Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE	**Legal challenge to the UK Internal Market Act 2020**
DATE	**19 January 2020**
BY	**Jeremy Miles MS, Counsel General and Minister for European Transition**

I have committed in statements to the Senedd, at committee appearances and in correspondence, to keep Members of the Senedd updated as to the steps the Welsh Government is taking to protect the Senedd from the attack on its competence made by the UK Internal Market Act 2020.

So far, there has been an exchange of pre-action correspondence with the UK Government about the Act. Members will recall that a pre-action letter was sent to the UK Government on 16 December, just before the Act was passed and received Royal Assent. We received a response to that letter on 8 January. That response did not address any of our concerns about the effect of the Act on devolution.

Therefore, I have today issued formal proceedings in the Administrative Court seeking permission for a judicial review. We recognise the difficulties faced by the Senedd because of the uncertainty that this Act leaves in terms of the Senedd's ability to legislate. I have therefore applied for the proceedings to be expedited although this is entirely a matter for the Court. I have proposed a timetable to the Court which would result in this case being heard in the final week of March 2021.

I attach the detailed Grounds of Claim. These grounds confirm the two planks of the challenge we seek to make; that the Act impermissibly, impliedly repeals parts of the Government of Wales Act 2006 in a way that diminishes the Senedd's legislative competence and that the Act confers power on the UK Government, by way of wide Henry VIII powers, which could be used by UK Ministers to substantively amend the Government of Wales Act in a way that cuts down the devolution settlement.

I will continue to keep Members closely updated on the progress of this action.

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT IN WALES

BETWEEN

THE COUNSEL GENERAL FOR WALES

Claimant

-v-

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Defendant

-and-

(1) THE LORD ADVOCATE FOR SCOTLAND

(2) THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Interested Parties

GROUNDS FOR JUDICIAL REVIEW

Introduction & Overview

1. This is a judicial review to seek declarations as to the scope of provisions of the United Kingdom Internal Market Act 2020 ('UKIMA') which ostensibly – albeit implicitly - limit the scope of the devolved powers of the Senedd and Welsh Government; and which appear to confer upon the Defendant power to limit the devolved powers further using secondary legislation. The ambit of these powers is set out in the Government of Wales Act 2006 as amended by the Wales Act 2017 ('GoWA'), and it was no part of the stated rationale for UKIMA that they should be curtailed: indeed, the Defendant asserts that they have not. UKIMA received Royal Assent on 17 December 2020 and was brought into force on 31 December 2020.

2. The Claimant is the Chief Law Officer for the Welsh Government, with statutory authority to bring litigation in the public interest under s67 of GoWA. The Defendant is the sponsoring Minister of the enactment.

3. The Claimant makes two central submissions:
    a. In so far as s54(2) of UKIMA purports impliedly to repeal areas of the Senedd's legislative competence, by including UKIMA – and the mutual recognition principle contained in s2 of UKIMA - in the list of enactments in schedule 7B of GoWA which may not be amended by the Senedd in their application to Wales, it must be interpreted in accordance with the principle of legality so that it does not prevent the Senedd legislating inconsistently with the mutual recognition principle;
    b. The delegated powers in UKIMA to amend primary legislation contained in ss 6(5), 8(7), 10(2), 18(2) and 21(8), read together with s56(2)(a), must be limited in application in relation to UKIMA and GoWA to incidental and consequential amendments, in accordance with the principle of legality.

4. Accordingly, the Claimant seeks declarations to the following effect:
    a. The amendment of schedule 7B of GoWA by s54(2) of UKIMA, to add UKIMA to the list of protected enactments, does not amount to a reservation and does not operate so as to prevent the Senedd from legislating on devolved matters in a way that is inconsistent with the mutual recognition principle in UKIMA;
    b. The Defendant's powers to make delegated legislation in ss 6(5), 8(7), 10(2), 18(2) and 21(8) of UKIMA, read together with s56(2)(a), cannot lawfully be used to amend either UKIMA or GoWA in a way which would substantively limit the legislative competence of the Senedd.

5. The devolution settlement for Wales is contained in GoWA, which is constitutional legislation. As is set out in sA1 of GoWA, the Senedd (formerly referred to as 'the Assembly') and Welsh Government are a permanent part of the constitutional arrangements of the United Kingdom, to which the United Kingdom Government and

Parliament have expressed their commitment, and which Parliament has expressly stated are not to be abolished without the consent of the people of Wales through a referendum. It is against that background that this claim is issued.

6. The need for these advisory declarations arises because:
    a. UKIMA leaves the ambit of the devolution settlement with Wales uncertain, and ostensibly limited, in important ways which are not clear on its face and which have a practical effect on the operation of democracy in Wales, by rendering uncertain the extent of the Senedd's ability to consider legislation and the operation of the Welsh Government; and
    b. The ostensible scope of the Defendant's regulation-making powers in UKIMA apparently render the scope of the Senedd and Welsh Government's devolved powers under GoWA susceptible to wide substantive future amendment, and serious diminution, at the hands of the Defendant, inadequately supervised by Parliament.

7. There was limited consultation with the Welsh Government before or during the Act's passage through Parliament and the Senedd refused legislative consent to UKIMA. The statutory mechanism set out in s109 of GoWA for amending the list of statutes 'protected' by provisions of schedule 7B of GoWA (which schedule precludes the Senedd from legislating in a way which would conflict with a scheduled enactment), was not used.

8. In short, the Claimant is concerned to establish that UKIMA cannot be interpreted so as to have the effect of cutting down the ambit of constitutional legislation, which protects the devolved powers of the Senedd and Welsh Government, either by implication or by secondary legislation. This is a matter of practical, constitutional and democratic significance.

The two issues in more detail

Implied Repeal

9. The Welsh devolution settlement means that the Senedd has power to legislate for Wales in all matters save those expressly reserved to the Westminster Parliament by being listed in schedule 7A of GoWA. For example, legislating in relation to consumer standards is a matter generally reserved to the Westminster Parliament by virtue of section C6, paras 72-76, schedule 7A of GoWA. However, food standards ("food, food products and food contact materials") are an explicit exception under section C6. Therefore, legislating for sale and supply of food is within the Senedd's devolved competence.

10. Even in relation to devolved matters, the Senedd may not legislate for matters within its own competence to the extent that any such Senedd legislation would conflict with the operation of 'protected enactments', which are set out in a list at para 5(1), schedule 7B of GoWA. These include, for example, the Human Rights Act 1998 and the Civil Contingencies Act 2004. It is because of the important implications for the scope of the devolution settlement that a mechanism was put into s109 of GoWA for amending schedule 7B, which required the consent both of the Senedd and the Westminster Parliament (but which mechanism was not invoked when adding UKIMA to schedule 7B).

11. Section 54(2) of UKIMA amends schedule 7B of GoWA so as to include UKIMA in the list of 'protected enactments'. No provision in UKIMA (save the limited exception of new C18 schedule 7A) expressly reserves any matter which was previously within the Senedd's devolved competence under schedule 7A of GoWA. In other words, save in the limited respects identified above, UKIMA does not expressly cut down or amend the ambit of the Senedd's devolved competence.

12. Nonetheless, for reasons explained below, the combination of the mutual recognition principle in s2 of UKIMA and the protection of UKIMA in schedule 7B of GoWA would

seem by implication to render certain devolved matters empty of content and implicitly 're-reserve' them by a sidewind, without expressly facing up to this on the face of the legislation. To the extent that the inclusion of UKIMA in schedule 7B of GoWA would protect it from modification by the Senedd in exercise of its power to legislate for Wales, this would amount to impermissible implied amendment of the ambit of devolved matters in schedule 7A of GoWA. The proposal to protect UKIMA would amount to a substantial diminution of the powers of the Senedd and Welsh Government, without their consent.

13. Schedule 7A of GoWA is constitutional legislation and so cannot be impliedly repealed in this way. It is important for the Welsh legislature and executive to be able to operate on the basis of a correct legal appreciation of this position. (It is also democratically important – in the forthcoming elections to be held in May 2021 – for all political parties to be able to set out their stalls on the basis of a proper understanding of the ambit of matters in relation to which legislative promises can be made).

Parliament purporting to delegate power to amend GoWA to a Minister

14. The Claimant's second concern is that UKIMA contains provisions which appear on their face to grant the Secretary of State power to make regulations from time to time amending the scope of UKIMA (and indeed other primary legislation). GoWA is constitutional legislation and can only be repealed by express Parliamentary authority. So, Parliament cannot - consistently with the long-established principle of legality - legislate so as to enable the extent of UKIMA (or GoWA) to be modified by a Minister, to the extent that, by doing so, it may permit the Government substantively to alter the ambit of the devolution settlement in Wales without express Parliamentary authority. Again, it is important for the proper operation of democratically accountable government in Wales that all constitutional actors operate on the basis of a proper understanding of this issue.

Legislative Material

United Kingdom Internal Market Act 2020

15. Part 1 of UKIMA sets out the new market access rules for goods, namely the mutual recognition principle and the non-discrimination principle.

16. The mutual recognition principle, set out in section 2 of UKIMA, provides:

> "***The mutual recognition principle for goods***
> *(1) The mutual recognition principle for goods is the principle that goods which—*
> *(a) have been produced in, or imported into, one part of the United Kingdom ("the originating part"), and*
> *(b) can be sold there without contravening any relevant requirements that would apply to their sale, should be able to be sold in any other part of the United Kingdom, **free from any relevant requirements** that would otherwise apply to the sale.*
>
> *(2) Where goods are to be sold in a particular way in the other part of the United Kingdom, the condition in subsection (1)(b) has effect as if the reference to "their sale" were a reference to their sale in that particular way.*
>
> *So, for example, if goods are to be sold by auction, the condition is met if (and only if) they can be sold by auction in the originating part without contravening any applicable relevant requirements there.*
>
> *(3) Where the principle applies in relation to a sale of goods in a part of the United Kingdom because the conditions in subsection (1)(a) and (b) are met, any relevant requirements there do not apply in relation to the sale*." [emphasis added]

17. Section 3 of UKIMA defines "*relevant requirements*" for the purpose of section 2 and provides so far as material:

> "***Relevant requirements for the purposes of section 2***

(1) This section defines "relevant requirement" for the purposes of the mutual recognition principle for goods as it applies in relation to a particular sale of goods in a part of the United Kingdom.

(2) A statutory requirement in the part of the United Kingdom concerned which—

(a) prohibits the sale of the goods or, in the case of an obligation or condition, results in their sale being prohibited if it is not complied with, and

(b) is within the scope of the mutual recognition principle,

is a relevant requirement in relation to the sale unless excluded from being a relevant requirement by any provision of this Part.

(3) A statutory requirement is within the scope of the mutual recognition principle if it relates 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, lot- marking 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;

…

(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."

18. Section 4 of UKIMA excludes pre-existing statutory requirements from the operation of the mutual recognition and non-discrimination principles.

19. Section 5 states the non-discrimination principle for goods, namely that the sale of goods in one part of the United Kingdom should not be affected by "*relevant requirements*" which directly or indirectly discriminate against goods that have a relevant connection with another part of the United Kingdom. Section 6 defines a "*relevant requirement*" for the purposes of the non-discrimination principle as follows:

"***Relevant requirements for the purposes of the non-discrimination principle***

(1) This section defines "relevant requirement" for the purposes of the non-discrimination principle for goods.

(2) A relevant requirement, for the purposes of the principle as it has effect in relation to a part of the United Kingdom, is a statutory provision that—

(a) applies in that part of the United Kingdom to, or in relation to, goods sold in that part, and

(b) is within the scope of the non-discrimination principle.

(3) A statutory provision is within the scope of the non-discrimination principle if it relates to any one or more of the following—

(a) the circumstances or manner in which goods are sold (such as where, when, by whom, to whom, or the price or other 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.

*(4) **A statutory provision is not a relevant requirement—***

***(a) to the extent that it is a relevant requirement for the purposes of the mutual recognition principle** for goods (see section 3), or*

(b) if section 9 (exclusion of certain existing provisions) so provides.

*(5) **The Secretary of State may by regulations amend subsection (3) so as to add, vary or remove a paragraph of that subsection.***

(6) Regulations under subsection (5) are subject to affirmative resolution procedure.

(7) Before making regulations under subsection (5) the Secretary of State must seek the consent of the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland.

*(8) If consent to the making of the regulations is not given by any of those authorities within the period of one month beginning with the day on which it is sought from that authority, **the Secretary of State may make the regulations without that consent**.*

(9) If regulations are made in reliance on subsection (8), the Secretary of State must publish a statement explaining why the Secretary of State decided to make the regulations without the consent of the authority or authorities concerned.

(10) In this section "statutory provision" means provision contained in legislation." [emphasis added]

20. Section 8 provides so far as material:

> "***The non-discrimination principle: indirect discrimination***
>
> *(1) A relevant requirement indirectly discriminates against incoming goods if—*
>
> *(a) it does not directly discriminate against the goods,*
>
> *(b) it applies to, or in relation to, the incoming goods in a way that puts them at a disadvantage,*
>
> *(c) it has an adverse market effect, and*
>
> *(d) it cannot reasonably be considered a necessary means of achieving a legitimate aim.*
>
> *…*
>
> *(6) "Legitimate aim" means one, or a combination, of the following aims—*
>
> *(a) the protection of the life or health of humans, animals or plants;*
>
> *(b) the protection of public safety or security.*
>
> *(7)* ***The Secretary of State may by regulations amend subsection (6) so as to add, vary or remove an aim.***
>
> *(8) Regulations under subsection (7) are subject to affirmative resolution procedure.*
>
> *(9) Before making regulations under subsection (7), the Secretary of State must seek the consent of the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland.*
>
> *(10) If consent to the making of the regulations is not given by any of those authorities within the period of one month beginning with the day on which it is sought from that authority****, the Secretary of State may make the regulations without that consent****.*
>
> *(11) If regulations are made in reliance on subsection (10), the Secretary of State must publish a statement explaining why the Secretary of State decided to make the regulations without the consent of the authority or authorities concerned.*" [emphasis added]

21. Section 10 provides so far as material:

> "***Further exclusions from market access principles***
>
> *(1) Schedule 1 contains provision excluding the application of the United Kingdom market access principles in certain cases.*
>
> *(2)* ***The Secretary of State may by regulations amend that Schedule****.*

(3) The power under subsection (2) may, for example, be exercised to give effect to an agreement that—

(a) forms part of a common framework agreement, and

(b) provides that certain cases, matters, requirements or provision should be excluded from the application of the market access principles.

(4) A "common framework agreement" is a consensus between a Minister of the Crown and one or more devolved administrations as to how devolved or transferred matters previously governed by EU law are to be regulated after IP completion day.

…

(8) Regulations under subsection (2) are subject to affirmative resolution procedure.

(9) Before making regulations under subsection (2), the Secretary of State must seek the consent of the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland.

(10) If consent to the making of the regulations is not given by any of those authorities within the period of one month beginning with the day on which it is sought from that authority, ***the Secretary of State may make the regulations without that consent****.*

(11) If regulations are made in reliance on subsection (10), the Secretary of State must publish a statement explaining why the Secretary of State decided to make the regulations without the consent of the authority or authorities concerned." [emphasis added]

22. Part 2 of UKIMA provides for a new market access regime for services in the UK based on the same mutual recognition and non-discrimination principles as for goods. Section 18 provides for exclusions from the definition of "services" to which UKIMA will apply as follows, so far as material:

"***Services: exclusions***

(1) Schedule 2 contains—

(a) a list of services specified in the first column of the table in Part 1 of that Schedule, to which section 19 (mutual recognition) does not apply;

(b) a list of services specified in the first column of the table in Part 2 of that Schedule, to which sections 20 and 21 (non-discrimination) do not apply;

(c) a list of authorisation requirements in Part 3 of that Schedule, to which section 19 does not apply;
(d) a list of regulatory requirements in Part 4 of that Schedule, to which sections 20 and 21 do not apply.

(2) ***The Secretary of State must keep Schedule 2 under review, and may by regulations—***

(a) remove entries in the tables in Part 1 or Part 2 of that Schedule *or entries in the lists in Part 3 or Part 4 of that Schedule;*
(b) amend entries in those tables or lists;
(c) add entries to those tables or lists.

(3) The power under subsection (2) may, for example, be exercised to give effect to an agreement that—
(a) forms part of a common framework agreement, and
(b) provides that certain cases, matters, requirements or provision should be excluded from the application of this Part.

(4) A "common framework agreement" is a consensus between a Minister of the Crown and one or more devolved administrations as to how devolved or transferred matters previously governed by EU law are to be regulated after IP completion day." [emphasis added]

23. Section 21 of UKIMA provides so far as material:

"***Indirect discrimination in the regulation of services***
…
(2) A regulatory requirement indirectly discriminates against an incoming service provider if—
…
(d) it cannot reasonably be considered a necessary means of achieving a legitimate aim.
…
(7) In this section "legitimate aim" means one, or a combination of any, of the following aims—
(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.

(8) ***The Secretary of State may by regulations amend subsection (7) so as to add, vary or remove a legitimate aim.***

(9) Regulations under subsection (8) are subject to affirmative resolution procedure.

(10) Before making regulations under subsection (8), the Secretary of State must seek the consent of the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland.

*(11) If consent to the making of the regulations is not given by any of those authorities within the period of one month beginning with the day on which it is sought from that authority**, the Secretary of State may make the regulations without that consent**.*

(12) If regulations are made in reliance on subsection (11), the Secretary of State must publish a statement explaining why the Secretary of State decided to make the regulations without the consent of the authority or authorities concerned." [emphasis added]

24. Section 54(2) inserts UKIMA into paragraph 5(1) of Schedule 7B of GoWA.

25. Section 56 provides so far as material:

"***Regulations: general***

…

*(2) **Any power to make regulations under this Act includes power**—*

*(a) **to amend, repeal or otherwise modify legislation**;*

(b) to make different provision for different purposes;

(c) to make supplementary, incidental, consequential, transitional, transitory or saving provision (including provision made in reliance on paragraph (a))." [emphasis added]

26. Paragraph 2 of schedule 1 of UKIMA provides so far as material:

"*(1) The mutual recognition principle for goods does not apply to (and section 2(3) does not affect the operation of) legislation so far as it satisfies the conditions set out in this paragraph.*

*(2) The first condition is that the aim of the legislation is to prevent or reduce the movement of **unsafe food** or feed into the part of the United Kingdom in which the legislation applies ("the restricting part") from another part of the United Kingdom ("the affected part").*

(3) The second condition is that it is reasonable to believe that the food or feed affected by the legislation is, is likely to be, or is at particular risk of being unsafe in a particular respect.

(4) *The third condition is the potential movement of food or feed that is unsafe in that respect into the restricting part from the affected part poses (or would in the absence of the legislation pose)* ***a serious threat to the health of humans*** *or animals in the restricting part.*

(5) *The fourth condition is that the responsible administration has provided to the other administrations an assessment of the available evidence in relation to—*
- *(a) the threat referred to in sub-paragraph (4), and*
- *(b) the likely effectiveness of the legislation in addressing that threat.*

(6) *The fifth condition is that the legislation can reasonably be justified as necessary in order to address the threat referred to in sub-paragraph (4).*

(7) *In this paragraph "food" and "feed" have the same meaning as in Regulation (EC) No 178/2002 (see Articles 2 and 3);*
"unsafe" —
- *(a) in relation to food, has the same meaning as in Article 14 of Regulation (EC) No 178/2002;*
- *(b) in relation to feed, means "unsafe for its intended use" within the meaning given by Article 15(2) of Regulation (EC) No 178/2002;*

"Regulation (EC) No 178/2002" means Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law (etc), as it forms part of retained EU law on IP completion day." [emphasis added]

Government of Wales Act 2006 (as amended by the Wales Act 2017) ("GoWA")

27. Devolution in Wales is now based on a model of 'reserved powers' rather than (as in the first model of Welsh devolution) on a 'conferred powers' model. In other words, the Senedd can legislate in any field unless and to the extent that the matter in question is expressly reserved to the Westminster Parliament. Reserved matters are listed in schedule 7A of GoWA subject to listed exceptions.

28. As explained in paragraph 10 above, the extent of the Senedd's power in devolved fields is also limited to the extent that any exercise of its power may not modify specific items of parliamentary legislation which are protected from such modification by being listed in schedule 7B of GoWA.

29. Section A1 of GoWA provides:

> "***Permanence of the Senedd and Welsh Government***
> *(1) The Senedd established by Part 1 and the Welsh Government established by Part 2 are a* ***permanent part of the United Kingdom's constitutional arrangements****.*
>
> *(2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Senedd and the Welsh Government.*
>
> *(3) In view of that commitment it is declared that the Senedd and the Welsh Government are not to be abolished except on the basis of a decision of the people of Wales voting in a referendum.*" [emphasis added]

30. Section 107 of GoWA provides so far as material:

> "***Acts of the Senedd***
> *…*
> *(5) This Part does not affect the power of the Parliament of the United Kingdom to make laws for Wales.*
>
> *(6) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Senedd.*"

31. Section 108A of GoWA provides so far as material:

> "***Legislative competence***
> *(1) An Act of the Senedd is not law so far as any provision of the Act is outside the Senedd's legislative competence.*
>
> *(2) A provision is outside that competence so far as any of the following paragraphs apply…*
> *(c) it relates to reserved matters (see Schedule 7A);*
> *(d) it breaches any of the restrictions in Part 1 of Schedule 7B, having regard to any exception in Part 2 of that Schedule from those restrictions…"*

32. Section 109 of GoWA provides so far as material:

"***Legislative competence: supplementary***

(1) Her Majesty may by Order in Council amend Schedule 7A or 7B.

…

(4) No recommendation is to be made to Her Majesty in Council to make an Order in Council under this section unless a draft of the statutory instrument containing the Order in Council has been laid before, ***and approved*** *by a resolution of, each House of Parliament and* ***the Senedd****."* [emphasis added]

33. Section 112 of GoWA provides so far as material:

"***Scrutiny of Bills by Supreme Court (legislative competence)***

(1) The Counsel General or the Attorney General may refer the question whether a Bill, or any provision of a Bill, would be within the Senedd's legislative competence to the Supreme Court for decision." [emphasis added]

34. Part 2 of schedule 7A ("Specific Reservations") section C6 Consumer Protection, provides so far as is material:

"*72 The regulation of;*

(a) the sale and supply of goods and services to consumers

Exceptions
Food, food products and food contact materials.
Agricultural and horticultural produce, animals and animal products, seeds, animal feeding stuffs, fertilisers and pesticides (including anything treated as if it were a pesticide by virtue of an enactment)."

"Food" is defined by reference to Regulation (EC) No. 178/2002 and "Food contact materials" means materials and articles to which Regulation (EC) No. 1935/2004 applies.

35. Schedule 7A of GoWA sets out a list of matters which are reserved to the competence of the Westminster Parliament. In Part 2 of schedule 7A, section C7 Product standards, safety and liability, provides so far as material:

"*77 The subject matter of all technical standards and requirements in relation to products that had effect immediately before IP completion day in pursuance of an obligation under EU law.*

…

79 Product safety and liability.

80 Product labelling.

Exceptions

Food, food products and food contact materials.

Agricultural and horticultural produce, animals and animal products, seeds, animal feeding stuffs, fertilisers and pesticides (including anything treated as if it were a pesticide by virtue of an enactment)."

36. Schedule 7B of GoWA sets out a list of restrictions upon the powers of the Senedd to legislate, even in fields of devolved competence. It does this in two ways. First, by precluding modification of provisions of enactments which concern 'reserved' matters as they apply to Wales, and secondly, by listing a set of enactments which are protected from modification by Senedd legislation.

37. Paragraph 1 of Part 1 of schedule 7B ("General Restrictions") provides:

"*(1) A provision of an Act of the Senedd cannot make modifications of, or confer power by subordinate legislation to make modifications of, the law on reserved matters.*

(2) "The law on reserved matters" means—

(a) any enactment the subject-matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament, and

(b) any rule of law which is not contained in an enactment and the subject-matter of which is a reserved matter, and in this sub-paragraph "Act of Parliament" does not include this Act."

38. Paragraph 5 of Part 1 of schedule 7B provides that a "*provision of an Act of the Senedd cannot make modifications of, or confer power by subordinate legislation to make modifications of, any of the provisions listed in the table below*". UKIMA is now listed in the table.

39. "Modifications" are defined by s158(1) of GoWA to include "*amendments, repeals and revocations*".

Background

40. There is a distinction between a 'conferred powers' model of devolution (whereby a devolved legislature has the powers expressly granted to it by parent enactment) and a 'reserved powers' model (whereby a devolved legislature has power to legislate for all matters in its jurisdiction save for those expressly reserved by the devolution legislation). The Welsh devolution settlement was originally a 'conferred powers' model, but became a 'reserved' model when the Wales Act 2017 came into force.

41. The current reserved powers model of devolution in Wales has its origins in 2011. The coalition government of the United Kingdom committed itself to a review of the operation of GoWA as originally enacted if the people of Wales voted for more primary legislative powers for the (then) Welsh Assembly, which they did in the 2011 Welsh devolution referendum. The Commission on Devolution in Wales, led by Paul Silk, was duly established. Part 2 of the 'Silk Report' on legislative powers, published in March 2014, recommended a change from the original "conferred powers" model to a "reserved powers" model, and this is what was implemented by the Wales Act 2017, which amended GoWA by, inter alia, replacing what was formerly schedule 7 of GoWA 2006 (which set out the scope of conferred powers) with schedules 7A and 7B of GoWA as amended (which set out those matters which are reserved, and/or protected from modification by Senedd legislation) with effect from 1 April 2018.

42. The Wales Act 2017 also inserted ss A1 and 107(6) into GoWA with effect from 31 March 2017.

43. Food standards and environmental protection were devolved matters before the changes brought about by the Wales Act 2017. The now repealed schedule 7 conferred power on the Welsh Assembly to legislate in the following areas, amongst others:

a. Paragraph 6: "*Environmental protection, including pollution, nuisances and hazardous substances…*";
b. Paragraph 8: "*Food and food products. Food safety (including packaging and other materials which come into contact with food). Protection of interests of consumers in relation to food*".

44. Following the European Union (Withdrawal) Act 2018, the UK and devolved governments entered into discussions regarding Common Frameworks in relation to areas where retained EU law overlapped with matters of devolved competence. The aim of those discussions was to agree parameters for divergence between standards imposed by the four nations. The Common Frameworks process is described in the Cabinet Office document *Revised Frameworks Analysis* (April 2019). It states at p2:

> *"In October 2017, the UK, Scottish and Welsh Governments agreed a set of principles to underpin this work.* ***They agreed that common frameworks will be established where they are necessary in order to: enable the functioning of the UK internal market, while acknowledging policy divergence****; ensure compliance with international obligations; ensure the UK can negotiate, enter into and implement new trade agreements and international treaties; enable the management of common resources; administer and provide access to justice in cases with a cross-border element, and safeguard the security of the UK.*
>
> ***It was further agreed that the frameworks established would respect the devolution settlements and democratic accountability of the devolved legislatures. They would maintain current levels of flexibility; increase the decision making powers of the devolved institutions; and would be based on existing conventions and practices, such as those around not normally adjusting devolved competence without their consent****" (emphasis added).*

45. However, the White Paper on the UK Internal Market, published in July 2020, marked a shift in the Defendant's approach to the devolved governments. At §32 it stated:

> "*Under the Government's proposed approach, the devolved administrations would retain the right to legislate in devolved policy areas that they currently enjoy. Legislative innovation would remain a central feature – and strength – of our Union. The Government is committed to ensuring that this power of*

innovation does not lead to any worry about a possible lowering of standards – by both working with the devolved administrations via the Common Frameworks programme and by continuing to uphold our own commitment to the highest possible standards."

46. This White Paper explained the decision to introduce legislation notwithstanding the Common Framework process in the following way:

> "*92. Common Frameworks constitute a valuable mechanism to ensure all parts of the UK agree common approaches where possible. The additional cross-cutting measures set out in this White Paper, will be, however, necessary to complement them. This is for a number of reasons.*
>
> *93. Firstly, Frameworks are not able to assess the wider economic impacts or knock-on effects of regulatory divergence, including how regulatory differences in one sector affects other sectors (the so called 'spill-over effect'). Secondly, Common Frameworks do not address how the overall UK Internal Market will operate once the UK has left the overarching EU system at the end of the Transition Period. Lastly, as Frameworks are limited to a specific number of policy areas, they will not account for the full UK economy across goods and services, and therefore will not be able to provide a comprehensive safety net for businesses and consumers.*
>
> *94. As a result, in order to ensure that a post-EU UK Internal Market delivers continued fair, coherent, frictionless trade across all parts of the UK, these gaps need to be addressed through a more robust legal architecture.*"

47. In respect of international trade deals, the White Paper states:

> "*123. As reflected in the devolution settlements, the UK Government is responsible for international relations of the whole of the UK and alone has the power to enter into international agreements binding on the whole or any part of the UK. The devolved administrations have competence to observe and implement international obligations that relate to devolved matters. The UK Government is responsible, as a matter of international law, for compliance with those obligations.*
>
> *124. To ensure such compliance, however, consideration must be given to the important interactions between a well-functioning Internal Market in the UK and the implementation of future trade deals.*"

48. The United Kingdom Market Bill was introduced to Parliament on 9 September 2020. The Scottish Parliament voted to refuse consent to the Bill on 8 October 2020 and the Senedd voted to refuse legislative consent to the Bill on 8 December 2020. However, UKIMA was passed by both Houses of Parliament, received Royal Assent on 17 December 2020, and came into force on 31 December 2020.

49. During a debate in the House of Commons, the Minister stated on 7 December 2020 (Hansard, volume 685, column 652[1]):

> "*I stress that the proposals in the Bill are designed to ensure that devolution can continue to work for everyone.* ***All devolved policy areas will stay devolved*** *and the proposals ensure only that there are no new barriers to UK internal trade. Indeed, at the end of the transition period hundreds of powers that are currently exercised by the EU will flow back to the UK. Many of these powers will fall within the competence of the devolved Administrations, and this flow therefore represents a substantial transfer of powers to the devolved Administrations that they did not exercise before the EU exit*" (*emphasis added).*

50. On 16 December 2020, the Claimant sent a pre-action protocol letter to the Defendant. The Defendant replied on 8 January 2021. In that letter, the Defendant stated at §13 that "*Senedd Cymru has competence to legislate in all areas which are not reserved… The boundaries of Senedd Cymru's devolved competence set by the reservations in Schedule 7A to GOWA are – save for the amendment made by section 52 of the Act [concerning the regulation of distortive or harmful subsidies] – unamended*."

Issue 1 – Devolved competence cannot be impliedly repealed

51. The 'protection' of UKIMA by its inclusion in schedule 7B of GoWA must be read down to the extent that it would otherwise implicitly re-reserve to the Westminster Parliament matters which have been devolved to the Senedd by GoWA, which is

[1] Available at https://hansard.parliament.uk/Commons/2020-12-07/debates/03F9AA70-3B1F-453B-A834-0498A5DDF1BF/UnitedKingdomInternalMarketBill

constitutional legislation. This reading is required by operation of the principle of legality; and to give effect to Parliament's intention (legislating in the light of the Minister's statement quoted at §49 above) that all devolved policy areas would stay devolved.

52. The Claimant relies upon two practical examples of how this concern arises.

53. First, the language of schedule 7A of GoWA puts it beyond doubt that legislating for food standards in Wales is a devolved matter. This is not expressly changed by UKIMA. However, it is impliedly undercut by the listing of UKIMA in schedule 7B of GoWA, which could be said to preclude any Senedd legislation requiring higher food standards in Wales than that in force in any other nation of the United Kingdom. That is because, on one reading, the ambit of the mutual recognition principle in Part 1 of UKIMA is so comprehensive that any future Senedd legislation or Welsh ministerial action which regulated the sale of food in Wales would be void and of no effect, save in the very limited circumstances set out in paragraph 2 of schedule 1 of the UKIMA. If that *were* the effect of the amendment of schedule 7B of GoWA, it would mean that UKIMA has the implicit effect of rendering the express terms of schedule 7A of GoWA which devolve food standards to the Senedd completely inoperable, notwithstanding that food standards remains an unreserved – ie devolved – policy area on the face of the legislation.

54. Second, the Senedd passed legislation banning certain single use plastics before such legislation was passed in England[2]. The Welsh Government has announced a proposal to implement legislation which mirrors the terms of Article 5 of Directive (EU) 2019/904, the European Union's Single Use Plastic Directive, and so to ban a whole range of single use plastics in 2021. If the ostensible 'protection' of UKIMA in schedule 7B of GoWA is not read down so as to give continuing effect to the devolution of environmental standards, the Senedd will not be able to give effect to this intention, notwithstanding that environmental protection is a devolved policy area. This is

[2] The Environmental Protection (Microbeads) (Wales) Regulations 2018

because s2 of UKIMA (which would be protected) would preclude the application of higher environmental standards for goods sold in in Wales than those applicable elsewhere in the United Kingdom. The protection of the market access principles in UKIMA would ostensibly preclude the Senedd from exercising its devolved power to regulate the sale of products on grounds of environmental protection, notwithstanding the fact that the power to do so remains unaffected by schedule 7A of UKIMA and the UK Government claims not to have cut down the devolution settlement.

55. Unless the Court makes the declaration which the Claimant seeks as to the proper reading of UKIMA in relation to the ambit of the devolution settlement, UKIMA would have the effect of reserving areas of devolved competence (such as regulation of the sale of goods on environmental protection grounds) *sub silentio,* and contrary to the express Ministerial statement to Parliament that the effect of UKIMA would be that "*all devolved policy areas will remain devolved"*. It would prevent the Senedd from legislating in any field where to do so might infringe the mutual recognition principle in Part 1 of UKIMA, which is very wide.

56. The Senedd, a permanent feature of the UK's constitutional arrangements, will have its competence very substantially diminished to the point of extinction in respect of significant fields of devolved policy, without any express admission that the devolution settlement has been seriously cut down.

57. The Court should make the declaration sought to ensure that this incorrect reading of the interaction between UKIMA and GoWA does not have a chilling effect on the operation of devolved powers. If Parliament intended to amend constitutional devolution legislation in such important respects, it should have done so by express language. The principle of legality means that Parliament cannot lawfully achieve by implication through schedule 7B of GoWA what it could have done expressly through amending the ambit of schedule 7A: see *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 at §51. UKIMA itself recognises this and amends schedule 7A of GoWA in respect of harmful subsidies; s52(2) of UKIMA.

58. It is well-established that; (i) GoWA is a constitutional enactment; and (ii) constitutional enactments cannot be impliedly amended or repealed: see *Thoburn v Sunderland City Council* [2002] EHWC 195 (Admin) per Laws LJ at §§ 62 – 63; *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46 per Lord Reid at §153; *H v Lord Advocate* [2013] 1 AC 413 at §30; *R (HS2 Action Alliance) v Secretary of State for Transport* [2014] UKSC 3 at §207; *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 at §66. To the extent that ss 2(3) and 54(2) of UKIMA purport to reduce the Senedd's competence, they are contrary to the principle of legality and inoperable.

59. The Defendant's position is that the Senedd can continue to legislate in all devolved areas; his Ministers said so in the White Paper, in Parliament and in pre-action correspondence. So he should agree to the Court making it clear that the effect of UKIMA is not to re-reserve policy making for food standards or environmental protection measures by a sidewind and that the mutual recognition principle in s2 of UKIMA cannot be read to have that effect, notwithstanding para 5 of schedule 7B of GoWA.

Issue 2 – Devolved competence cannot be cut down by secondary legislation

60. Further, and in any event, the regulation-making provisions of UKIMA must be read down to the extent that they could otherwise be used to diminish the ambit of the powers of the devolved legislatures without express Parliamentary authority.

61. Sections 6(5), 8(7), 10(2), 18(2) and 21(8) of UKIMA, read together with s56(2)(a), purport to give the Defendant wide and unconstrained powers to amend the scope of the principles of mutual recognition and non-discrimination in substantive ways, with limited Parliamentary scrutiny.

62. As described above, s54(2) of UKIMA states on its face that UKIMA is a protected enactment for the purposes of GoWA. If that were read in a wide and literal way, it would mean that the Minister could alter the scope of devolved competence by secondary legislation. If that were the right reading, *any* amendments to the ambit of UKIMA made by the Minister using his regulation-making powers would thereafter prevent the Senedd from being competent to act in any way which might modify the operation of UKIMA as so modified. In other words, future regulations made under UKIMA could have far-reaching – but obviously uncertain - consequential effects on the scope of the Senedd's legislative competence because any changes to the ambit of UKIMA would be protected from modification.

63. Still further, s56(2)(a) of UKIMA would, on its face, give the executive an unfettered power to amend any other legislation whatsoever, which would include GoWA.

64. The Court is asked to declare that the scope of the regulation-making powers in UKIMA cannot be so broad so as to grant the *executive* wide and unrestricted powers to amend the ambit of the constitutional settlement subject to inadequate Parliamentary scrutiny. That would be contrary to the rule of law.

65. The long-established principles of legality and certainty require clear and express legislative language to be used to have the effect of amending constitutional principles (*a fortiori* constitutional legislation): *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 per Lord Hoffman at p131. Secondary legislation must be read with respect for the concept of the separation of powers and Parliamentary supremacy over the executive: see *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39 at §§ 23 – 28.

66. Section 107(5) of GoWA reserves the power of *Parliament* to make laws for Wales. It does not reserve the power of the *executive* to make laws for Wales, or to decide the scope of devolved competence, and it cannot be interpreted as including a power for Parliament to delegate its power of constitutional amendment to a Minister.

67. Accordingly, the principles of legality and certainty in combination with fundamental constitutional values require the Henry VIII clauses in UKIMA to be given a narrow construction so that they may only be used to effect incidental and consequential amendments; and for it to be accepted that they cannot be used to make any substantive amendment to UKIMA or GoWA.

68. Other recent Henry VIII powers recognise these principles and are constrained in their scope so that they may not amend constitutional legislation, including GoWA and the Human Rights Act 1998: see s8(7) of the European Union (Withdrawal) Act 2018 and s31(4) the European Union (Future Relationship) Act 2020. The powers in UKIMA should be limited by the Court in the same way.

The declarations sought are neither academic nor premature

69. The Defendant seeks to argue in his response to the pre-action letter that the declarations sought are in some way abstract and/or hypothetical, and should await some future attempt by the Senedd to legislate. This assertion is misconceived. The application for the declarations sought is neither academic nor premature.

70. The Defendant, properly, does not suggest that the Court has no jurisdiction to make the declarations sought. It is well established that the Court has a discretion to make an advisory declaration where there is good reason in the public interest and/or a real practical purpose would be achieved: see *R (Williams) v Secretary of State for the Home Department* [2015] EWHC 1268 (Admin) per Hickinbottom J at §55; *R (Yalland) v Secretary of State for Exiting the European Union* [2017] EWHC 630 (Admin) per Lloyd-Jones LJ at §24. That is also true in a case concerning the interpretation of primary legislation: see *Jackson v HM Attorney General* [2005] UKHL 56 per Lord Bingham at §§ 2 and 27 (where a declaration of invalidity was sought in relation to Hunting Act 2004 upon it receiving Royal Assent).

71. The declarations sought affect the operation of democratic devolved government in Wales (and indeed in the other nations of the United Kingdom) and the nature of the

Senedd's powers in ways which may affect the scope of the statements which political parties can properly make as to the scope of their legislative ambitions in the forthcoming Senedd elections in May 2021.

72. It is plainly in the public interest for the Court to provide clarity to the Welsh Government (and, by extension, all of the devolved governments) now as to what they are permitted to achieve through their legislative programmes. It would cause legislative and constitutional uncertainty if a dispute had to be resolved by the Supreme Court every time the Welsh Government sought to introduce legislation in relation to devolved matters which potentially affected the operation of the internal market. Moreover, the proper legal interpretation of the ambit of the devolution settlement is a matter of constitutional importance.

73. Further, the suggestion made in the response to the pre-action letter that the interaction of schedule 7A and paragraph 5 of schedule 7B of GoWA should await a reference under s112 of GoWA is misconceived. An application for judicial review must be brought promptly and in any event within three months of grounds first arising (i.e. UKIMA receiving Royal Assent on 17 December 2020). So, this is the only point at which the Court can give a declaration in relation to issue 1 (implied repeal).

74. This ground would simply not arise on a reference of a Welsh bill to the Supreme Court under s112 of GoWA. On such a reference, the sole question for the Supreme Court is whether the bill is within the legislative competence of the Senedd by reference to the statutory scheme of GoWA itself. The Claimant would not be permitted to rely on common law grounds of challenge concerning the proper constitutional interpretation of the separate legislation (UKIMA): see *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 at §§ 26 and 35. Thus, the Claimant would not be permitted on such a reference to seek the declaration sought in these proceedings that the purported protection of UKIMA in paragraph 5 of schedule 7B should be read down in accordance with the principle of legality. That is a point of administrative law which must be determined on an application for judicial review.

75. Finally, the declaration sought in relation to issue 2 is a point of principle which does not turn on a specific set of facts. The specific context in which the executive may in future seek to exercise its regulation-making powers under UKIMA is immaterial to this point of principle as to their proper constitutional scope.

Venue

76. The Court is requested to hear this application in Cardiff; CPR PD54D §5.2(10). The Claimant is the Counsel General for Wales, based in Cardiff, and the applications raises devolution issues of importance to the people of Wales. Given the constitutional importance of this matter, it ought to be heard by a Divisional Court.

Timing & Directions

77. As noted, the outcome of this application is material to the scope of devolved policy areas and therefore the matters upon which all political parties can properly campaign in the forthcoming elections to the Senedd in May 2021. This application is therefore one which ought to be expedited.

78. The Claimant therefore respectfully invites the Court to amend the usual directions as to timetable, with view to enabling the substantive hearing to take place before the end of the Hilary term:

    a. Acknowledgement of service to be lodged and served within 21 days (9 February 2021);
    b. Permission decision on papers within 7 days (16 February 2021);
    c. Detailed grounds of defence and any evidence within 21 days (9 March 2021);
    d. Any reply and application to rely on evidence in reply within 7 days (16 March 2021);
    e. Claimant's skeleton argument also by 16 March 2021;
    f. Agreed bundle by 19 March 2021;

g. Defendant's skeleton argument by 23 March 2021;
h. A further copy of the Claimant's skeleton argument, amended to include bundle references, also by 23 March 2021;
i. Agreed bundle of authorities two days prior to the date of the hearing;
j. Hearing for two days between 26 and 31 March 2021.

Conclusion

79. The declarations sought are plainly properly arguable ones and the application raises issues of considerable constitutional and democratic significance, in relation to which declarations would be of real practical importance. It is not premature because it affects the day-to-day operation of the Welsh Government and the ambit of the Senedd's power to legislate for Wales.

80. The Claimant respectfully invites the Court:

a. to grant permission;
b. to expedite the hearing of the application in accordance with the timetable suggested at §78 above; and
c. (at the substantive hearing) to make the declarations sought at §3 of these grounds.

Helen Mountfield QC
Christian J Howells
Mark Greaves
18 January 2021