be created and maintained. It did though reiterate a commitment that 'no decisions currently taken by the devolved administrations will be removed from them and we will use the opportunity of bringing decision making back to the UK to ensure that more decisions are devolved'.<sup>8</sup>

Though the language of the internal or single market was not used in the White Paper, these terms had, on occasion, appeared in earlier official documents- including in legislation. The 1998 Northern Ireland Act provides at section 14 that the Secretary of State may decide not to submit for assent NI Assembly Bills which s/he considers 'would have an adverse effect on the operation of the single market in goods and services within the United Kingdom'. No comparable provision appears in either the Scottish or Welsh devolution statutes. The rationale for the inclusion of NI provision was that EU legislation 'enforces a single market between EU member states, but not necessarily within each member state', and there were concerns expressed that goods from England, Wales and Scotland may be treated less favourably than those from other member states<sup>9</sup> (presumably, though not expressly mentioned, the Republic of Ireland). No use of this provision has ever been made, nor has it been officially raised as an option for inclusion in devolution legislation generally as a means to manage the

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<sup>6</sup> *Legislating for the United Kingdom's Withdrawal from the European Union* Cm 9446, March 2017, at para. 3.6

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, at para. 3.5

<sup>9</sup> Hansard, 18 November 1998, Adam Ingram, Minister of State NI Office.

post-EU internal market. Instead, the approach envisaged under the initial draft of the Bill<sup>10</sup> that was to become the EU (Withdrawal) Act was a holding position – with powers within devolved competence effectively returned to Westminster until such a time as a decision was made to introduce UK wide measures in that space, or to release the powers back.

In June 2018, almost a year after the Bill's introduction in the House of Commons, the final version of the legislation became law. There had been some significant movement from the Bill's starting position, following extensive opposition to the proposals and an effectively coordinated response from governments and parliamentarians in Edinburgh, Cardiff and Westminster. The Act provides UK Government ministers with the power to issue regulations to maintain restrictions on devolved legislatures' ability to modify or repeal EU-derived law (retained law) which falls with devolved competence. Devolved Parliaments, whilst not being able to block any regulations, would be asked to give consent, and their response aired before the Westminster Parliament, which would have to approve any use of the power in the regulations. The Welsh Assembly gave legislative consent to the Act following an intergovernmental agreement reached between Welsh and UK Government in April 2018, though consent was refused by the Scottish Parliament.<sup>11</sup>

This IGA established a set of principles and commitments about the use of the Act's freezing powers, and about the introduction of cross-UK common frameworks. These principles had first been agreed in October 2017 under the auspices of the Joint Ministerial Committee (EU Negotiations),<sup>12</sup> and identify the factors that implicate UK-wide cooperation. Frameworks were identified as being necessary to: enable the functioning of the UK internal market, while acknowledging policy divergence; ensure compliance with international obligations; ensure the UK can negotiate, enter into and implement new trade agreements and international treaties; enable the management of

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<sup>10</sup> First Reading in July 2017.

<sup>11</sup> The IGA also led to the repeal of Welsh continuity legislation (Law Derived from the European Union (Wales) Act). The comparable (though not strictly equivalent) Scottish Bill was maintained, and was subject to a partially successful legal challenge

<sup>12</sup> JMC (EU Negotiations) Communiqué, 16 October 2017



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

In the interim, between the October 2017 JMC and the conclusion of the IGA, work had continued on identifying the areas where common frameworks were going to be required, and the governance principles that would underpin them. A first assessment of the affected areas was published in March 2018, and this identified issues where a legislative response may be required, as well as non-legislative cooperation, and areas where no co-operative framework, legislative or non-legislative was needed.<sup>13</sup> This was subsequently updated in April 2019.<sup>14</sup> Under that assessment, some 21 areas were identified as requiring a legislative framework, a common theme here being their close connection to the trade (including matters such as mutual recognition of professional qualifications, agricultural support and food labelling). Amongst the 78 areas identified for a non-legislative framework, are matters related to environment protection, (such as air quality, and waste management), but also trade related issues including public procurement and aspects of the regulation of tobacco products. Four areas were identified as being of disputed competence – the UK Government considering them reserved (including state aid, and geographical indications). The common frameworks workstream has been led by the Cabinet Office, with oversight from the JMC(EN). Under the EU (Withdrawal) Act, reporting on progress with the Frameworks is required every three months. Effective and extensive collaboration involving officials across the governments of the UK had been taking place over 2018 and 2019, though progress had slowed during 2020, meaning frameworks would not be in place by the end of the transition period.

Running alongside this work on common frameworks have been strands of work across associated areas. One is work on broader intergovernmental relations, where progress has been limited. Another is work on the internal market beyond the common frameworks. According to an update in 2019,<sup>15</sup> the UK Government reported that it was

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<sup>13</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/686991/20180307\\_FINAL\\_\\_Frameworks\\_analysis\\_for\\_publication\\_on\\_9\\_March\\_2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686991/20180307_FINAL__Frameworks_analysis_for_publication_on_9_March_2018.pdf)

<sup>14</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/792738/20190404-FrameworksAnalysis.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf)

<sup>15</sup> An Update on Progress in Common Frameworks, July 2019.

continuing to seek ‘development of a shared approach to the UK Internal Market with the devolved administrations, and, alongside the work being undertaken by policy teams, we are considering how to manage internal market issues across framework areas’. Work on the internal market has been led from the Department of Business, Energy and Industrial Strategy. This has proved more controversial, with disagreement over the necessity of further interventions to support a domestic internal market, beyond common frameworks. The Scottish Government withdrew from engagement on the internal market in early 2019, though it has continued to cooperate on common frameworks.

Though Welsh Government maintained engagement, the introduction of the Internal Market White paper in July, followed swiftly<sup>16</sup> by the Bill has been marked by unilateral action by UK Government. The Bill’s timetable envisages it leaving the Commons by the end of September/early October, and the Lords at the latest in November. The intention is clearly for the legislation to be in place by the time the transition period out of EU membership ends on 31 December 2020. Legislative consent is being sought for the whole Act.

#### **4. Market Access: Mutual Recognition and the Non-Discrimination Principle**

The Bill introduces two principles which together are intended to create a market access guarantee for goods and services across the UK. Both mutual recognition and non-discrimination are concepts which operate within EU free movement law, and which UK courts are familiar with applying. However, they are re-defined in the Bill’s proposals in ways which introduce additional complexities and a lack clarity. They are also rather more centralising, limiting the capacity for divergence and differentiation currently permitted under EU law. The implications for legislative competence will be addressed

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<sup>16</sup> Following a four-week consultation process, from 16 July to 13 August 2020. Individual submissions have not been published, though an account is provided in the Government response.

in section 5. In this section, the scope of the principles will be outlined, and their legal enforceability considered.

Under the terms of the Bill, once products meet their local regulatory requirements, they are deemed to satisfy the requirements for the rest of the UK. They then have access to all other parts of the UK market, regardless of any more stringent regulation than might otherwise apply there. More demanding regulatory standards may only be maintained against incoming products on the narrow grounds identified in the Bill – for goods, this is the prevention or reduction of the spread of pest, disease, and unsafe food and feed.<sup>17</sup> This mutual recognition principle operates in respect of product requirements – rules that go to the nature of the product being regulated. In addition, the principle of non-discrimination applies to rules which deal with the conditions under which something is sold – these rules must not discriminate, whether directly (by imposing different requirements) or indirectly (by imposing requirements applicable to all but which puts incoming goods at a disadvantage, and have adverse market effects). In the case of indirect discrimination, local rules may be applied to incoming products where this fulfils a legitimate aim – defined as the protection of the life or health of humans, animals or plants, and the protection of public safety or security.

Comparable market access principles operate in relation to services in part two of the Bill (with Schedule 2 detailing those services excluded from the Bill's scope). Part three covers professional qualifications, and establishes that (with the exception of the legal profession), residents authorised to practice a profession or trade in one part of the UK, shall also be recognised as qualified to practice anywhere else in the UK (either automatically or through a process of individual assessment established by the relevant regulatory body). In all cases, for goods, services, and qualification requirements, existing measures are protected from challenge under the market access principles. These only begin to bite on new, or substantially revised regulations.

Existing measures of course have themselves had to comply with the EU free movement principle, which requires states remove quantitative restrictions on trade, and all measures having equivalent effect. This has been interpreted broadly to capture

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<sup>17</sup> Schedule 1.

measures which (actually or potentially) hinder market access, which moves beyond the elimination of discrimination. A presumption of regulatory equivalence exists, as contained in the mutual recognition principle. In the case of devolved governments and legislatures, measures which do not comply with EU law are 'not law', and challenge may be brought in accordance with the legislative checks provided for under the devolution acts. Additionally, as directly enforceable EU rights, these EU law principles have been enforceable by individuals and businesses against regulatory requirements adopted by governments and legislatures – including Westminster Parliament. While the EU regime is directed at inter-state trade, the review of compatibility of measures against a standard of unjustified hindrances to free movement has internal consequences too for trade within the UK.

In this way, there have in the past been challenges variously to Welsh regulations banning the use of electronic training collars for dogs, to Scottish regulations banning vending machines as a means for the sale of tobacco products, and to minimum pricing regulations for alcohol sales to the public. In all these cases, the regulation itself fell within the EU law test of a measure having an equivalent effect to a quantitative restriction, but were able to be successfully justified, as a proportionate means of achieving a public policy objective.

Were those measures to be adopted from scratch under the Bill's proposed system (or substantially revised), would they survive any potential challenge? The first stage is to consider whether they would fall within the scope of the Bill's market access principle, either under the mutual recognition or discrimination element, and then to consider possible justification. Were the pet collars to be banned from sale in Wales, the mutual recognition obligation would be engaged, on the basis that this would be a rule which is directed to the intrinsic nature of the product itself – the 'characteristics of the goods themselves' (clause 3 (4) (a)). There are no available justifications available under the proposed legislation that would support the choice of the legislature in Wales – justifications being limited to measures to prevent/reduce the spread of pest, disease, and unsafe food and feed. The situation where the product may be sold, but its lawful *use* is restricted is less clear, reflecting the difficulties in the partial reading over of EU law here. EU law has recognised categories of measures which are neither product requirements nor selling arrangements, and notably these include product use rules. Under the Bill's schema, a measure is either categorised as bearing on the nature of the product, or arrangements around its sale. As already highlighted, rules relating to the products characteristics are only able to be maintained on exceedingly narrow grounds. If it is a rule seen as relating to the arrangements on sale, then it will only fall within scope if it is shown to discriminate, directly or indirectly, with an adverse market impact on products originating in other parts of the UK. Available justifications, though broader than those when mutual recognition is applied, remain very restricted when compared to the EU rules.

Similarly, dispute may arise over the proper characterisation of rules on minimum alcohol pricing, and the applicable regime. Whilst the UK Government indicated in its response to the consultation<sup>18</sup> that it did not intend to prevent this policy, there are no guarantees on the face of the Bill as to how these provisions will be interpreted. In the example of restrictions on where and how tobacco products may be sold, this is clearly a measure which would engage the discrimination test, and would require a consideration of whether products from outside the destination market are disadvantaged compared to those from within the local market. The justifications available, whilst broader than those available in relation to mutual recognition fall far shorter than those available under EU law, which, outside direct discrimination, recognise an open list of grounds including environmental, consumer, and worker protection. There is also a lack of clarity around how the assessment will be undertaken of whether in any particular case, a justification will be accepted as legitimate. EU law uses a test of proportionality – though that language does not appear in the Bill. Instead the Bill provides that exclusions are available where measures can 'reasonably be justified as necessary' to achieve a legitimate aim.<sup>19</sup>

The Bill does not clarify who will be making these assessments and interpretations, as the scheme of enforcement is not set out. It is unclear whether its provisions create legally enforceable rights to market access and non-discrimination that can form the basis of legal actions, whether by individuals, businesses, or indeed by prospective consumers of those businesses' products and services. The role of the proposed Office for the Internal Market in relation to individuals and businesses is not expressly made out. From the Bill's Impact Assessment, it is suggested that 'businesses and individuals might choose to enforce their rights in court if a UKIM matter remains unresolved, potentially incurring substantial legal costs, time and effort. These instances would only

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<sup>18</sup> BEIS, Government response to the consultation on the UK Internal Market, at p. 13.  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/916154/ukim-consultation-government-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916154/ukim-consultation-government-response.pdf)

<sup>19</sup> Schedule 1(2)(6).

occur in the event of directly or indirectly discriminatory measures'.<sup>20</sup> It is unclear why only discriminatory measures are identified as potentially forming the basis of an action, or whether there might be the basis of court action in relation to mutual recognition.

## 5. Legislative competence

The Bill proposes explicit changes to devolved competence in two ways. First, it designates state aid as a reserved area of competence, removing it from devolved competence (see section 6 below). Second, it adds the Internal Market legislation to the list of protected enactments in each of the devolution statutes (clause 49). This has the consequence of pre-empting subsequent devolved legislation (primary and secondary) to the extent that it amends, modifies, or repeals (expressly or in substance) the protected provisions. The Bill removes any power under any other Act of Parliament for secondary legislation to be used to amend, modify or repeal the Act which might be used for England or more broadly.

Beyond this, the UK Government maintains that there is no restriction on devolved competence introduced by the Bill. The position is that the governments and legislatures can continue to regulate economic activity for their territories and within their field of competence. However, the effects of the Bill's provisions are to prevent the application of those regulations to products, service providers and workers from outside their local territory. The Impact Assessment acknowledges the cost of this for public policy objectives : as the 'scale of the intended public benefit of local measures might not be fully realised due to the more limited number of goods and services to which the policy applies'.<sup>21</sup> Thus, whilst the Senedd could<sup>22</sup> introduce rules banning in Wales the sale of chlorinated chicken, or GMO containing products, this may only apply to Welsh producers/importers. If regulations in any other part of the UK recognised these products as lawful, they would have access to the Welsh market. The system under the Bill does not foresee the use of the same legislative competence tests which would

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<sup>20</sup> BEIS, Impact Assessment of UK Internal Market Bill, at p. 3.

<sup>21</sup> Ibid, at p. 29.

<sup>22</sup> Assuming there are no common frameworks operating in this area committing Wales to a different course.

render rules that do not comply as 'not law' (as has been the case with rules conflicting with ECHR and EU commitments). Instead it provides that the local laws 'do not apply' to products and services from other parts of the UK. The proposed Office of the Internal Market may be called on by governments to review their own or others' regulations, though the OIM has no legal powers to disapply the law. As noted above, enforcement issues remain unclear.

The UK Government is seeking legislative consent from the devolved parliaments for the Bill in its entirety. The Bill itself contains a number of provisions giving power to the Secretary of State to amend aspects of the legislation – including the definition of what falls within the mutual recognition principle, and what falls within the non-discrimination principle; the scope of potential grounds for justification; and, very significantly, exclusions of policy areas from coverage of the market access principle. The list of services in Schedule 2 – including healthcare services and social services – which are currently excluded from the Bill's scope could be changed by the Secretary of State without any input from the devolved administrations. Only in respect of the mutual recognition/non-discrimination provisions is any consultation with the devolved administrations foreseen by the Bill. There is no consent requirement at all throughout the Bill. Comparison may be drawn with the EU (Withdrawal) Act's provisions which included the consent decision procedure for the use of ministerial powers under the Act.

## **6. Spending Powers and State Aid**

As proposed UK Internal Market is basically structured around an economic regulation system based on Mutual Recognition and Non-Discrimination. The Bill also has other significant provisions. As drafted it reserves State Aid policy as a UK-wide competence and creates new financial powers that give scope for new UK Government public spending in the devolved nations, including in areas of devolved policy competence.

Leaving the EU legal framework made some decision about the regulatory control of State Aids unavoidable. There was some disagreement between the devolved and UK governments over where State Aids policy would 'land' naturally once outside the EU. The UK Internal Market Bill proposes to resolve that matter by reserving the policy to the UK level. This provision may be intended to prevent devolved governments developing policies that redistribute economic activity across territorial boundaries, more than enhancing overall levels of production. The implication of that reservation is that the scope for devolved governments to support economic activity within, say, Scotland or Wales, might be restricted. In principle, additional provision could be made explicitly to allow devolved governments a margin of discretion within a new UK State Aid/industrial policy regime. This matter is not one considered in the UK Internal Market Bill.

The issue of State Aids is deeply tangled up with questions about the position of Northern Ireland. These issues are dominating debate about the UK Internal Market Bill at Westminster. The UK-EU Withdrawal Agreement – particularly its Protocol – set out key aspects of the position of Northern Ireland after the end of the transition period. In principle, Northern Ireland fell within both the UK and the EU customs territories. The EU is concerned to avoid the possibility of businesses in either Northern Ireland or Great Britain enjoying an unfair advantage over those in EU member states. Among other things, the Withdrawal Agreement is structured to minimise that risk. Despite being party to it, the UK Internal Market Bill and the resulting debates reveal UK Government concerns about the Withdrawal Agreement's State Aids provision, particularly their potential reach into Great Britain.

This is one of the issues over which the UK Internal Market Bill is controversial in relation to the question of the UK Government breaking international law in its commitment to the Withdrawal Agreement.

Over the past 30 years or so, the UK has generally made less use of discretionary interventions to support industry than other EU member states. The UK Internal Market Bill's reservation of State Aids may be intended to prevent devolved governments pursuing expansive discretionary industrial policies and/or herald a new discretionary interventionism by the UK Government itself.

The UK Internal Market Bill proposes new financial powers for the UK Government. There does not seem to be any close mechanical relationship between these new powers and the basic operation of the proposed Internal Market. Some discussion around the Bill suggests that these powers are seen as replacing EU funding streams. The UK Government has long promised a discussion of a replacement for those funds in the form of a so-called 'Shared Prosperity Fund'. It is not clear whether the financial powers in the Bill replace that strategy, implement it or are entirely separate from it. It is important to note that proportionately, Wales has received much higher levels of EU structural funding than any other part of the UK. A good deal of that funding has flowed through the voluntary sector in Wales. Its objectives are often social cohesion as much as economic development. Should the replacement funds be associated with the UK Internal Market, rather than these historic objectives, that could trigger major structural change for the voluntary sector in Wales.

The UK Government already has significant scope for public spending in devolved parts of the UK. Many major infrastructure projects and 'City Deals' involve cooperation between different levels of government in the devolved nations. Clues about how the new powers might be used can be found more in UK Government messaging around



the UK Internal Market, rather than in the legislation itself. Reports that the UK Government might seek to revive the M4 relief road and fund it directly suggest it may be taking an increasingly combative approach to devolution. Without other significant changes, it is hard to see how the UK Government could implement a policy of this kind against Welsh Government opposition. Planning rules would, for example, stand in the way.

Equally, the absence of any proposals to entrench and protect devolved policy competences within the UK Internal Market structure together with no suggestions for new forms of intergovernmental cooperation seem to point towards political competition more than policy collaboration between levels of government. Areas of shared competence are a feature of most other multi-level systems. The UK Internal Market Bill does little or nothing to develop ways of working of that kind.

Major infrastructure projects tend to redistribute economic activity as well as generating new capacity. For example, modelling suggests that HS2 will divert economic activity away from South Wales, at a cost of some £200 million per annum, while enhancing the economy of North East Wales by roughly £50 million.<sup>23</sup> Leaving aside questions of its overall costs and benefits, then, a particular major infrastructure investment also has the scope reshape the economy. Enhancing the connectivity between South East Wales and England could well bring a net economic benefit to Wales. A similar scale of investment could be used to enhance connectivity within Wales itself. Their relative benefits might look different to the UK and Welsh governments. There is an unavoidably territorial-political element in choices of this kind.

## **7. Relationship with common frameworks and broader IGR considerations**

As outlined in section 3, a considerable amount of work has been undertaken creating common frameworks in areas where EU law has previously provided a degree of policy

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<sup>23</sup> <https://www.bbc.co.uk/news/uk-wales-51460737>

coordination across the legislatures of the UK. The unfinished state of many of these frameworks has been given as one reason for legislation to introduce the market access principle ahead of the end of the Transition Period. The EU (Withdrawal) Act provides an alternative route to providing regulatory stability and consistency across the UK ahead of the agreement of common frameworks, with the freezing of devolved competence (along with a political commitment from the UK Parliament not to legislate contrary to existing EU law). That course may be seen as not giving the UK government sufficient flexibility to revise regulations in view of new international trade deals that the UK may be negotiating. The deregulatory Internal Market Bill approach has become its preferred option.

Notably, the reach of the market access commitment in the Bill appears to go beyond simply those areas where EU law is falling away, and across devolved powers more generally. Given the significance of these proposals for devolution, especially the restrictions on the practical effect of legislation, the process under which the Bill is being introduced is particularly unsatisfactory. This is a hurried piece of law which has lacked the degree of consultation and cooperation running up to its introduction that one would expect from a major piece of constitutional legislation.

The justifications given for the need for the legislation are not convincing - the problems created by policy divergence are as yet unrealised, and hypothetical. Amongst the examples of where potential divergences may hinder the operation of the UK internal market and create costs are areas which are meant to be covered by common frameworks – including pesticides, food labelling, and nutritional health claims. The extent to which these prospective domestic common frameworks are now overtaken by the provisions of the Internal Market Bill is unclear. It raises the issue of the relationship more generally between specific regulatory regimes and a general horizontal market access commitment. Drawing parallels with the EU regime that currently operates across the UK, the operation of a market access principle to create and sustain the internal market is secondary to reliance on harmonising legislation. These common (though not necessarily uniform) rules are adopted through shared process of governance which demonstrates a commitment to respect for principles of subsidiarity,

and a mainstreaming of environmental and equality concerns.<sup>24</sup> They ensure that there is a minimum floor of regulatory standards in operation, below which no part of the Union can legally fall. In the UK content, the relationship between legislation creating frameworks with minimum standards, and the market access principle seems to be inverted. The prospect for collaborative governance through the common frameworks appears side-lined by the internal market principle.

Both the content of the Bill, and the way it has been introduced are a reflection of the difficult relations between the governments of the UK. Placing IGR on a more stable footing becomes more important under these circumstances, and there should be an effective commitment to taking forward the work of intergovernmental relations begun in 2018.<sup>25</sup>

## **8. Scrutiny and IPR**

There has been a tendency throughout the Brexit process to proceed with critical legislation at pace, without ensuring appropriate opportunity for full and effective engagement by the parliaments. The legislative timetable for this Bill is no different. As noted, the UK government has indicated legislative consent is sought for all parts of the Bill. Given the expected refusals of legislative consent, a decision to proceed with the legislation without satisfactory amendment will be a reflection of weakness of the constitutional protections available to devolution.

If the Bill proposes a range of measures which potentially side-line the devolved governments, the consequences for the Parliaments are at least as concerning. The operation of a robust mutual recognition principle raises the prospect of products and

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<sup>24</sup> Jo Hunt, 'Subsidiarity, Competence and the UK Territorial Constitution' O. Doyle, A. McHarg and J Murkens, ed. *The Brexit Challenge for Ireland and the United Kingdom: Constitutions under Pressure* (CUP), 2021.

<sup>25</sup> Nicola McEwen, Michael Kenny, Jack Sheldon, and Coree Brown Swan, 'Intergovernmental Relations in the UK: Time for a Radical Overhaul?' (2020) 91 *Political Quarterly* 632-640.

services being in circulation which comply with rules set by other legislatures or governments. The Senedd may have no oversight of, or input into, standards set elsewhere that nevertheless apply within their jurisdiction and fall within devolved competence. The need for an effective system of inter-parliamentary relations becomes particularly acute under these circumstances.

## 9. Responses from Welsh/Scottish/NI Governments

Both the Welsh and Scottish governments responded to the White Paper on the UK Internal Market in robustly negative terms.<sup>26</sup> Each has roundly rejected UK Internal Market Bill. They have focused on the particular definitions of Mutual Recognition and Non-Discrimination within the Bill. In contrast to EU legal principles that also have these names, the UK Internal Market Bill concepts, they argue, cut much more deeply devolved competences. The UK Internal Market approach provides little or no scope for other public policy priorities to justify exceptions to Mutual Recognition or Non-Discrimination. The Bill's provides for a standstill in some areas of regulation. Some existing regulatory divergence is exempt from Mutual Recognition. But any change to regulation within these categories brings them within scope, in ways that limit the scope for devolved governments to keep regulation up to date.

As it returns from the EU, many lawyers regard State Aids policy as naturally a devolved area of policy competence.<sup>27</sup> Mark Drakeford is reported to support a UK-wide State Aid

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1. <sup>26</sup> Michael Russell *United Kingdom Internal Market White Paper: statement by the Cabinet Secretary for the Constitution, Europe and External Affairs*

<http://www.gov.scot/publications/united-kingdom-internal-market-white-paper-cabinet-secretary-constitution-europe-external-affairs/>

Jeremy Miles *Correspondence from the Counsel General August 2020*

<https://business.senedd.wales/documents/s103942/Correspondence%20from%20the%20Counsel%20General%2014%20August%202020.pdf>

<sup>27</sup> This is also acknowledged in the Concordat on Financial Assistance to Industry, one of the Supplementary Agreements appended to the main UK intergovernmental Memorandum of Association, October 2013

regime in principle, while arguing that the UK Government Internal Market plans are 'absolutely not the way of going about it'.<sup>28</sup> Both governments also object to the new UK spending powers.

In Northern Ireland the Executive has been much less vocal on the subject of the UK Internal Market than either the Welsh or Scottish governments. The response to the White Paper on the internal market was muted, perhaps because, until the Bill was published, the position of Northern Ireland seemed to be defined more by the Withdrawal Agreement than the idea of a UK Internal Market.

The UK Internal Market Bill seems to have divided the Executive along party lines. On 22 September, the Northern Ireland Legislative Assembly held a debate on a motion calling on the UK Government to 'honour its commitments' made in the Withdrawal Agreement.<sup>29</sup> The motion passed by 48 votes to 36. Sinn Féin the SDLP, Alliance and smaller parties supported the motion, which was opposed by the DUP and UUP.

At Westminster, attention has focused much more on the implications of the UK Internal Market Bill for Northern Ireland. The main controversy is attached to the issue of the UK Government's appetite to breach its commitments under the Withdrawal Agreement and 'break international law'. The strengths and weaknesses of the Bill as the framework for an Internal Market seem not to have garnered as much attention in the House of Commons as might be expected from a Welsh or Scottish perspective.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316157/MoU\\_between\\_the\\_UK\\_and\\_the\\_Devolved\\_Administrations.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf)

<sup>28</sup> <https://www.bbc.co.uk/news/uk-wales-politics-54072660>

<sup>29</sup> <https://www.irishtimes.com/news/politics/ni-assembly-approves-motion-calling-on-uk-to-honour-brexite-commitments-1.4360836>