

Application of the Market Access Principles of the United Kingdom Internal Market Bill

Finance and Constitution Committee

Briefing Paper

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Summary

Earlier briefings and evidence sessions have explored the key features of the United Kingdom Internal Market Bill which is currently completing its legislative stages in the House of Commons before its consideration in the House of Lords. The aim of this briefing is to consider the implications of the Bill in terms of the application of the **market access principles** contained in the Bill.

The Bill creates two market access principles: the mutual recognition principle and the non-discrimination principle. Both principles can be applied to relevant requirements in respect of the sale of goods or the provision of services.

These principles serve to disapply relevant requirements in one part of the UK when goods or services are lawfully provided in another part of the UK. The requirements remain applicable to the sale of goods and the provision of services originating in a jurisdiction, but they cannot be applied to goods or services originating in another part of the UK and which comply with the rules applicable there.

By permitting access to the Scottish market under different regulatory conditions, it is apparent that the effectiveness of Scottish regulatory regimes may be impacted. In this briefing, the impact of the Bill on the sale of goods is tested in respect of two recent interventions by the Scottish Government:

- The **Deposit and Return Scheme (DRS)** for single use containers
- **Minimum Unit Pricing (MUP)** for Alcohol.

As it has also been suggested that the market access principles could impact on the system by which water is provided in Scotland, this briefing also considers the impact of the Bill on the provision of **water services**.

The analysis suggests:

- Applying the market access principles, key aspect of the Deposit and Return Scheme may be rendered inapplicable, undermining the effectiveness of the scheme.
- As things stand, the market access principles would not disapply the current version of the Minimum Unit Pricing scheme for alcohol but could restrict the ability to modify the scheme following its review.
- The supply of water is not expressly excluded from the reach of the mutual recognition principle but the way in which the service is provided in Scotland may mean that access to the Scottish market could not be secured through the provisions of the Bill. Litigation to determine the reach of the Bill cannot be excluded.

The Deposit and Return Scheme Regulations

Aims of the Scheme

When its provisions come into effect:

- The marketing and sale of certain single use containers will be prohibited unless they are registered for use with the Scottish Environment Protection Agency;
- A refundable deposit of 20p will be levied on the sale of such containers;
- Producers will be required to keep data and information and to meet targets for the collection of their packaging covered by the scheme;
- Retailers will be required to operate return points for containers within the scheme or to provide a take back scheme for those products sold online.

Position under EU Law

Rules on deposit and return would fall within the scope of Article 34 TFEU which governs the free movement of goods. The Court of Justice of the EU has previously found that deposit and return schemes falling within the scope of Article 34 should be considered in light of their environmental objective and the proportionality of any consequential restriction on free movement ('Danish Bottles' case). In other words, the position under EU law is that the environmental and economic effects are balanced in light of the **proportionality** principle.

Similar to the minimum unit pricing rules for alcohol, the European Commission was notified of the Scottish Government's intention to adopt rules that were subject to the notification obligations under Directive 2016/1535. This gives the European Commission and the Member States an opportunity to review and raise any objections they might have at the draft legislative stage. The European Commission did not respond to the notification (it is not clear whether this was because no objections were raised or because of the obvious effects of the UK's withdrawal from the EU).

The Relative Scope of Application of the Market Access Principles to the Sale of Goods

The effect of the UKIM Bill is to disapply relevant requirements applicable in one part of the UK if they conflict with either of the market access principles. In respect of the sale of goods, the principles of mutual recognition and non-discrimination apply respectively to different types of regulatory requirements. **Characterisation of a requirement is, therefore, crucial to its legal treatment.**

If a requirement is caught by the mutual recognition principle, it will be disapplied in respect of its application to goods lawfully sold in another part of the UK with only a very limited capacity to apply the rule to prevent the movement of disease, or a pest or unsafe food. If a measure is within the scope of the non-discrimination principle then absent any direct discrimination, a measure has to be assessed in terms of whether:

- It puts incoming goods at a disadvantage, and
- It has a significant adverse effect on competition, and
- It has a legitimate aim within the meaning of the Bill.

In other words, the disapplication effect is triggered more clearly if a requirement falls within the scope of the mutual recognition principle.

Applying the Market Access Principles

Principle	<i>Mutual Recognition</i>	<i>Non-Discrimination</i>
Relevant Requirements Subject to the Principle	Characteristics of the goods or their performance; Presentation of the goods; Production of the goods; Animal tracing; Registration or approval or authorisation; Maintaining records or information; Anything else relating to the goods before they can be sold.	Circumstances or manner of sale; Transportation, storage, display, handling of goods; Registration or approval or authorisation; Regulation of businesses selling certain types of goods.
Specific Exclusions	Requirements that are: Necessary to reduce or prevent the movement of a pest or disease into that part of the UK; or Necessary to reduce or prevent the movement of unsafe food or feed into that part of the UK; or An authorisation covered by REACH regulation (chemicals); or Related to a tax, duty or similar charge.	Requirement that are: Directly discriminatory but a response to a public health emergency; or Indirectly discriminatory and pursues a legitimate aim of the protection of the life or health of humans, animals or plants, or protects public safety or security
General Exclusions for Relevant Requirements	The relevant requirement is applicable to the sale of goods on the day before the UKIM provisions comes into effect; AND There is no corresponding requirement to the relevant requirement in another part of the UK. Re-enactment (without substantive change) of a statutory requirement does not affect its continuity for the purposes of this exclusion.	

Assuming the Bill enters into force by the end of the year, only relevant requirements applicable to the sale of a good before that date will be potentially excluded from the scope of the Bill.

Although the Regulations were made on 19th May 2020, Part 2 of the Bill which governs the deposit and return scheme; relevant obligations on retailers in Part 5; and the enforcement provisions in Part 7, enter into force on 1 July 2022. The provisions in Part 3 relating the registration of producers come into force on 1 January 2022. As these provisions would not have applied to a sale of goods on the day before the UKIM provisions come into effect, the provisions of the Bill are applicable to the Deposit and Return Scheme Regulations.

The Prohibition on the Sale of Containers that are not Registered

Confusingly, registration requirements appear to fall under both the mutual recognition principle and the non-discrimination principle. As the non-discrimination principle does not

apply to the extent that the mutual recognition principles does apply then one approach might be to see whether the type of registration or authorisation scheme is more related to the product and production process (and so the mutual recognition principle applies) or more related to issues concerning the retail and sale of the goods (where the non-discrimination principle applies).

That only products of a certain composition fall within the scope of the scheme and that producers selling those products must be registered tends to suggest that the scheme should be considered under the mutual recognition principle. To the extent that a product and a producer is within the scope of the Regulations, the application of the Regulations to products lawfully sold in another part of the UK (or imported into and sold in another part of the UK) would be disapplied by the operation of the UKIM Bill.

Unlike the current position under EU law, there is no possibility under the Bill for the restrictions on market access to be saved by reference to their environmental objective or for a proportionality analysis to be applied. The Bill would simply disapply the rules for drinks sold in single use containers lawfully sold in another part of the UK.

20p Deposit

The imposition of a 20p deposit is not a tax and so is not automatically excluded from the scope of application of the Bill. However, determining whether either the mutual recognition or the non-discrimination principle should apply is not without its difficulties. In the *Scotch Whisky Association* case relating to MUP, the Court of Justice of the EU found that the rules on minimum unit pricing for alcohol – which impacted on the price of goods – were in principle a restriction on market access. However, as the Bill makes clear that the market access principles only have application within the terms of the Bill and are not free-standing legal principles it is more necessary to determine why the levy falls within any of the categories of requirements detailed in the Bill.

There is no express inclusion of requirements in relation to pricing and so it might be suggested that this falls outside the scope of the Bill. However, it could be argued that imposition of the deposit falls within the scope of something which has to be done in relation to the goods before they can be sold. That would bring it within the mutual recognition principle and for the reasons given previously, the environmental objective would not save the requirement from disapplication in respect of goods coming from another part of the UK.

Failing that, and perhaps more appropriately, the deposit could be characterised as the terms on which single-use drinks containers may be sold and would be subject to the non-discrimination principle. While the requirement is not directly discriminatory it would have to be determined whether it was indirectly discriminatory. That the requirement makes it 'less attractive' to sell such goods in Scotland would be relevant in determining whether there was indirect discrimination. Whether there was a significant adverse effect on competition between goods would then be taken into account to determine whether the non-discrimination principle had been breached. The claim might be made that there is no breach because the impact is the same on goods regardless of which part of the UK they come from. But if there was a significant impact, it is also clear that the protection of the environment is not a legitimate aim recognised by the Bill as a means of saving indirectly discriminatory measures.

Accordingly, if the mutual recognition principle applies, the requirement would be disapplied for goods originating in another part of the UK. If that principle does not apply,

there is a more complex assessment of whether the rule has a significant adverse effect on competition between goods. If it does, there is no relevant legitimate aim to protect it against disapplication when applied to goods originating in another part of the UK.

There is obvious legal uncertainty as to how different requirement will be characterised and, therefore, what the legal consequences will be. This is likely to lead to protracted litigation through the court system with the possibility that different courts within and between jurisdictions will arrive at different conclusions.

Producer Obligations – Data Collection and Targets for Container Collection

The requirements on producers to keep information and data for a period of four years would fall within the scope of the mutual recognition principle. It would be disapplied in respect of goods lawfully sold elsewhere in the UK.

The meeting of targets forms part of the system for producers to be registered. Failure to meet targets could lead to a producer losing its registration in which case it would not be able lawfully to place goods on the market in Scotland. Accordingly, this would likely to be considered as covered by the mutual recognition principle and disapplied in respect of goods originating in another part of the UK.

Retailer Obligations

There are a range of obligations on retailers that include the operation of returns points and a take back scheme for containers covered by the Regulations. This could fall within the scope of the non-discrimination principle in that it relates somewhat to the storage and handling of goods (albeit once they have been sold). Given that the requirements are not different depending on the origin of the goods and so not directly discriminatory, they could be considered to be indirectly discriminatory if they made the sale of goods in Scotland less favourable for producers selling in other parts of the UK and if there was a significant adverse impact on competition.

The operation of a take-back service in the context of online retail sales may be more problematic. It is clear that the retailer is subject to the obligation to provide a free takeback service regardless of whether the retailer has a registered or principal office in Scotland, or, where the site of sale is. That means that an online retailer in England selling drinks covered by the scheme to consumers in Scotland would be required to operate the takeback scheme. This could be considered to make the sale of goods less favourable and could have a significant impact on cross-border competition (on the basis that goods originating outside Scotland might prefer to use online sales as a retail method rather than having physical retail premises in Scotland). If the rules were found to be indirect discrimination, their environmental objective would not prevent their disapplication when applied to retailers based outside Scotland.

Conclusion: the environmental aims of the DRS are not relevant in terms of excluding the operation of the market access principles. Different aspects of the regime will trigger the application of the mutual recognition and non-discrimination principles. If the mutual recognition principle is triggered that aspect of the DRS is not applicable to containers lawfully sold elsewhere in the UK. If the non-discrimination principle applies, a more complex assessment is required of the effects of a requirement on competition. The relative application of these two principles is also uncertain making litigation likely.

Minimum Unit Pricing for Alcohol

The rules on minimum unit pricing for alcohol in Scotland are already in force and as such would not be subject to scrutiny in light of the Bill. Clause 4(4) of the Bill excludes statutory requirements:

- That were applicable the day before the entry into force of the provisions of the Bill, and
- That had no corresponding requirement in force in each of the other parts of the UK.

However, it needs to be recalled that in terms of section 2 of the Alcohol (Minimum Pricing) (Scotland) Act 2012, the provisions expire 6 years from their date of entry into force (May 2024). Scottish Ministers may, however, after 5 years order the continuation of minimum unit pricing. The continuation of the scheme would not itself bring minimum unit pricing within the scope of the UKIM Bill. Clause 4(4) of the Bill states that the re-enactment without substantive change of a statutory requirement maintains the continuity required to meet the conditions of the clause. And although minimum unit pricing has now been introduced in Wales, there are currently no such rules elsewhere in the UK.

The big problem might be if the Scottish Government – following its report on the effects of MUP required under the Act – decides to modify the operation of the legislation. While the UKIM Bill does not constrain Scottish ministers if they wish to maintain the scheme unchanged, the introduction of substantive changes would then bring it within the scope of the Bill. Although the Bill is not clear on the point, presumably the provisions of the Bill would only be applied to those modifications of the 2012 Act and not the entirety of the Act.

If modifications were made and the provisions of the Bill triggered then it would be crucial to know how minimum unit pricing would be characterised under the Bill. As was noted in respect of the 20p deposit, the Bill does not expressly bring pricing within its scope. Yet it was clear that under EU law, minimum unit pricing was considered to be a restriction on market access. The CJEU did not characterise the measure as a ‘selling arrangement’ – rules relating to the conditions of sale of a good which are broadly within the scope of the non-discrimination principle under the Bill – and so it might be considered that the mutual recognition principle ought to apply. However, this point was not sufficiently addressed during the course of the litigation so it may be possible to argue it either way.

If the mutual recognition principle is applied, there is no scope to seek to protect the rules because of their health objective. The requirements would be disapplied insofar as they were applicable to alcohol lawfully for sale in another part of the UK. If the non-discrimination principle is applied then it would have to be determined what sort of impact the rules had and if found to be indirectly discriminatory then the legitimate aim would have to be considered.

Conclusions: As things stand, the existing MUP for alcohol would not be subject to the market access principles under the Bill. However, and following a future review of the operation of the scheme, any modification of the operation of the scheme could result in the provisions of the Bill becoming applicable. Given that the legal tests would be different from those applied previously under EU law, there is evident scope for further litigation to determine the effects of the UKIM Bill on any new version of the MUP scheme.

Water Provision

There has been some discussion about whether the system for the provision of water in Scotland might fall within the scope of the Bill. Water is both a commodity (good) and a service and so could, in principle, be affected by the Bill and its market access principles. However, in respect of goods, Clause 14(2) of the Bill provides that:

*“Goods” means any tangible movable, or corporeal moveable, thing, **but not water or gas** that is not offered for sale in a limited volume or set quantity.*

Therefore, if the provision of water does fall within the scope of the Bill it would be in respect of the provision of “services”.

The Bill deals with services in the following way:

Principle	<i>Mutual Recognition</i>	<i>Non-Discrimination</i>
Application	Authorisation Requirements – a legislative requirement that a service provider must have the permission of a regulator before carrying on a business of providing particular services	Other Regulatory Requirements – a legislative requirement that would if not satisfied ... prevent a service provider from carrying on a business of providing particular services
Specific Exclusions	Water Supply and Sewerage Services NOT excluded	Water Supply and Sewerage Services excluded
General Exclusion For Legislative Requirements	The relevant requirement: Is in force on the day before the day on which provision comes into force, OR Comes into force on or after the day on which provision comes into force if it re-enacts (without substantive change) a legislative requirement in force immediately before that day	

It is clear that “water supply and sewerage services” are specifically excluded from the operation of the non-discrimination principle. No such exclusion is made for the application of the mutual recognition principle which would cover authorisations to provide water services. Other utility network services – electricity, gas, postal, transport – are treated in the same way i.e. excluded from the operation of the non-discrimination principle but not from the mutual recognition principle.

Scope of Application of the Mutual Recognition Principle – Authorisations

The mutual recognition principle disappplies an authorisation requirement in one part of the UK where a person is authorised to provide those services in another part of the UK. In other words, the service can be provided in one part of the UK based on the authorisation obtained in another part of the UK. In the case of water services, the issue would then be whether this would mean that water companies in England could rely on the Bill to offer water services in Scotland without the need for an authorisation in Scotland.

An important question is whether the provision of water services in Scotland falls within the definition of an authorisation under the Bill namely, services are provided pursuant to a legislative requirement by which a service provider must have permission of a regulator to provide such services.

Scottish Water was created by the Water Industry (Scotland) Act. It still needs to be determined whether the statutory scheme is one in which a service provider must have the permission of a regulator. A “regulator” for the purposes means a person exercising regulatory functions. “Regulatory functions” includes imposing or securing compliance with “requirements, restrictions or conditions, or setting standards or giving advice in relation to the [service]”. A “regulator” includes Scottish Ministers.

Scottish Water is designated as the public water supplier for the purposes of water quality regulation by the Drinking Water Quality Regulator for Scotland. However, the regulation of water quality is not the same as an authorisation to provide services (it would fall within the definition of regulatory requirements and would be subject to the non-discrimination principle were water supply services not excluded from it).

Scottish Water is a creature of statute established as a body corporate. While Scottish Ministers have extensive powers in terms of the composition and management of Scottish Water, its powers flow directly from statute. It is not providing services pursuant to a permission but rather has a statutory duty to supply pursuant to the Water (Scotland) Act 1980 as amended. As there is, then, no general statutory permission regime for the provision of water services, there is no legislative requirement capable of disapplication pursuant to the mutual recognition principle. Without being expressly excluded from the scope of the mutual recognition principle, the legislative scheme by which water services are provided in Scotland could be interpreted as not susceptible to the application of the mutual recognition principle as a means of providing market access for water companies in other parts of the UK.

Even if that interpretation was wrong and it was considered that Scottish Water was providing a service pursuant to a permission, the general exclusion for legislative enactments in force before the entry into force of the UKIM would apply. Obviously, any substantive change in that legislation could lead to the provisions of the Bill being triggered.

Conclusion: while water supply is excluded from the scope of application of the non-discrimination principle it is not excluded from the mutual recognition principle. However, applying that principle to the way in which water supply is organised in Scotland is not without its difficulties and it may be that the Bill alone would not provide a means of obtaining market access for water companies in other parts of the UK.

Final Point

The Bill empowers the Secretary of State to make changes to the activities included or excluded within its scope. Accordingly, the position could change once the Bill enters into force. Moreover, the analysis does not take into account the impact of any common frameworks which may be agreed. The Bill does not create an explicit mechanism by which the market access principles may be disapplied to the extent that a common framework is in place. It is unclear whether the ministerial power to amend the Schedules to the Bill would include suspending the market access principles where common frameworks exist.