

# MANAGING REGULATORY DIVERGENCE BETWEEN WALES AND THE REST OF THE UK POST-BREXIT

Report for Senedd Cymru/Welsh Parliament, Professor Jo Hunt, Cardiff University School of Law and Politics, Wales Governance Centre

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## Introduction:

This report considers the legal and policy constraints on the exercise of competence by Senedd Cymru and the Welsh Government post-Brexit, in the fields formerly covered by EU law. The scope of devolved powers has been impacted by the process of withdrawal from the EU. Brexit has marked the end to the primacy of EU law in the UK order,<sup>1</sup> and an end to its role as a check on what Senedd Cymru and Welsh Ministers can lawfully do.<sup>2</sup> With certain exceptions,<sup>3</sup> the body of EU law operating at a domestic level during the period of EU membership is carried forward and redesignated EU retained law, and a distinctive status afforded to this law.<sup>4</sup> For a time-limited period, any ‘deficiencies’ in retained EU law can be amended using delegated powers under the **EU (Withdrawal) Act 2018**.<sup>5</sup> More substantive policy changes<sup>6</sup> can be introduced through either primary or secondary legislative powers, though for some forms of direct retained EU law, there are restrictions on the secondary legislative powers that can be used. The starting point is nevertheless now one of the Welsh Ministers and Senedd Cymru having competence to determine policy in those devolved areas previously covered by EU law. That competence is however limited both de facto and de jure through a range of constraints. The sources and extent of these constraints are considered below. In turn, they include those written into the **Government of Wales Act**, marking a re-settlement of

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<sup>1</sup> Except for the continued supremacy of EU retained law over pre, but not post-exit domestic law, see s. 5(2) EU (Withdrawal) Act 2018. New, post-Implementation Completion Day domestic legislative enactments may therefore overturn existing retained EU law provisions.

<sup>2</sup> Previously, GOWA 2006 s. 108 made EU law a constraint on Senedd competence, and s. 80 a constraint on Ministers’ powers.

<sup>3</sup> Exclusions include the EU Charter of Fundamental Rights.

<sup>4</sup> In addition to its (limited) supremacy, retained EU law is distinctive in that there are limitations on the powers of courts (below the Court of Appeal) to diverge from case law authorities (both UK and Court of Justice of the EU) dating from the UK’s membership. Additionally, retained EU law which derives from directly applicable regulations, and were recognised in UK law on that basis rather than having been transposed into UK primary or secondary law, is referred to as ‘direct’ retained EU law, and is neither primary nor secondary legislation. This law then has a unique status in UK law (see section 7 EU (Withdrawal) Act 2018).

<sup>5</sup> Section 8, EU (Withdrawal) Act, 2018. These correcting powers run for two years from the end of the Implementation Period, until 31 December 2022, and are extended to the devolved governments under Schedule 2 of the Act.

<sup>6</sup> As has been reported by inter alia Public Law Project’s SIFT Project, the ‘deficiency correcting’ powers under s. 8 EU (Withdrawal) Act have been used to effect substantive policy change (see A. Sinclair and J. Tomlinson ‘Plus ca change? Brexit and the Flaws of the Delegated Legislation System’ <https://publiclawproject.org.uk/content/uploads/2020/10/201013-Plus-ca-change-Brexit-SIs.pdf>), though this is arguably goes beyond the scope of the correcting powers.

devolved powers (flowing from both the **EU (Withdrawal) Act 2018** and the **UK Internal Market Act 2020**); international law commitments entered into by the UK; and political commitments made to cooperate through the Common Frameworks process. Post-Brexit primary and secondary legislation in a range of policy fields has also bitten into powers of Welsh Ministers, impacting on their capacity to make decisions for Wales. Perhaps as a result of the urgency with which some of this legislation has been passed, there are inconsistencies and incompatibilities between these post-Brexit legal provisions, resulting in a profoundly complex governance terrain.

### **Retained EU law and Regulatory Alignment:**

HM Government has undertaken a range of activities to scope out how best to use its regulatory autonomy having left the European Union. These include the work of the Sir Iain Duncan-Smith chaired Taskforce on Innovation, Growth and Regulatory Reform (TIGRR), reporting in June 2021, and the establishment of the Brexit Opportunities Unit, under the direction of Jacob Rees-Mogg. Areas identified by TIGRR where the UK may develop different policies from those of the EU include financial services, data protection, AI, and transport technologies (including autonomous vehicles). More generally, in September 2021, HM Government announced a review into both the substance and the status of retained EU law, and the intention 'eventually to amend, replace, or repeal all the retained EU law that is not right for the UK'.<sup>7</sup> Subsequently, the **Brexit Freedoms Bill** has been announced as a vehicle to make it easier to 'amend or remove 'outdated' EU retained law'. HM Government presents this as part of a drive it says will 'cut £1 billion of red tape for UK businesses'. The Bill advocates a 'proportionate, rather than precautionary' approach to regulation – marking a potential break with the approach to regulation adopted by the EU. This raises the prospect of regulatory divergence developing between UK and EU. The extent of any legal constraints on such divergence is considered below (ii), however, it is recognised that whatever policy objectives lie behind adopting different policies from the EU, any resulting divergence can, as the OECD recognises, result in costs to businesses, which may hinder trade. These include information costs (involved in scoping the relevant regulatory regimes), specification costs (the costs of complying with different product regulations) and conformity assessment costs (ensuring that necessary proof of compliance with standards is obtained).<sup>8</sup>

In areas falling within devolved competence, the choice for Welsh Government includes moving in alignment with any new Westminster rules, maintaining alignment with the retained EU rules, aligning with any newly adopted EU rules, or indeed, setting a different standard for Wales. Emerging active regulatory divergence between the UK and EU<sup>9</sup> has to date been seen in the fields of agriculture and the

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<sup>7</sup> Lord Frost, Statement to the House of Lords, 16 September 2021.

<sup>8</sup> OECD, *International Regulatory Co-operation and Trade: Understanding the Trade Costs of Regulatory Divergence and the Remedies*, 2017, pp. 16-17.

<sup>9</sup> The think-tank UK in a Changing Europe are operating a regulatory divergence tracker, which categorises UK/devolved action as 'active divergence' where new laws replace/amend EU retained law; 'passive divergence' where the EU legislates but the UK/devolved law does not follow suit, and

environment, including on agricultural subsidies (where there will be internal variation in schemes across the UK),<sup>10</sup> and genome editing of food crops, where England is set to remove such genome editing that could occur naturally or through conventional breeding from the scope of GMO regulation.<sup>11</sup> This has already been done for field trials of such crops.<sup>12</sup> Whilst there is an expectation for UK divergence which is deregulatory in comparison with EU standards, this is not reflected in all regulatory activity – see the more stringent rules banning the export of livestock for slaughter under Westminster legislation, the **Animal Welfare (Kept Animals) Bill**. In 2021, Welsh Government sought and obtained legislative consent for the UK Bill to operate for Wales, welcoming it as a timely opportunity to progress the law, and for ensuring ‘absolute clarity for enforcement agencies, the Courts and the public’.<sup>13</sup>

As well as determining whether to follow new UK legislation which diverges from retained EU law, the devolved legislatures need also be aware that retained law may itself no longer reflect the current EU law position on an issue, as existing EU law is revised or replaced by the EU legislative bodies. Within areas of devolved competence, the issue of whether or not to align with this new EU rule can then arise. Northern Ireland is required to align with EU law on a range of market and related matters under the NI Protocol<sup>14</sup> with over 300 EU acts identified as applying to NI at the point at which the Protocol entered into force. Unlike retained EU law, this list of EU measures is not static, and modifications, as well as new EU law in affected areas will apply for Northern Ireland. For example, the applicable regulations on organic products applicable to Northern Irish producers is the revised Regulation 2018/848, whilst the rest of the UK continues to operate the retained EU law provisions which reflected the earlier regulatory regime<sup>15</sup>. Under the Protocol, planned new (rather than amending) legislation within scope should be notified to the UK through the relevant Joint Consultative Working Group, and the adopted legislation shared with the Withdrawal Agreement Joint Committee, which will add it to the list of measures applying to Northern Ireland. Not accepting such new laws can ultimately result in the EU taking remedial measures. Scrutiny of EU measures within the scope of the Protocol is undertaken by the Commons European Scrutiny Committee, and the Protocol Sub-Committee of the House of Lords European Affairs Committee, along with the relevant committees of the Northern Ireland Assembly. The Protocol sub-committee has called for greater detail in the explanatory

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‘procedural divergence’ in the case of new systems required to replace those previously managed through EU agencies and institutions.

<sup>10</sup> There are distinctive policy approaches emerging, with at one end the public money for public goods model (for England- see Agriculture Act 2020,) and at the other, a model which incorporates payments on the basis of area of land farmed, designed more as income support (see Scotland) <https://www.instituteforgovernment.org.uk/explainers/agriculture-subsidies-after-brexite>

<sup>11</sup> DEFRA (2021), Genetic technologies regulation: Government response.

<sup>12</sup> The GMO (Deliberate Release) (Amendment) (England) Regulations 2022, laid 20 January 2022.

<sup>13</sup> LCM, Animal Welfare (Kept Animals) Bill, June 2021, para 137. A Supplementary LCM was laid in January 2022 (and subsequently revised and resubmitted) to reflect amendments made to the Bill by the house of Commons in November 2021.

<sup>14</sup> Including customs, technical regulations, vat and excise, state aid, single market in electricity, NI Protocol, Articles 5-10.

<sup>15</sup> Council Regulation 834/2007 and Commission Implementing Regulation 889/2009, retained under the EU (Withdrawal) Act provisions, and subsequently subject to amendments, most recently for Wales by the Organic Production and Control (Amendment) (EU Exit) Regulations (last amended October 2020).

memoranda (EM) that accompany proposals for amending/replacement EU laws, which are deposited by the UK Government; as well as the automatic lodging of EM relating to new EU regulations. In particular, they have asked for the routine inclusion of information about the response of the different governments of the UK to the proposal, as well as whether the measure will result in regulatory divergence, and if so, what steps the UK Government is taking to address any divergence.<sup>16</sup>

The Scotland Government has an official policy of dynamic alignment with EU law.<sup>17</sup> The **UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021** section 1(1) confers a power on Scottish Ministers to make regulations to align Scots law with EU law. ‘Keeping pace’ is seen as a means of advancing standards across key policy areas,<sup>18</sup> as well as a mechanism to facilitate a future independent Scotland rejoining the EU. The policy of alignment is dependent on an assessment of what is appropriate – both in terms of substance (whether to align) and how (which instruments to use). On the former, the impact of any constraints on Scotland’s law-making powers will be a factor in the assessment. On the latter, the Act’s powers are presented as a fall-back, with the preference being for primary legislative powers to be used, or as an alternative, existing secondary powers covering the relevant subject area.<sup>19</sup> Despite the policy commitment to align, and new EU measures within devolved competence, no use has yet been made of the keeping pace powers for Scotland. The scrutiny challenges faced by the Scottish Parliament’s Constitution, Europe, External Affairs and Culture Committee are reflected in a letter from the Committee’s convenor to the Cabinet Secretary, which included inter alia clarification on the extent to which the Scottish Ministers could provide committees with information about developments in EU law.<sup>20</sup>

Wales’ own continuity legislation, **the Law Derived from the European Union (Wales) Act 2018**, was repealed as part of the 2018 Intergovernmental Agreement. This IGA broke the impasse over the then Withdrawal Bill, which had initially proposed to restrict the devolved governments and parliaments from exercising any law-making powers over EU retained law until a subsequent UK Ministerial decision to release restrictions on competence. The absence of Scottish-type continuity legislation is not an impediment to alignment, as Senedd Cymru holds primary law-making powers, and the Ministers a range of secondary powers in specific policy sectors, in line with devolved competence. The First Minister, in a letter to EU President Von der Leyen following the coming into force of the Trade and Cooperation Agreement in January 2021 recognised that Welsh Government and the EU have ‘shared policy goals’ on many issues ‘such as sustainability, the environment and biodiversity, climate, innovation and regional development, equality, and social affairs, amongst others.... In particular, we share the EU’s ambition for the progressive development of social and environmental standards,

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<sup>16</sup> House of Lords European Affairs Committee, Sub-Committee on the Protocol on Ireland/Northern Ireland, Scrutiny of EU Legislative Proposals within the scope of the Protocol on Ireland/Northern Ireland, HL Paper 177, 22 March 2022.

<sup>17</sup> Scottish Government, 2021 Programme for Government.

<sup>18</sup> UK Withdrawal from the EU (Continuity) (Scotland) Act 2021, Section 2.

<sup>19</sup> Draft Statement of Policy by the Scottish Ministers in Exercise of the Power in Section 1 of the UK Withdrawal from the EU (Continuity) (Scotland) Act 2021, 29 October 2021.

<sup>20</sup> Letter from the Convener to the Cabinet Secretary for Constitution, External Affairs and Culture, 22 September 2021.

and look forward to developing policies in these areas that will align with those of the EU'.<sup>21</sup> It is not though official Welsh government policy to align. The reasons given by the then Counsel General and Minister for Brexit against Wales having replacement Continuity legislation included that it was not necessary for Ministers to take such powers, nor would it be supported by the Welsh Parliament, and also that space should be given to the Common Frameworks programme, which should provide opportunity for managed divergence.<sup>22</sup>

There are thus multiple permutations of regulatory alignment and divergence for Wales with retained and new EU law, and with the other legislatures of the UK. As the Office for the Internal Market acknowledges in its initial report, there are 'democratic, policy and practical reasons for governments to adopt different regulatory regimes'.<sup>23</sup> The adoption of common regulatory regimes may nonetheless be preferable for reasons of greater effectiveness in achieving broader policy objectives, or for minimising the disruptions to trade within and beyond the UK. The determination of Wales' regulatory choices will be influenced *inter alia* by its policy objectives, and the degree to which different legal constraints might inhibit the achievement of those objectives. These constraints are now addressed in turn.

### **Constraints arising from Amendments to the Government of Wales Act 2006 - Constitutional Re-settlement of Devolved Powers:**

Senedd Cymru's powers to legislate are governed by the provisions of the **Government of Wales Act 2006** and its Schedules 7A and 7B, whilst Welsh Government Ministers' powers are broadly (though not exactly) coterminous with devolved legislative competence.<sup>24</sup> Acts of Parliament relating to the UK's withdrawal have made changes to each of these elements – the scope of legislative and Ministerial competence has been redefined, a new field of reservations has been added to Schedule 7A, and new protected enactments (UK Acts of Parliament which may not be modified by Senedd Cymru) included in Schedule 7B.

The **EU (Withdrawal) Act 2018** has introduced the concept of retained EU law into domestic law, replacing the previous constraint over legislative competence which operated to render any legislative act adopted contrary to EU law 'not law'. Only such EU retained law which would have been subject to 'freezing' regulations adopted by UK Ministers under powers in section 12 **EU (Withdrawal) Act** would limit the competence of the Senedd (sections 108A and 109A **Government of Wales Act 2006**) and Welsh Ministers (s80(8)). These powers were never used, and

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<sup>21</sup> Letter from First Minister Mark Drakeford to EU Commission President Ursula von der Leyen, 20 January 2021.

<sup>22</sup> Statement by the Counsel General and Brexit Minister: Legislation related to leaving the EU, Plenary, 25 February 2020.

<sup>23</sup> Office for the Internal Market, Overview of the Internal Market, 22 March 2022, OIM 6, at para 11.

<sup>24</sup> Unlike Scotland, (Scotland Act, s. 53) there is no general transfer of functions within the scope of devolved competence to Welsh Ministers. This is achieved in a more piecemeal way for Wales, through transfer of functions orders, Acts of Parliament, Senedd Acts, etc.

in January 2022, the UK Government laid a statutory instrument to repeal section 12 powers.<sup>25</sup>

The powers had been created to place retained EU law in a holding pattern whilst agreement was reached on the areas that would require common frameworks. The **EU (Withdrawal) Act** is now listed as a protected enactment under Schedule 7B. Also now listed as a protected enactment is the **UK Internal Market Act 2020**. The Act impacts on competence in both direct and indirect ways. Directly, it categorises the area of subsidy control as a reserved competence into the devolution statutes<sup>26</sup>. There had been dispute between the governments as to whether or not this field was previously devolved. New powers are also taken for UK Government Ministers to provide financial assistance for economic development, infrastructure and cultural activities, across the UK as a whole, or any part of it.<sup>27</sup>

Indirectly, it impacts on competence through its measures designed to reduce the significance of any policy divergence across the UK for internal trade in goods and services (and by extension, for international trade). In so doing, it has the potential to reduce the effectiveness of local regulatory choices in meeting specific policy objectives, particularly in light of the intra-UK trade flows, with England as a net exporter to other parts of the UK, which are all net importers.<sup>28</sup> Whilst existing regulatory divergence (at the point at which UKIMA 2020 came into force) is respected, 'substantive change' will engage the Act, and the operation of its market access principles.<sup>29</sup> These principles are two-fold. First, the mutual recognition principle is designed to ensure that products which comply with the regulatory standards dealing with the physical characteristics, composition, presentation or mode of production in effect in their originating part of the UK<sup>30</sup> will have access to the market in any other part of the UK, regardless of the different regulatory standards which might apply. Legislation adopted for Wales by Senedd Cymru or Welsh Ministers will be disapplied for products coming from other parts of the UK if different standards apply there. The possible exceptions from this rule are very limited, covering local regulatory responses to serious threats to human, plant or animal health posed by pest, disease, or unsafe food or feed, or certain rules relating to fertilisers and pesticides. The mutual recognition rule also applies to certain rules affecting the provision of services, specifically authorisation requirements, where the permission of a regulator must be granted to the service provider.<sup>31</sup> Exclusions from these provisions are more widely drawn, and currently include audiovisual services,

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<sup>25</sup> The EU (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation, etc) Regulations, UK SI 2022 No 357.

<sup>26</sup> Section 52 UKIMA 2020, with consequent amendments to the Schedules to GOWA 2006, the Northern Ireland Act 1998 and Scotland Act 1998.

<sup>27</sup> UKIMA 2020 s. 50. These now exist alongside the powers of Welsh Ministers in GOWA 2006, though the funding initiatives replacing EU schemes including the Shared Prosperity Fund and the Levelling Up Fund are bypassing the devolved governments, and have implications for the achievement of the Welsh Government's strategic objectives reflected in its Framework for Regional Investment in Wales.

<sup>28</sup> Office of the Internal Market, Overview of the UK Internal Market, March 2022, para 3.15.

<sup>29</sup> Sections 4(4), 9(2), 17(5) UKIMA 2020.

<sup>30</sup> This will be where something is made or where it is imported into (s. 2(1)).

<sup>31</sup> Section 19, which applies to rules except for legitimate responses to a public health emergency.

healthcare services, social services and transport services.<sup>32</sup> The mutual recognition principle also applies to professional qualifications obtained in the UK, with the exception of the legal profession and school teaching.<sup>33</sup>

The second market access principle is non-discrimination. For goods, this will engage regulations governing the manner of sale (including where and when goods are sold, their price, and other terms of sale),<sup>34</sup> and these will be disapplied if they place the incoming goods at a disadvantage compared to local goods. For services, the non-discrimination rule applies to regulatory requirements that would preclude the provision of services if they were not complied with (other than authorisation by a regulator). The Act applies to both directly discriminatory regulations, and indirectly discriminatory measures - where the regulation draws no explicit distinction between products on the basis of where they are produced or where the service provider is located, but where there is an adverse impact on trade nonetheless. In these cases, the local regulation can continue to apply to incoming goods or services where that regulation pursues a legitimate aim, stated to cover the protection of the life and health of humans, animals and plants, and the protection of public safety and security (and additionally, for services, the efficient administration of justice).<sup>35</sup> The range of service sectors excluded from the non-discrimination principle is wider than that operating for authorisation requirements subject to the mutual recognition principle.<sup>36</sup>

Both market access principles may be excluded where common frameworks have been agreed<sup>37</sup> – though that exclusion does not operate automatically.<sup>38</sup> The potential hollowing-out effect of the **UKIMA 2020** market access provisions on the effectiveness of local regulation has been frequently highlighted, **UKIMA 2020** being less accommodating of local regulatory variation than the previous EU system of rules it replaces.<sup>39</sup> Legal challenge to the Act has been brought by Welsh Government on the grounds that it effectively cuts down devolved competence by implication, rather than expressly, (and prospectively, by secondary legislation), which is arguably beyond the constitutional limits of what might be done in relation to a piece of ‘constitutional’ legislation, such as the **Government of Wales Act 2006**. In January 2022, the Court of Appeal confirmed the decision of the High Court to refuse the Welsh Government permission to bring judicial review on the grounds of prematurity, requiring a specific Senedd Bill to be at issue for judicial review to be brought. An appeal to the Supreme Court has been lodged. Unless and until the

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<sup>32</sup> Schedule 2 Part 1 UKIMA 2020.

<sup>33</sup> Sections 24, 27 UKIMA 2020.

<sup>34</sup> Section 6-8 UKIMA 2020.

<sup>35</sup> Section 8(6) (goods) and s. 21(7) (services) UKIMA 2020.

<sup>36</sup> Schedule 2 Part 2 UKIMA 2020.

<sup>37</sup> By the Secretary of State, using powers in Schedule 1 UKIMA 2020, (as per s. 10 (3) UKIMA 2020) for goods and Schedule 2 (as per s. 18(4) UKIMA 2020) for services.

<sup>38</sup> Cabinet Office, Process for considering UK Internal Market Act exclusions in Common Framework areas, 10 December 2021.

<sup>39</sup> K.A. Armstrong, ‘The Governance of Economic Unionism after the United Kingdom Internal Market Act’, forthcoming *Modern Law Review*, early view 1 November 2021; S. Weatherill, ‘Comparative Internal Market Law: The UK and the EU’ *Yearbook of European Law*, Volume 40, 2021, Pages 431–474; M. Dougan, J. Hunt, N. McEwen, A. McHarg, ‘Sleeping with an Elephant: Devolution and the United Kingdom Internal Market Act 2020’, forthcoming *Law Quarterly Review*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4018581](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4018581)

Supreme Court finds in favour of the Welsh Government, law-makers in Wales will need to consider the scope of any possible exception to the application of the **UKIMA 2020**, or pursue, through the process for agreement for an exception for divergence otherwise agreed under the Common Frameworks process.<sup>40</sup>

### **International Legal Commitments binding Welsh law makers:**

As stated in **Government of Wales Act 2006**, Schedule 7A, 'international relations, regulation of international trade and international development assistance and co-operation are reserved matters'. The negotiation and agreement of new international agreements is thus a matter for the UK Government, with the Westminster Parliament having a role – albeit a limited one - in ratifying those agreements.<sup>41</sup> Formal acknowledgement of the role for the involvement of devolved governments and parliaments is even more limited, despite them being required to comply with international obligations, and having the power to introduce implementing legislation within devolved competence. As the House of Commons research briefing observes, '...devolved countries' interests may be different from or even opposed to those of the UK Government, and their legislatures are responsible for passing any implementing legislation needed in their areas of competence. Despite this, there is no legal requirement for the UK Government to consult the devolved administrations or legislatures on treaties'.<sup>42</sup> The degree of engagement depends on the accommodation the UK Government is prepared to make<sup>43</sup>, and a variegated picture has developed, with more constructive relations being reported with the Department for International Trade on Rest of the World negotiations, as opposed to the work of the Cabinet Office in negotiating the new EU/UK relationship.<sup>44</sup> In any event, the commitments entered into by the UK may bind the devolved governments and legislatures to particular courses of action, or close down particular regulatory choices.

The UK, as a member of the World Trade Organisation (WTO) is bound by commitments in agreements reached under its auspices, including those on sanitary and phytosanitary (SPS) measures, technical barriers to trade, and on subsidies. The SPS agreement concerns the application of food safety and animal and plant health regulations. Countries are permitted to set their own standards, but these should be based on science, and applied only to the extent necessary to protect human, animal or plant life or health. The TBT agreement meanwhile covers other

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<sup>40</sup> See further the discussion below on Common Frameworks.

<sup>41</sup> Constitutional Reform and Governance Act 2010. There have been ministerial commitments for greater Parliamentary involvement in post-Brexit trade agreements, but these fall short of the powers exercised by the European Parliament when the UK's international trade deals were negotiated through the EU governance system, see House of Commons Research Service, 'How Parliament Treats Treaties', Briefing Paper Number 9247, 1 June 2021, <https://researchbriefings.files.parliament.uk/documents/CBP-9247/CBP-9247.pdf>.

<sup>42</sup> *Ibid*, para. 6.

<sup>43</sup> The 2012 Devolution Memorandum of Understanding and supplementary agreement includes a concordat on International Relations, which foresees the devolved administrations being involved through eg information exchange, consultation, and their ministers and officials being part of negotiating teams. The MoU is expected to be updated in light of recent developments in IGR.

<sup>44</sup> Inter-institutional relations agreement between the National Assembly for Wales and the Welsh Government: annual report 2019 to 2020, 2 February 2021.

technical regulations which may impact on trade. These should not discriminate, nor create unnecessary obstacles to trade. SPS and TBT Agreements do not themselves set product or production process regulatory standards – but principles about how these should operate. Where there are relevant international standards, these should form the basis for their SPS/technical regulations.<sup>45</sup> Where regulatory action is proposed consideration should be given to whether such measures are in compliance with these WTO provisions. These are not new obligations, though EU membership layered additional regulatory requirements over this regime (along with particularly effective mechanisms of enforcement). As mentioned above, the UK Government's review of retained EU law has raised the prospect of a shift domestically away from a precautionary approach to regulation (at least outside the field of environmental protection), which reflects the EU approach, to one which is more 'science' based. The long-running EU-US trade dispute over the EU's ban on hormone-treated beef involved at various stages an assessment that the ban went beyond what was scientifically justifiable, and in breach of the SPS Agreement. Moves away from a precautionary approach *may* however generate issues between the EU and the UK under the terms of the Trade and Cooperation Agreement (TCA).

The TCA contains non-regression duties, under which the labour and social standards, environmental and climate change standards, and subsidies control should not be weakened by either side from their position at the end of the transition period, on 31 December 2020. This is to give effect to the commitment to open and fair competition between the parties. Whilst this does not demand regulatory alignment, a divergence from EU standards may trigger rebalancing measures (eg tariffs) and the TCA's dispute resolution procedure, should it have a material impact on trade or investment. The TCA also obligates parties to continued respect for standards in various international legal instruments – which include environmental measures which commit to a precautionary and preventative approach.<sup>46</sup>

Following the end of transition period, the UK has begun to independently adopt new international trade agreements. As noted by the Trade and Agriculture Commission (TAC), the independent advisory board established to inform the UK government's trade policies, 'the UK does not require imported products to meet UK environmental or animal welfare standards'.<sup>47</sup> The TAC proposes an approach to new trade agreements which marries liberalisation with the safeguarding of standards. Concerns have been expressed from some quarters that new FTAs might put pressure on the UK's continued regulatory standards,<sup>48</sup> The opportunities for Wales to diverge, and require higher local standards to be met by imports would be limited through the operation of the mutual recognition principle in **UKIMA 2020**, or the powers of the Secretary of State to ensure compliance with international obligations.<sup>49</sup>

### **Common Frameworks:**

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<sup>45</sup> Eg, World Organisation for Animal Health (OIE) standards.

<sup>46</sup> Article 393 Trade and Cooperation Agreement.

<sup>47</sup> Trade Advisory Committee, Final Report, March 2021, at para 6.2.

<sup>48</sup> As explained by Institute for Government, rather than new (lower) regulatory standards being fixed in FTAs, these are more likely to be seen in side-deals which will result in apparently autonomous changes in domestic regulation, IFG, Trade and Regulation after Brexit, March 2020.

<sup>49</sup> Section 82 Government of Wales Act 2006.

Marking a more collaborative approach to the management of internal policy divergence than seen in the top-down **UKIMA 2020**, Common Frameworks are agreed ways of intergovernmental working in areas of devolved competence which were previously covered by EU law. The principles underpinning this approach were first set out in the 2017 Joint Ministerial Committee (EU Negotiations) communique, the first of these being that frameworks will be established ‘where they are necessary in order to: enable the functioning of the UK internal market, while acknowledging policy divergence’. Respect for devolved competence is built into the frameworks, which should, ‘maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules’.<sup>50</sup> Whilst the intention was to have established the frameworks ahead of the end of the transition period, work on the frameworks has overrun.

The original catalogue of policy issues which would require a framework has been successively refined,<sup>51</sup> so that there are now expected to be twenty six common frameworks applying to Wales. The terminology has also been revised, with the previously termed ‘legislative frameworks’ now described as being ‘with associated primary legislation’. These are the Emissions Trading Scheme; Agricultural Support; and Fisheries Management and Support frameworks. The relevant primary legislation is accompanied by a framework agreement, setting out how governance will operate, and how disputes will be resolved. The remaining frameworks are described as operating with ‘no associated primary legislation’, underpinned by secondary legislation – usually EU retained law, which through ‘consistent fixes’... creates ‘a unified body of law’.<sup>52</sup> Examples include the frameworks on Food Compositional Standards and Labelling, and on Animal Health and Welfare. This categorisation between those with and without associated primary legislation is not clear cut, as there are other frameworks incorporating elements of primary legislation – eg the provisional Fertilisers Framework, and those where primary legislation has been introduced– eg the Mutual Recognition of Professional Qualifications. In the case of the vast majority of policy areas at the intersection of devolved competence and EU law, no framework is deemed necessary, either due to the possibility of divergence being minimal, or, because there are sufficient intergovernmental mechanisms already in place, or, where divergence may be expected, it will have little impact for internal or international trade.

The original communique foresaw frameworks as setting out ‘a common UK, or GB, approach and how it will be operated and governed. This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued’. As they

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<sup>50</sup> Joint Ministerial Committee (EN) Communique, 16 October 2017.

<sup>51</sup> The Frameworks team in UK Government is now based in the Department of Levelling Up, Housing and Communities. The Government has published an analysis of the policy sectors to be governed through the frameworks process annually since 2018. The most recent Frameworks Analysis 2021: Breakdown of areas previously governed by EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland, November 2021; [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1031808/UK\\_Common\\_Frameworks\\_Analysis\\_2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031808/UK_Common_Frameworks_Analysis_2021.pdf)

<sup>52</sup> Frameworks Analysis 2021: Breakdown of areas previously governed by EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland, November 2021.

have evolved, it is clear that frameworks are more properly seen as mechanisms for governance, rather than policy outputs. A common form of words used in the Framework Agreements is that 'Where one or more of UK Government, the Scottish Government or the Welsh Governments propose to change rules in a way that has policy or regulatory implications for the rest of the UK, or where rules in Northern Ireland change in alignment with the EU, the Framework is intended to provide governance structures and consensus-based processes for considering and managing the impact of these changes'.<sup>53</sup>

The Framework outline agreements indicate the international legal commitments that will need to be accommodated. They can indicate politically agreed parameters for divergence – so in the case of the Animal Health and Welfare Framework, for example, such divergence must not change baseline standards in a manner harmful to biosecurity or welfare. Proposals for regulatory change should be assessed for their impact on internal and international trade. If divergence is not considered acceptable by one or more Parties, the dispute resolution mechanism can be engaged.

To the extent that a particular framework provides scope for agreed policy divergence, there are concerns about the way in which the **UKIMA 2020** market access principles may subsequently undermine that divergence. Agreement was reached in December 2021 on a process for exclusion of agreed policy divergence between the governments. However, this exclusion is not automatic. It relies on the relevant Secretary of State laying a draft statutory instrument, which requires the approval of both Houses of the UK Parliament. Consent should be sought from the devolved Governments, though the making of the SI does not depend on consent being given.<sup>54</sup> The House of Lords Common Frameworks Scrutiny Committee has been pushing for the mechanism to be formally incorporated into each framework agreement, as outlined in the procedure, but this has not been done. The Committee has argued that 'failure to do so jeopardises respecting the autonomy of the devolved administrations within their areas of competence'.<sup>55</sup> On the basis of very limited experience to date, the exclusion process has the potential to be protracted, and lacking transparency, as seen with the Scottish request for an exclusion from the Resources and Waste Common Framework to enable them to pursue bans on a range of single use plastic products.

The House of Lords Common Frameworks Scrutiny Committee also shares the concerns which have been expressed by the devolved Governments about the potential for agreed frameworks to be undermined by legislation other than **UKIMA 2020**. The intersection between the **Subsidy Control Bill** and the Common Frameworks for Agriculture Support and Fisheries Support has been highlighted.

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<sup>53</sup> See eg. the Outline Framework Agreements for Agricultural Support; Animal Health and Welfare; Plant Health; Air Quality.

<sup>54</sup> Sections 10 and 18 UKIMA 2020.

<sup>55</sup> This point has been reiterated in correspondence to Ministers, eg. letter from Baroness Andrews, Chair Common Frameworks Scrutiny Committee to Secretary of State for Environment, Food and Rural Affairs, George Eustice, 23 March 2022

<https://committees.parliament.uk/publications/9441/documents/161305/default/>

Whilst these measures are described by UK Government as ‘complementary’,<sup>56</sup> the potential for contradiction between these policies, and the problematic implications for devolved government decision making has been raised the Common Frameworks Scrutiny Committee.<sup>57</sup>

### **Primary and Secondary Sectoral Legislation:**

In our 2019 Review of the Implications of Brexit-Related UK Legislation for Devolved Competence,<sup>58</sup> we noted a number of emerging trends in post-Brexit legislation. These included defining issues as outside devolved competence where they intersected with the international relations reservation, and also the inclusion in primary legislation of regulation-making powers for UK Ministers in devolved areas, which create the potential for the future use of these powers to restrict policy options open to the devolved law-making bodies. This latter trend of including UK Ministerial powers over devolved matters is very much apparent in the primary legislation that has been introduced subsequently, and on a number of occasions, legislative consent has not been granted to UK bills. Recent examples include the **Professional Qualifications Bill** (concurrent powers, which can be used with the consultation of the Welsh Ministers). The **Subsidy Control Bill** is an example of UK legislation on a (previously disputed) reserved matter, which impacts on non-reserved matters (including economic development), which may restrict the future policy options open to Welsh Ministers in these areas, though the regime is being constructed effectively unilaterally.

Finally, in relation to secondary legislation, very extensive use has been made of the **EU (Withdrawal) Act 2018** section 8 regulation-making powers, in the adoption of amendments to retained EU law. These EU (Exit) Statutory Instruments perform a range of functions, including, transferring functions from EU agencies to UK ones (including, to UK Ministers, with powers to act in devolved areas). In this amended form, they comprise the legislative basis of the majority of Common Frameworks. The majority of the Exit SIs adopted which apply to devolved areas of competence were made by UK Ministers, rather than Welsh Ministers. The Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks provides that UK Ministers will not normally pass SIs in devolved areas using powers under the Withdrawal Act without Welsh Ministerial consent.<sup>59</sup> Senedd scrutiny of these consent decisions operates under standing order 30C. As Taylor and Wilson have observed in relation to the operation of these powers for Scotland, ‘some of these UK Exit SIs could have significant implications for the devolution settlement in terms of the future exercise of powers to make secondary legislation by the UK and/or Scottish Governments and changes in future

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<sup>56</sup> Letter from Lord Callanan, Minister for Business, Energy and Corporate Responsibility to Baroness Andrews, Chair Common Frameworks Scrutiny Committee, 18 February 2022, <https://committees.parliament.uk/publications/9056/documents/159216/default/>

<sup>57</sup> Letter of 23 March 2022 to Secretary of State DEFRA, Supra, note 55.

<sup>58</sup> T.Mullen and J. Hunt, [https://archive2021.parliament.scot/S5\\_Finance/General%20Documents/201908\\_Paper\\_by\\_Prof\\_To\\_m\\_Mullen\\_and\\_Prof\\_Jo\\_Hunt.pdf](https://archive2021.parliament.scot/S5_Finance/General%20Documents/201908_Paper_by_Prof_To_m_Mullen_and_Prof_Jo_Hunt.pdf)

<sup>59</sup> Senedd Scrutiny of Welsh Ministerial consent operates under Standing Order 30C. Where regulations also amend primary legislation, a SI Consent Memorandum is required.

policy direction in Scotland'.<sup>60</sup> Comparable concerns might be raised from a Welsh perspective. The example of Geographical Indications is pertinent here. GIs are signs used on products to identify their quality or other such characteristics related to its geographical origin. The domestic replacement for the EU regime of GI protection was initially formed through a UK SI – the **Agricultural Products, Food and Drink (Amendment Etc.) (EU Exit) Regulations 2020**. Consent was given for it by Welsh Ministers for the reasons of 'efficiency, expediency and due to the technical nature, that there was no divergence in policy, and to enable the statute book to remain functional. However, the issue of whether GIs are within reserved or devolved competence remains an issue of dispute between the governments. Accepting UK legislation, though a pragmatic response, may be seen to strengthen the claim to it being an area where the UK Ministers have overriding decision making powers.

### **Conclusion:**

The UK's exit from the EU, and from EU legal regimes, has created a host of legal and political points of contestation between the governments of the UK. As the UK took its first steps to deal with the consequences of the vote in favour of leaving the EU, the then Secretary of State for Exiting the European Union declared 'what is clear is that the outcome of this process will be a significant increase in the decision-making power of each devolved administration'.<sup>61</sup> Through this process however, devolved competence has been impacted in a range of direct and indirect ways. Given the speed at which some of the key legislative provisions have been adopted, the interconnections between instruments and powers have not been effectively mapped, leading to inconsistencies and the potential for disputes to arise. The test is now to see how effective the new common frameworks, and more broadly the renewed IGR mechanisms will prove in managing those disputes.

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<sup>60</sup> Spice Briefing, Brexit Statutory Instruments: Impact on the Devolved Settlement and Future Policy Direction, SB-21-52, 18 August 2021, <https://sp-bpr-en-prod-cdnep.azureedge.net/published/2021/8/19/e0175834-506d-4e58-b9dd-a57604f819dd/SB%2021-52.pdf>

<sup>61</sup> Legislating for the United Kingdom's Withdrawal from the EU, Cm 9447, March 2017, p.8 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604516/Great\\_repeal\\_bill\\_white\\_paper\\_accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf)

