

Response to Constitution, Europe, External Affairs and Culture Committee UK Internal Market Inquiry Report 22 February 2022

Introduction

The Scottish Government welcomes the Committee's inquiry into the UK Internal Market, which heard from a range of witnesses. It has produced a substantial report, which echoes many of the Scottish Government's concerns and priorities.

As the Committee has recognised, particularly at paragraph 109, the UK Internal Market Act 2020 poses the most serious threat to the devolution settlement since the establishment of the Scottish Parliament. The Scottish Government remains fundamentally opposed to the Act; it is unacceptable both for its impact on devolution, and because it was imposed across the UK without the consent of any devolved legislature. The new regulatory regime differs considerably from the European Single Market and was imposed against the will of the Scottish Parliament. The Scottish Government has already been required to request an exclusion from the UK Government simply to ensure that regulations on single use plastics, passed by this Parliament, can operate as intended and is very likely to be in a similar position with regard to other policies. As the written submission from a number of academics noted, there is also a risk that the Act could have a chilling effect on the development of policy within devolved governments, and it was certainly intended to constrain devolved policy making in this way.¹

The Committee has identified the wider constitutional significance of the UK Government's attempts to address the tension between open trade and regulatory divergence by introducing the UK Internal Market Act. Given these significant implications for the making and scrutiny of devolved policy, the Scottish Government recognises the importance of ensuring transparency and accountability within the new regulatory regime. Set out below is the Scottish Government's response to the points highlighted in the Committee report, which have been grouped thematically. It is hoped that the Committee finds this response helpful and the Scottish Government looks forward to continuing engagement in order to understand the implications of the UK Internal Market Act and related constitutional issues.

¹ [Response 17405563, Professor Nicola McEwen, Professor of Territorial Politics at the University of Edinburgh and Senior Fellow at UK in a Changing Europe, Professor Aileen McHarg, Professor of Public Law and Human Rights, Durham University, Professor Jo Hunt, Professor of Law, Wales Governance Centre, Cardiff University, and Professor Michael Dougan, Professor of European Law, University of Liverpool.](#)

UK Internal Market and Policy autonomy/competency

37. The Committee recognises that there are significant challenges in managing the tension which exists in any internal market between open trade and regulatory divergence. Within the context of the UK internal market the Committee’s view is that in resolving this tension it is essential that the fundamental principles which underpin devolution are not undermined.

38. The Committee believes it would be regrettable if one of the consequences of the UK leaving the EU is any dilution in the regulatory autonomy and opportunities for policy innovation which has been one of the successes of devolution. It is essential as recognised by the Joint Ministerial Council (JMC) in 2017 that devolution outwith the EU continues to provide “as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules.”

91. The Committee recognises that UKIMA market access principles do not introduce any new statutory limitations on the competence of the Scottish Parliament or Scottish Ministers. However, they can automatically disapply Scottish legislation. While UKIMA may not affect the Scottish Parliament’s ability to pass a law, it may have an impact on whether that law is effective in relation to goods and services which come from another part of the UK.

92. In particular, given the size of the English population and economy relative to the three other nations within the UK, the Scottish Government will need to take account of market forces when considering regulatory divergence. It is unlikely that the devolved governments will want to put their own economies at a competitive disadvantage with the much larger English economy by introducing higher regulatory standards which imports from other parts of the UK do not need to comply with.

93. The Committee also recognises that there are significant differences between the market access principles within UKIMA and within the EU Single Market. In particular, the list of exclusions on public interest grounds from the application of the mutual recognition principle are much narrower within UKIMA.

94. There is a clear consensus within the evidence which the Committee received that UKIMA places more emphasis on open trade than regulatory autonomy compared to the EU Single Market. We discuss the impact of this shift in the balance between open trade and regulatory autonomy on devolution below.

109 The Committee invites the UK Minister for Intergovernmental Relations to respond to the weight of evidence in this report which suggests that UKIMA undermines the devolution settlement. Specifically, the Committee would welcome the Minister’s response both in writing and then in oral evidence to the following –

- **The clear consensus within the evidence which the Committee received that UKIMA places more emphasis on open trade than regulatory autonomy compared to the EU single market;**
- **The animal protection charity, Onekind’s view that UKIMA “undermines devolution and will limit the ability to the Scottish Parliament and Government to improve farmed animal welfare standards”;**
 - **Scottish Health Action on Alcohol Problems’ view that UKIMA “could create risks for the integrity of the existing devolution settlement”;**
 - **Professor Armstrong’s view that the Act “places too much emphasis on market liberalisation over local rights to regulate”;**
- **The IfG’s view that UKIMA “has fewer and much more narrowly defined exemptions, and therefore places new constraints on the governments of the UK”;**
- **Professor Weatherill’s view that UKIMA “contains a structural bias in favour of market access, and against local regulatory culture”;**
 - **Professor McEwen and colleagues’ view that UKIMA “arguably creates a powerful disincentive to engage in legal reform or policy innovation, in response to changing social and economic” preferences;**
- **Dr McCorkindale’s view that the Subsidy Control Bill “cuts across devolved competence in significant ways”.**

Response

The Scottish Government welcomes the thoroughness of the Committee’s investigation into the effects of the UK Internal Market Act on devolved policy autonomy and the summary of the evidence presented by witnesses. We welcome the fact that the Committee has highlighted points raised by witnesses to the inquiry and identified a number of issues for the UK Government to address and respond to.

As the Committee acknowledges at paragraph 109 the evidence presented by witnesses reaches a clear consensus that “the UKIMA places more emphasis on open trade than regulatory autonomy compared to the EU single market”.

As the Committee notes, this far less flexible and proportionate approach to managing the UK’s internal market significantly undermines the devolution settlement. Instead of the broad legal principles of market access and non-discrimination – which are balanced against wider policy considerations and the balancing principles of proportionality and subsidiarity – the Act imposes a rigid statutory system that stifles policy innovation and flexibility. This has the potential to undermine the policy effect of devolved legislation passed by Scotland’s democratically elected parliament.

The Act reserves previously devolved powers on subsidy control. It introduces new complexities and uncertainties regarding the policy effect of devolved laws – the Scottish Parliament may still set rules and standards but can do nothing to stop products and services provided to different standards being placed on the market in Scotland. On granting the exclusion relating to regulations on single use plastics, the Secretary of State for Levelling Up acknowledged that the exclusion was necessary to allow the regulations, passed by the Scottish Parliament, to function as the Parliament intended. In other words, as noted by a number of witnesses to the Committee, while

not preventing the Scottish Parliament from passing legislation, the Act has the potential to render that legislation ineffective.² It is worth noting, that the exclusion was narrower than the one originally requested by the Scottish Government, and that further exclusions may be necessary to ensure future Scottish Parliament legislation can be effective.

The Act allows for direct spending by UK ministers in Scotland with no consultation or oversight from the Scottish Parliament. This is a recipe for policy incoherence, lack of accountability and inefficient use of public money. Using these powers (and hitherto dormant, legislative) powers the UK Government is planning to spend money on devolved matters in Scotland with little or no involvement or oversight from Scottish Ministers and the Scottish Parliament. It is initiating an increasingly wide range of live spending programmes, for example the Levelling Up Fund, Shared Prosperity Fund, (including the numeracy programme Multiply), Turing Scheme and Grassroots Football Facilities. In doing so, the UK Government has engaged directly with local authorities and other public bodies, as well as third sector organisations in Scotland. Local authorities have been appointed to deliver the Shared Prosperity Fund, while Scottish Government request for involvement and engagement in the development of this fund have not been met. It is vital for the Scottish Government to be involved to ensure the best for the people of Scotland, and to allow oversight by the Scottish Parliament.

Furthermore, the UK Government has not kept its promises that Scotland would not lose out on funding as a result of EU Exit. Through the Shared Prosperity Fund, the UK Government has offered Scotland just £212 million over a three-year period, which is way below our expectations and way below matching EU funding. The Scottish Government calculated that £183 million per year is required to replace EU funding. Multiplying that over the three-year SPF period, Scotland should receive at least £549 million, so the UK Government's figures simply do not add up. That £212 million equates to a 60 per cent reduction in real terms.

The Act undermines the common frameworks programme which was established, equally, by all four governments of the UK to manage the internal market in the UK and regulatory divergence in devolved policy areas upon EU exit. The Act's market access principles dis-apply divergent policy, cutting across the frameworks approach. As the Committee notes at paragraph 116, a number of witnesses to the inquiry highlighted that frameworks provided a consensual model for managing divergence, which is threatened by the unilateral imposition of the market access principles that will undermine agreements reached under frameworks.

Scotland's commitment to remain close to the EU means Scotland will continue to align with the EU where appropriate, and in a manner that contributes towards protecting and advancing standards across a range of policy areas. While it does not prevent us from ostensibly taking decisions within devolved competence, the UK

² [Response 17405563, Professor Nicola McEwen, Professor of Territorial Politics at the University of Edinburgh and Senior Fellow at UK in a Changing Europe, Professor Aileen McHarg, Professor of Public Law and Human Rights, Durham University, Professor Jo Hunt, Professor of Law, Wales Governance Centre, Cardiff University, and Professor Michael Dougan, Professor of European Law, University of Liverpool; Professor Stephen Weatherill, Oral Evidence 2 December 2021](#)

Internal Market Act means that the effects of policy decisions made in Scotland could be constrained in practice – which has implications for alignment in policy outcomes.

Common Frameworks

Exclusions Process

131. **The Committee welcomes the inter-governmental agreement on a process for seeking exclusions from the market access principles. The Committee notes, however, that there is very little detail in the public domain in relation to how this will work. The Committee recommends the need for clarity in the following areas –**

- **Is the process intended as a means of managing policy divergence before regulations are adopted?**
 - **What criteria will be used in assessing exclusions and how will this balance the priority within devolution for regulatory autonomy with open trade?**
 - **If an exclusion cannot be agreed whether the matter may then be resolved through the IGR dispute resolution process?**
 - **How the process will provide certainty and clarity for businesses and consumers?**

132. **The Committee also notes that there is no mention of any requirement for public consultation or parliamentary scrutiny of the process for seeking an exclusion. Neither is there any requirement for proposed exclusions to be made public. In contrast at an EU level there is a public consultation on notifications by a Member State of draft proposals for regulatory divergence during a standstill period (usually 3 months).**

133. **It is essential that the Common Frameworks process builds in formal structures which allow for public consultation where an exclusion from the market access principles is sought on significant policy areas. Such a consultation may need to be UK or GB wide given an exclusion may impact on businesses and consumers across the UK or GB. This could be conducted simultaneously by the respective governments involved. The relevant committee in each legislature should also be notified of any request for an exclusion on significant policy areas.**

Response

The Act is incompatible with the frameworks approach agreed by all four UK governments in 2017, which respects devolved policy autonomy. UK Government ministers have stated that the Act is there as a form of backstop should frameworks not operate as expected or where gaps in coverage may emerge. This is not the case. The Act will in many, if not most, cases overwrite and undermine policy divergence agreed through a common framework, unless it is expressly excluded from the market access principles – and even then, the decision on whether to make an exclusion rests with the UK Government.

The exclusion process in the Internal Market Act is the result of amendments introduced late in the Act's passage, that makes clear UK ministers can use delegated powers to exclude policy divergence agreed through a common framework from the Act's effect. During the passage of the Bill, Lord Callanan said to the House of Lords on 15 December 2020 that "we want to put it beyond doubt that the delegated powers under Clauses 10 and 17 may be utilised to, among other things, make provision to reflect common framework agreements. This can be achieved by excluding specific divergence agreed through the common frameworks process from the operation of the market access principles where all parties to the common framework are in agreement."

While remaining fundamentally opposed to the Act, and in favour of its repeal, the Scottish Government recognised that this amendment could mitigate some of the adverse impacts of the legislation. Subsequently, a process for considering exclusions from the Act was agreed between the four nations and UK ministers committed to its use in a written ministerial statement in December last year.³ In this statement, the Parliamentary Under Secretary of State for the Department for Levelling Up, Housing and Communities made clear that: "New exclusions from the UK Internal Market Act's market access principles require the approval of both Houses of Parliament through the affirmative resolution procedure. Accordingly, where agreement to such an exclusion is reached within a Common Framework, the relevant department and minister will seek that approval by laying a draft statutory instrument before Parliament in accordance with the UK Internal Market Act."

The Scottish Government recognises the need for the involvement of the public in policy making, through consultation, and the role of Parliament in scrutinising decisions, and that these principles are relevant to the exclusions process. Where an exclusion from the provisions of the UK Internal Market Act is necessary to ensure the policy effect of devolved legislation, that will be made clear by the Scottish Government to the Scottish Parliament, in order to allow for proper consideration of the exclusion by interested parties. In addition, all policy proposals are subject to the policy development principles of the Scottish Government, which include consultation with the public and Parliament. This is a separate process and will, where relevant, consider interactions with frameworks and the internal market, and will usually take place before considerations within the framework process on how best to manage policy divergence between nations.

The first test of the UK government's commitment to the exclusion process came in the form of the Environmental Protection (Single-use Plastic Products) (Scotland) Regulations 2021, legislation laid in the Scottish Parliament in November 2021 to ban the manufacture and supply of certain types of single use plastic items which come into effect on 1 June 2022. Although the other governments in the UK share similar policy ambitions, the Scottish Government was in a position to move forward with a ban at a faster pace. However, the Internal Market Act would have significantly undermined the policy effect of any Scottish ban, as products produced legally in, or first imported into, other parts of the UK could still be placed on the Scottish market as a result of the Act.

³ [Written statement, House of Commons 9 December 2021](#)

The UK Government has now written to the Scottish Government confirming that it supports an exclusion on bans of single use plastic items covered by the Scottish regulations and existing Scottish and UK bans from the Act's effect. Now that a decision to grant an exclusion has been reached, the Department for Environment, Fisheries and Rural Affairs is taking forward work to draft the Statutory Instrument (SI) required by the Act. The Scottish Government has written to the UK Government to highlight a number of issues in relation to the operation of the exclusions process agreed between the four nations to help ensure that the future application of the process is informed by lessons drawn from this case. It is clear that UK ministers' consideration of this issue fell short of the commitments made by Lord Callanan and Neil O'Brien which are set out above.

While recognising that this is a new process, the Scottish Government is concerned at the length of time taken to agree the exclusion. Under the terms of the process developed with UK ministers, agreement on policy divergence was reached through the provisional Resources and Waste common framework last autumn. An exclusion from the Act was required if the Environmental Protection (Single-use Plastic Products) (Scotland) Regulations 2021 were to be fully effective. However, the time taken by UK Ministers to consider the exclusion means that it is unlikely to be in place when our regulations come into force. Furthermore, Scottish ministers made the case for a broader exclusion with the support of the Welsh Government and the evidence gathered in the common framework process. However, this was rejected by UK ministers. The approach to determining scope is at direct odds with the common framework principles and with the stated policy intent behind the amendment to the Bill. It is noted that senior officials in the UK Government have acknowledged that there are lessons to learn for the future and the Scottish Government hopes to have the opportunity to work with them to ensure that the process can work as it was intended.⁴

With regard to the Committee's recommendation on scrutiny, the Scottish Government agree that the Act, like other recent UK legislation confers sweeping delegated powers on UK Ministers with little scrutiny for the UK Parliament or the Scottish Parliament. The Committee may wish to pursue this with UK ministers but the Scottish Government is open to discussions with Parliamentary clerks about how to ensure that an appropriate level of scrutiny can be maintained despite these developments.

Frameworks and Transparency

142 The Committee notes that the published Common Frameworks do not generally provide for minimum standards or for common approaches as set out in the JMC principles and reaffirmed in November 2021 in the UK Government Frameworks Analysis. Rather they appear to be technical documents which provide for ways of working for government officials which might include agreeing UK or GB wide minimum standards or a common approach.

143. The published documents are therefore limited in improving public awareness and understanding of policy areas where a UK or GB wide approach is likely. They are also limited in providing information on minimum standards.

⁴ [Common Frameworks Scrutiny Committee, House of Lords, 29 March 2022](#)

The Committee is concerned, therefore, that the published documents have not provided the certainty and clarity which businesses, consumers and other stakeholders which frameworks were anticipated to provide.

186. The Committee is, therefore, concerned that if the operation of these frameworks is viewed as being solely inter-governmental this may undermine the Scottish Parliament's commitment to being accessible, open and responsive. It may also undermine its ability to develop procedures which make possible a participative approach to the development, consideration and scrutiny of policy and legislation.

187. The Committee recommends that to address these concerns consideration needs to be given to opening up the Common Frameworks process to allow opportunity for public consultation and parliamentary scrutiny in significant policy areas prior to inter-governmental decisions being made. We discuss this in more detail below.

202. The Committee's view is that any proposal for a UK or GB wide policy approach within a common framework that constrains, albeit on a voluntary basis, the exercise of devolved competence, should require the approval of the Scottish Parliament.

220. The Committee notes, however, that the Resource and Waste Common Framework and a number of other Frameworks have not yet been published and the Parliament has not seen or had an opportunity to scrutinise these. This lack of transparency raises questions of clarity and certainty for businesses, consumers and the wider public. The Committee recognise the need for confidentiality in inter-governmental discussions under the auspices of Common Frameworks but believes that stakeholders and the Parliament must be involved at appropriate points in order to facilitate proper policy making and robust scrutiny.

221. In order to provide clarity and certainty there needs to be a formal agreement with the four legislatures across the UK that each government will provide detailed information on the outcome of common framework discussions which impact on significant policy areas, such as single-use plastics. This should include clarity in relation to –

- The exclusions process including details of why any request for an exclusion was not agreed;
- The potential impact of the market access principles;
- Any advice and/or report provided by the OIM;
- Any agreement to postpone the date for regulations to come into force to allow a UK-wide or GB-wide approach to occur simultaneously;
- The outcome of any disputes within frameworks, including those resolved at official and senior official level and the intergovernmental dispute resolution mechanisms;
- The impact of any other factors including the Protocol, TCA and other international obligations.

222. The Committee is strongly of the view that it would be highly unfortunate if, having left the EU, there was a decrease in public access for businesses and citizens to influence regulatory policy.

223. As part of the Common Frameworks process there is an agreement between the UK, Scottish and Welsh Governments to “maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules.” The Committee recommends that there should be a similar agreement between the Scottish Government and Scottish Parliament that, as a minimum, there should be no dilution of public consultation or of parliamentary scrutiny.

250. The Committee recommends that further consideration is given by Scottish Parliament and Scottish Government officials to how the Common Frameworks process interacts with the SIP 2 consent process.

Response

The Scottish Government recognises the importance of avoiding any diminution of transparency and parliamentary oversight as a result of leaving the EU, and is committed to ensuring that Parliament is provided with sufficient opportunities to scrutinise the arrangements for intergovernmental relations on these islands.

It is important to emphasise that frameworks are policy neutral and are agreements about ways of working rather than particular policy outcomes. Any measures agreed within frameworks or affected by the exclusions process would be subject to Parliamentary scrutiny the same way as other policies, through established processes. Because of the range of subjects covered by frameworks we anticipate that some will be used more than others in order to facilitate divergence in particular areas.

Scottish Government officials are working with Parliamentary officials to discuss new ways of working to manage the complex environment which now exists after EU exit, These discussions are at an advanced stage

Frameworks and Intergovernmental Relations

185. The Committee’s view is that there is a need to re-examine the UK’s approach to IGR within the context of Common Frameworks. As noted above these frameworks may set out a common UK or GB approach, or at the least a forum for decision making on what approach should be taken. Given that frameworks require the four governments of the UK to discuss and agree approaches they may act as a practical constraint on the exercise of Ministers’ powers and on the legislative programme a government may pursue.

Response

The IGR review was commissioned in March 2018 when Heads of Government agreed at JMC (P) that officials should review and report on the existing intergovernmental structures, to ensure they were fit for purpose in light of the UK’s exit from the EU. The

IGR proposals deliver many elements of what the Scottish Government set out to achieve from the review and offer the prospect of improvements to current processes. They also set out a series of principles for collaborative working:

- a. Maintaining positive and constructive relations, based on mutual respect for the responsibilities of the governments and their shared role in the governance of the UK;
- b. Building and maintaining trust, based on effective communication;
- c. Sharing information and respecting confidentiality;
- d. Promoting understanding of, and accountability for, their intergovernmental activity;
- e. Resolving disputes according to a clear and agreed process.

These proposals if properly implemented and followed should lead to a better functioning formal engagement. However, the UK Government's approach to EU Exit, and imposition of the UK Internal Market Act show that procedural improvements alone are not enough for improved intergovernmental relations.

Common Frameworks should be seen as an integral part of the arrangements for managing intergovernmental relations. They are underpinned by the JMC principles and as a number of witnesses, notably Professor Nicola McEwen, pointed out during the Committee's inquiry, they are collaborative and based on the principle of consent.⁵ They are policy neutral and intended to facilitate divergence between jurisdictions rather than implement a particular outcome, thus respecting the autonomy and competence of each government. Despite the threat posed by the UK Internal Market Act the frameworks process has been comparatively successful in terms of the consensual approach that has been adopted. As such, they offer a model for joint working which could be developed and used to support intergovernmental relations more broadly.

The UK Internal Market Act, Frameworks and the NI Protocol

158. The Committee notes that one effect of the Protocol is that UKIMA does not apply to goods moving from GB to NI. It is not clear therefore how UKIMA "will guarantee UK companies can trade unhindered in every part of the United Kingdom" as stated in the UK Government's white paper on the internal market.

159. The Committee's view is that it would be possible to design a UK internal market which accommodates the possibility of regulatory divergence within each of the four parts of the UK, given that the Protocol provides such an arrangement for Northern Ireland.

160. The Committee notes that Scottish businesses seeking to trade with NI may need to comply with different regulatory standards. The Scottish Government and Scottish Parliament in considering new regulatory proposals will therefore need to take account of the impact of the Protocol.

⁵ [Oral Evidence, 2 December 2021](#)

161. The Committee would welcome clarity on the extent to which Common Frameworks are intended to manage policy divergence within the context of the Protocol. The Committee recognises that the operation of the Protocol has a significant impact on Scotland and we will continue to monitor developments in relation to how it is working.

Response

Common Frameworks are agreements between the four nations of the UK to manage areas of potential policy divergence by cooperation and consensus. The Frameworks were in development before the Northern Ireland Protocol (NIP) was in contemplation, so they are not specifically intended to manage divergence under the NIP – they should operate regardless of the status of the NIP. As the NIP maintains alignment in Northern Ireland with EU regulatory standards, additional complexities may arise as a result of the operation of the Internal Market Act.

The practical operation of the Internal Market Act/NIP/Border Operating Model and common frameworks as they affect NI/ROI – GB trade is still being explored. For Scotland, it is unclear what the arrangements and Official Control checks for foods which are not Qualifying Northern Ireland Goods entering GB at Cairnryan from Ireland will be. Regular meetings between government officials and agency representatives take place in order to address the challenges associated with the NIP and Qualifying Northern Ireland Goods.

The Scottish Government fully agrees with the Committee that Scotland has direct interests at stake in the NI protocol particularly in trade, customs check and around a Border Control Post at Cairnryan. Unfortunately, despite the Scottish Government's clear interests and the potential impacts on Scotland, the UK Government will not meaningfully engage on these matters, and has repeatedly excluded the Scottish Government from discussions and decisions around the NI Protocol. To complicate matters further, in April the UK Government announced unilaterally that new border arrangements for imports from the EU, which had been agreed with devolved governments and scheduled for 1 July 2022, would not come into force, and that instead a new borders operating model would be designed for implementation from the end of 2023 – without any meaningful discussion with devolved governments in advance.

The Scottish Government remains deeply concerned about the current dispute between the UK and EU over the Protocol.

On 28 April 2022, without any consultation with the Scottish Government, the UK Government made an announcement on further delays to the introduction of customs and Sanitary and Phytosanitary (SPS) controls on the imports of goods from the EU.

SPS matters are devolved. By not engaging with the Scottish Government, the UK Government is disrespecting the devolved settlement.

The Scottish Government find it completely unacceptable that there was no significant meaningful consultation between the UK Government and the Scottish Government before this announcement was made.

International obligations

39. At the same time the Committee recognises the significant economic benefits of the UK internal market and open trade. It is therefore critical that the intergovernmental process for managing the tension between regulatory divergence and open trade includes transparent opportunities for public engagement with businesses, consumers and other stakeholders.

51. The Committee notes that where UK ministers consider that a UK-wide approach is necessary to uphold international agreements and obligations, the Scotland Act 1998 already provides scope to UK ministers to ensure compliance. For example, by enabling the Secretary of State to prohibit the Presiding Officer from submitting Bills for Royal Assent which contain provisions which are incompatible with international obligations.

52. Section 58 of the 1998 Act also provides the Secretary of State with a power to prevent or require action by the Scottish Government to secure compliance with international obligations. The Committee also notes that one of the purposes of Common Frameworks is to ensure compliance with international obligations and to support the UK's ability to negotiate, enter into and ratify trade and other international agreements. The Committee notes that text covering international trade issues impacting on frameworks is expected to be included in the published frameworks.

Response

The Scottish Government recognises its role in implementing Free Trade Agreements (FTA) that are agreed between the UK Government and other countries. It has consistently made the case for a guaranteed role for the Scottish Government and Parliament in all stages of FTA negotiations. However this has not been accepted by the UK Government, who will only engage with the Scottish Government on areas it considers relevant to devolved competence. Modern trade agreements merge a range of reserved and devolved policy areas, which is evident in the agreements considered so far. For example, decisions taken on tariffs (which are reserved) impact heavily on Scottish agriculture (which is devolved). Despite this clear interest, the UK Government has offered little meaningful involvement. The Scottish Government will continue to engage constructively with the UK Government on the negotiation and implementation of FTAs.

It is a matter of concern that the UK Government are using international obligations as a justification for disregarding the Sewel Convention and legislating on devolved matters without the consent of the Scottish Parliament. This happened most recently

in respect of the Professional Qualifications Bill, and as a result progress on the framework for the Mutual Recognition of Professional Qualifications has stalled.

Trade and Cooperation Agreement

231. The Committee's view is that the Parliament's scrutiny of the implementation of the TCA requires transparency in relation to the Scottish Government's position in areas of devolved competence considered by the Partnership Council and the Specialised Committees. The Committee notes that awareness of the Scottish Government's position will also be essential in order for the Scottish Parliament to meaningfully contribute to the work of the PPA.

232. The Committee will invite the appropriate Scottish Government Minister to give evidence after each meeting of the Partnership Council. This will allow the Committee to hear an update on the Scottish Government's policy approach in discussions with the UK Government ahead of the Partnership Council and to provide details of the discussions at the meeting of the Partnership Council. The Committee also recommends that a formal parliamentary process needs to be developed in relation to the communication to the relevant subject committee of binding decisions of the Partnership Council and the Specialised Committees which relate to matters within devolved competence.

233. The Committee notes that there is a lack of clarity in relation to how the Common Frameworks process will work in relation to the implementation of the TCA. The Committee asks the Scottish Government to provide details of the role of Common Frameworks in relation to the TCA including whether they could provide a forum –

- to agree a UK position in advance of meetings of the Partnership Council and Specialised Committee;**
- to address the implementation of binding decision of the TCA**

Response

The Scottish Government welcomes the committee's interest in TCA issues. In order to be transparent and inform Parliament on these matters, Ministers will continue to update the committee in writing ahead of and after each Partnership Council meeting and will be happy to meet with the committee. As the committee will be aware, meetings of the Partnership Council are ongoing. The UK and EU and the Scottish Government will continue to respect the confidentiality of these negotiations.

Transparency – relationship with parliamentary process

183 The Committee is very supportive of inter-parliamentary working and agrees that it is essential in developing more effective scrutiny of IGR. The Committee notes that COVID combined with recent parliamentary elections have restricted opportunities for inter-parliamentary working over the past two years. The Committee welcomes plans to refresh the Inter-Parliamentary Forum and notes that the first meeting is scheduled for 25 February 2022.

184. The Committee recognises as discussed by the Law Society of Scotland that transparency and confidentiality is a difficult circle to square when seeking to improve the scrutiny of inter-governmental relations. While recognising the challenge involved the Committee nevertheless agrees with Professor McEwen that the IGR review offers very little in improving transparency.

244. The Committee recommends that further consideration is given by Scottish Government and Scottish Parliament officials to the level of information which the Scottish Government is required to provide in supporting documents published alongside primary and secondary legislation relating to any consideration of the impact of –

- The market access principles;
- Common Frameworks;
- The Ireland/Northern Ireland Protocol;
- The TCA including binding decisions of the Partnership Council and the Specialised Committees;
- Other international obligations and international trade agreements;
- Reports and advice of the OIM.

Response

The Scottish Government recognises the complexity of the post-EU regulatory environment in which Scotland now operates, and the variety of considerations to be made when developing and scrutinising legislation. With regard to international obligations and trade agreements specifically, policy officials are now asked to consider the impacts of a proposed regulatory measure on international trade and investment when completing Business and Regulatory Impact Assessments (BRIAs). This enables the Scottish Government to meet certain obligations under Free Trade Agreements and WTO agreements.

The Scottish Government would welcome an opportunity for further discussion with the Committee and Parliamentary officials about how to ensure that sufficient information is provided to Parliament within appropriate timescales to support the scrutiny of legislation.

OIM

236. The Committee recognises that it would be inappropriate for the OIM to publish advice on a regulatory proposal not yet in the public domain. The Committee notes, however, that while UKIMA does not impose a requirement on the OIM for advice provided under section 34 to be published, neither does it preclude it. On this basis, it is essential that at the point where regulatory proposals on which advice is sought enter the public domain (either in draft form as part of a public consultation or when legislation is introduced) the advice is published. The Committee will invite the OIM to respond but would also welcome the view of the Scottish Government.

Response

The Scottish Government agrees that the transparency is important to the work of the Office of the Internal Market (OIM) and that advice should be published alongside the regulatory proposals in relation to which the advice was sought. In this respect, it is noted that the OIM has been clear that its remit will be focused on economic and technical matters only, and barriers to trade – not on wider policy aims.

It is also important to recognise the statutory requirement for the OIM to act “even handedly” toward each of the four governments of the United Kingdom. There are material challenges for the OIM, inherent in the market regime that it will monitor: a regime designed and imposed by one of the participant governments despite the (continued) opposition of the others.

Conclusions

251. In this report we have identified three significant and interrelated tensions arising from and/or exacerbated by the UK leaving the EU –

- **First, tension between open trade and regulatory divergence;**
- **Second, tension within the devolution settlement;**
- **Third, tension in the balance of relations between the Executive and the Legislature.**

252. The Committee recognises, in relation to the first of these tensions, the economic benefits for businesses and consumers in ensuring open trade across the UK.

253. But equally we recognise that the fundamental basis of devolution is to decentralise power so as to allow policy and legislation to be tailored to meet local needs and circumstances.

254. The Committee believes that policy innovation and regulatory learning are one of the key successes of devolution.

255. Our view is that it is essential, as recognised by the Joint Ministerial Council (JMC) in 2017 168 , that devolution, outside the EU, continues to provide “as a

minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules.”

256. The Committee recognises that UKIMA seeks to address the first tension.

257. But from the clear consensus in the evidence we received it is the Committee’s view that UKIMA places more emphasis on open trade than regulatory autonomy compared to the EU Single Market.

258. It is also the Committee’s view that this has led to tensions within the devolved settlement.

259. On this basis the Committee invites the UK Government to explain how in its view UKIMA will provide “as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules.”

260. The four governments of the UK agreed that it would be beneficial to manage divergence in some policy areas that were previously governed by EU law and are within devolved competence. The Committee recognises that Common Frameworks thus have the potential to resolve the tensions within the devolved settlement through managing regulatory divergence on a consensual basis while facilitating open trade within the UK internal market.

261. But the Committee believes there is a risk that the emphasis on managing regulatory divergence at an inter-governmental level may lead to less transparency and Ministerial accountability and tension in the balance of relations between the Executive and the Legislature.

262. The Committee is concerned that this may result in reduced democratic oversight of the Executive and a less consultative policy-making process.

263. Our view is that there is a need for a much wider public debate with regards to how to deliver appropriate levels of parliamentary scrutiny and public and stakeholder engagement at an inter-governmental level especially in relation to the operation of common frameworks.

264. We believe that resolving this tension should be an immediate priority for the refreshed inter-parliamentary forum and we highlight the findings of this report to our colleagues on the relevant committees in the House of Commons, House of Lords, Welsh Senedd and Northern Ireland Assembly.

265. The Committee also invites the views of both the Scottish Government and the UK Government on how to resolve this tension and ensure appropriate levels of public and stakeholder engagement and parliamentary scrutiny of inter-governmental working especially in relation to the operation of common frameworks.

266. Finally, we will give further consideration as part of our work programme planning to addressing in more detail some of the fundamental issues raised in this report.

Response

The Scottish Government welcomes the Committee's wide-ranging inquiry into the significant issues relating to the regulation of the UK internal market, not least the approach of the UK Government which has imposed the UK Internal Market Act. As the Committee has highlighted, this has significant implications for the exercise of devolved competence by both the Scottish Government and the Parliament.

As a result of the UK's exit from the EU, its governments are no longer governed by the rules and institutions of the European Union, a single market that protected the powers of the devolved institutions while ensuring that there were no unnecessary barriers to trade across these islands, or indeed with the European Union.

The European Single Market is based on co-operation, co-decision and equality between member states, and offers a model of how to balance market efficiencies with the ability to set rules at a local level. The Committee acknowledged that the UK Internal Market Act introduces a significant re-balancing of these factors, and gives much greater weight to the need for open trade while undermining regulatory autonomy. Furthermore, the disregard for the constitutional conventions that underpin the devolution settlement which has upheld regulatory autonomy for over twenty years, is illustrated in the manner in which the Act was imposed without the consent of the Scottish Parliament, or indeed of any devolved legislature.

The evidence given to the Committee exposed concerns among a wide range of stakeholders about the impact of the UK Government's approach to managing the internal market on devolved policy, particularly on issues such as public health, environmental and agricultural policy. The ability of the Government to develop policies in these areas, and the ability of the Parliament to scrutinise them, are both threatened by the UK Internal Market Act.

The Scottish Government understands and shares the concerns of the Committee in relation to accountability and transparency in this new context. The Scottish Government will continue engaging with the Committee, in order to understand more deeply the extent of the shared risk, which the UK Internal Market Act represents. The Scottish Government welcomes the Committee's in-depth report and hopes that it is the start of a process of working together to develop appropriate ways of responding to the significant constitutional issues created by the UK Internal Market Act. However, the Scottish Government remains fundamentally opposed to the Act which poses an existential threat to the devolution settlement. The Act erodes the powers and responsibilities of devolved institutions. This is not only contrary to the principles of devolution but is placing practical constraints on the exercise of devolved decision making.