CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE

12th Meeting 2021, Session 6

2 December 2021

The UK Internal Market

1. The Committee is currently conducting an inquiry on the UK Internal Market. The aim of this inquiry is to consider the implications of the UK internal market for Scotland including how devolution will work going forward.

2. This is the second evidence session on this topic and the Committee will take evidence from two panels of witnesses who will join the meeting remotely.

3. Panel 1 will focus on the Protocol on Ireland and Northern Ireland and will consist of—

   - Billy Melo Araujo, Senior Lecturer, School of Law, Queen's University Belfast
   - Seamus Leheny, Northern Ireland Policy Manager, Logistics UK

4. Panel 2 will focus on UK Internal Market more generally and will consist of—

   - Professor Stephen Weatherill, Emeritus Jacques Delors Professor of European Law, University of Oxford
   - Professor Jo Hunt, Professor in Law, Cardiff University
   - Professor Nicola McEwen, Senior Fellow of the UK in a Changing Europe

5. Members can find the written submissions from Mr Melo Araujo, Professor Weatherill, Professor Hunt and Professor McEwan in **Annexe A**.

6. SPICe has also provided a summary of the written evidence received from the call for views in **Annexe B**.

Committee Clerks
November 2021

Written submission from Billy Melo Araujo, Senior Lecturer, School of Law, Queen's University Belfast

General Overview

Market Access Principles under the Internal Market Act

1 The Internal Market Act establishes two market access principles that govern intra-UK trade in goods.

2 First, the mutual recognition principle (MRP) according to which any good that can lawfully be marketed in one part of the UK can automatically be sold in any other part of the UK. This principle applies to relevant requirements, which are defined as statutory requirements that prohibit the sale of goods or impose an obligation or condition which, unless complied with, will lead to a prohibition of sale. Relevant requirements encompass 'product rules' - that is, rules regulating the physical characteristics of goods such as composition, labelling and packaging.

3 Secondly, the non-discrimination principle (NDP) applies to rules regulating the circumstances or manner in which goods are marketed (where, when and how goods are sold). Two forms of discrimination are prohibited: (i) direct discrimination where a good imported another part of the UK is disadvantaged compared to locally produced goods; and (ii) indirect discrimination where there is no direct discrimination but the application of a local regulation places the imported good at a competitive disadvantage and produces an adverse market effect.

4 There are a certain exceptions to these rules. Indirect discrimination can be justified by reference that are expressly and exhaustively listed legitimate aims in the IMA: protection of the life or health of humans, animals or plants or the protection of public safety or security. Moreover, there are regulatory areas that are carved out from the scope of the MAPs. These include, for example, measures intended to prevent the spread of pests and disease, rules relating to the authorisation of certain chemicals and taxation.

5 One of the main criticisms levelled at the IMA is that, by severely limiting the grounds for the invocation of exceptions to the MAPs, it generates a trend towards deregulation[1]. Where a constituent part of the UK adopts high regulatory standards to achieve a public interest goal that is not recognised in the IMA, such regulatory standards will only apply to locally produced/manufactured goods. This places a higher regulatory burden on

[1] S Weatherill, 'Will the UK survive the United Kingdom Internal Market Act?' UKICE Working Paper 03/2011, 12.

locally produced/manufactured goods and, therefore, places such goods at a competitive disadvantage.

Ireland-Northern Ireland Protocol

6 The Ireland-Northern Ireland Protocol (Protocol) is a legal instrument annexed to the Withdrawal Agreement concluded by the European Union (EU) and the UK. It governs Northern Ireland's (NI) trading relationship with the European Union. One of the central aims of the Protocol is to avoid a return to "hard border" in the island of Ireland. A hard border can be understood as any physical infrastructure marking the border between two jurisdictions.

7 To avoid a hard border, the EU and UK negotiated the Protocol, which requires Northern Ireland to comply with EU customs, internal market and value added tax laws. By keeping NI subject to the EU's customs and regulatory regime, the Protocol ensures that goods are traded between NI and the EU as if NI was still part of the EU. The upshot is that by placing NI in a separate by customs and regulatory regime to that of the rest of the UK, the Protocol has created certain barriers to trade in goods between Great Britain (GB) and Northern Ireland. Barriers faced by GB goods being moved on to NI include (i) customs procedures and declaration requirements; (ii) the application of EU tariffs where GB or third-country imports goods are deemed at risk of being moved on to the EU; and (iii) regulatory compliance checks.

How do the Protocol obligations impact on the operation of the UK internal market and in particular the market access principles?

8 In relation to NI, the market access principles established under the IMA apply in an asymmetric manner. GB goods moving to NI and NI goods moving to GB are subject to separate regimes.

9 GB goods moving to NI face barriers to trade that result from the application of the Protocol. This includes the application of EU customs legislation and EU regulatory compliance checks. By contrast, Section 11 of the IMA provides for unrestricted access for 'qualifying goods' moving from NI to GB.

10 The concept of qualifying NI goods is defined under Article 3 of the Northern Ireland Goods (EU Exit) Regulations 2020. Qualifying NI goods concern:

- Goods that are in free circulation in NI –that is, not subject to any customs supervision, restriction or control which does not arise from the goods being taken out of the territory of the Northern Ireland or the European Union; or

- Goods that have undergone processing operations carried out in Northern Ireland only.

11 The "qualifying goods" criteria are phrased in purposefully vague and broad language in order to avoid trade disruptions in the immediate aftermath of the UK's withdrawal from the EU. The UK government has, however, signalled that these rules are to be refined to ensure that only genuine NI businesses (businesses established in NI) benefit from unfettered access. This is to ensure that that EU imports destined for the GB market are not deliberately routed via NI in order to avoid UK customs checks.

12 The UK government had planned to publish the new rules on NI qualifying goods in October 2021 to coincide with the introduction of full border controls on EU imports. However, the full implementation of UK customs controls on goods moving from the EU to GB was postponed to January 2022 due to ongoing discussions with the EU regarding the potential renegotiation of the Protocol[2].

What are the risks arising from the Protocol for Scottish businesses and the Scottish economy?

13 The application of the Protocol means that goods being moved from Scotland to NI face increased barriers to trade in the shape of customs checks, regulatory checks and, in some cases, tariffs. As a result, it seems likely that Scotland will lose some market share in NI.

14 The UK's decision to apply a light-touch approach to checks between NI and GB may also lead to the diversion of RoI-NI trade to GB-NI. This is because the minimal checks applied at the Irish Sea border may create an incentive for RoI exporters of goods destined to Scotland to route those goods to Scotland via NI.

15 The Protocol may also lead to a reduction of the flow of goods in Scottish ports. Third-country goods that would have previously transited through Scotland on their way to NI may opt to enter NI directly to avoid being subject to dual customs and regulatory checks.

16 It should be noted that analysis conducted by the Northern Ireland Department for the Economy on the potential long-term impact of the Protocol (in combination with a zero-tariff EU-UK trade agreement) anticipates a 5.6%

[2] J Campbell, Brexit: Rules for moving goods from NI to GB delayed 1 September 2021. Available at: https://www.bbc.co.uk/news/uk-northern-ireland-58411406.

reduction in imports from GB and a 5.3% reduction in exports to the rest of the world[3].

What impact might the Protocol have on future trade agreements and how might this impact on Scottish economic interests in negotiating those deals?

17 The fact that NI is subject to a separate customs and regulatory regime to the rest of the UK may reduce the UK's leverage in trade negotiations and, in turn, impact Scottish economic interests. This is because when negotiating trade agreements, the UK cannot guarantee its trading partners access to the NI market. Goods imported into NI from the UK's trading partners may be subject to EU tariffs where they are deemed at risk of being moved on to the EU. Further, any mutual recognition arrangement agreed to in the context of a trade agreement will likely not apply in relation to NI. This means that, when negotiating trade agreements, the UK can only guarantee preferential access to the GB market rather than the entire UK. However, the practical impact of this may be limited to the extent NI represents a small fraction of the UK market.

18 Some current UK trade agreements reflect this special legal status of NI. For example, Article 2.4(a) of the UK Singapore Free Trade agreement provides that in the event of an inconsistency between the Protocol and the trade agreements, parties may adopt measures that are inconsistent with the trade agreement.

19 The Protocol may undermine the ability of NI to fully benefit from UK trade agreements. It will reduce the imports that can access NI on preferential terms agreement in such agreements and will likely exclude NI goods from any mutual recognition arrangement. NI goods exported to countries with whom the UK FTAs may, as a result, face higher tariffs and regulatory barriers than GB exports.

Does the Protocol make regulatory divergence across the UK more or less likely?

20 The Protocol means that further regulatory divergence between, on the one hand, Northern Ireland and, on the other hand, Great Britain is more likely. This is because, unlike NI, GB is not subject to EU internal market rules. Therefore, any future deviation in one of the constituent parts of the UK from EU rules will inevitably cause regulatory divergence with NI. Similarly, because the Protocol requires dynamic alignment, NI has to comply with any new EU internal market legislation falling within the scope of the Protocol. Any new EU legislation may exacerbate regulatory divergence between NI and the rest of the UK.

[3] NI Department for the Economy, Direct Economic Impact of the Northern Ireland Protocol on the NI Economy, December 2020. Available at: https://www.economy-ni.gov.uk/sites/default/files/publications/economy/direct-economic-impact-ni-protocol-on-ni-economy.pdf

What impact might the Protocol have on agreeing UK-wide common frameworks and UK-wide minimum standards?

21 There is a considerable overlap between the scope of the Protocol and the regulatory areas covered by the Protocol[4].

22 The Protocol may undermine the development of UK-wide minimum standards to the extent that it ties NI to the EU regulatory framework in relation to trade in goods. In NI, under the Protocol, EU law will prevail over domestic UK law meaning that common frameworks will only apply in NI to the extent that they do not conflict with applicable EU law. Any change in EU law or in any of the three administrations has the potential to lead to regulatory divergence.

23 It is worth noting that identifying and avoiding regulatory divergence with NI will be no easy task because of the sheer complexity of NI's post-Brexit regulatory regime. This regime is shaped by the interaction of EU law falling under the scope of the Protocol, the UK common frameworks, UK law, changes to retained EU law and NI law and policy.

What are the implications for the Scottish Government's commitment to align with EU law arising from the Ireland/Northern Ireland Protocol?

24 The commitment to align with EU law will minimise regulatory divergence between Scotland and NI. A clear benefit of regulatory alignment is that it will reduce regulatory burden for businesses involved in NI-Scotland trade. Scottish producers or manufacturers wishing to export goods to NI may not have to adapt the product to comply with regulatory standards applicable in NI and vice versa.

25 Regulatory alignment will not, however, remove regulatory barriers faced by Scottish business exporting to NI. In the absence of an agreement on the mutual recognition of rules between the EU and the UK, goods originating from GB will remain subject to checks when accessing NI.

26 Finally, it is worth noting that any decision by Scotland to align with EU law and, in doing so, diverge from the rest of GB may prompt the application the Common Frameworks processes and the application IMA.

Does dynamic alignment arising from the protocol make keeping pace in Scotland more or less likely, for example as a consequence of shared information between the Northern Ireland Executive and Scottish Government?

[4] J Sargeant and M Thimont Jack, 'The UK Internal Market', June 2021. Available at: https://www.instituteforgovernment.org.uk/publications/uk-internal-market.

27 The dynamic alignment arising from the Protocol could be used to strengthen the argument for Scotland to "keep pace" with EU rules. The common frameworks should be used as a platform to facilitate dialogue on areas where regulatory divergence between NI and GB emerge and assess what steps can be taken to minimise such divergence.

What are the challenges in relation to the transparency and accountability of the operation of the protocol and implementation of dynamic alignment given the UK is no longer directly involved in the EU legislative and policy-making process?

28 Article 13(3) of the Protocol on Ireland/Northern Ireland provides the legal basis for dynamic alignment to identified areas of EU law. The EU has an obligation to inform the UK about planned EU legislation falling within the scope of the Protocol, including any legislation amending or replacing acts listed in the Annexes of the Protocol. This occurs through the Protocol's Joint Consultative Working Group (JCWG) – a body constituted of representatives of both the EU and the UK.

29 Where the EU is merely amending or replacing legislation listed in the Protocol, the act will apply automatically in NI. In other words, the UK cannot object to the application of such legislation. Where the EU is planning to adopt a new legislative act that falls within the scope of the Protocol, the EU must notify the UK before these acts are adopted. Upon the request of either the EU or the UK, the Protocol's Joint Committee (which oversees the implementation of the Protocol and makes decisions by mutual consent) will hold an exchange of views on the implications of the newly adopted for the proper functioning of the Protocol. The Joint Committee then has the option to either: (i) adopt the relevant act; or (ii) where no agreement can be found 'examine all further possibilities to maintain the good functioning of this Protocol and take any decision necessary to this effect'.

30 A recent study focusing on the first six months of dynamic regulatory alignment with EU law under the Protocol identified three types of changes: (i) additions to and deletions from the Annexes of the Protocol, (ii) the repeal, replacement and expiry of EU law; and (iii) amendments to EU law implementing applicable EU law[5]. The study found that since the end of the transition there were no additions or deletions made to the Annexes of the Protocol and that number of EU acts applicable in NI post-Brexit had, in fact, reduced in numbers. In the short-term, at least, there have not been significant substantive amendments to the EU law applicable under the Protocol. However, once new EU legislation is added to the Protocol, the questions on the lack of democratic accountability

[5] L Claire Whitten, 'The Protocol: 'dynamic alignment' in post-Brexit Northern Ireland, UK in a Changing Europe', September 2021. Available at: https://ukandeu.ac.uk/long-read/the-protocol-post-brexit-northern-ireland/.

and scrutiny around the implementation of the Protocol will likely come to the fore.

31 While the JCWG offers a venue where the UK could potentially influence the EU, its role remains consultative and the content of the meetings are confidential. The UK government called for the development of "more robust arrangements to ensure that, as rules [EU law] are developed, they take account of their implications for Northern Ireland – and provide a stronger role for those in Northern Ireland to whom they apply (including the Northern Ireland Assembly and Executive, and wider Northern Ireland civic society and business). More recently, the EU has also recognised the need for transparency and proposed the establishment, within the framework of the JCWG, of structured groups with NI stakeholders (including NI authorities, civic society and business).

32 The current system, as well as proposed reforms, falls short of the level of involvement granted to other third countries that are subject to EU dynamic regulatory alignment in the EU decision-making process[6]. For example, under the European Economic Agreement (EEA), the EU has an obligation consult with EEA states when preparing EU legislation that may fall under scope of the agreement. The obligation also includes a requirement to seek the advice of experts of the EEA states in the same way as it seeks advice of EU Member States. While EEA states are required to apply EU law, they have multiple formal and informal structures through they can influence the outcome of the decision making process.

[6] K Hayward, "Flexible and Imaginative': The EU's Accommodation of Northern Ireland in the UK–EU Withdrawal Agreement' (2021) 58(2) *International Studies* 209-210.

Written submission from Professor Stephen Weatherill, Emeritus Jacques Delors Professor of European Law, University of Oxford

Designing an internal market: asking the questions

The United Kingdom Internal Act 2020 addresses a problem caused by Brexit. The release of the UK from the blanket of common rules which are imposed on EU Member States and which applied throughout the UK opens up the possibility that divergent regulatory choices made by the four constituent elements of the UK may cause obstacles to intra-UK trade in goods and services. So leaving the EU's internal market sharpens awareness of the need to decide on the shape of the UK's internal market. The 2020 Act is exactly that decision.

The design of any internal market requires that a choice be made between the competing claims of unimpeded trade (served by excluding the application of rules which cause such impediment) and local regulatory autonomy (served by permitting the application of rules even where they cause such impediment). And, a second order issue, such design requires choices about which institutions shall be empowered to interpret and apply the rules.

Both the EU and the UK internal markets are built on rules which seek to promote unimpeded trade, but neither sets aside completely the virtue of protecting local regulatory autonomy. But the EU's internal market is designed to favour the claims of local regulatory autonomy over the claims of unimpeded trade significantly more than is the UK's internal market. And, the second order issue, the EU scheme is heavily influenced by decades of judicial interpretation of the sparely written provisions of the Treaty, whereas the UK Act is based on tightly drawn and relatively precise legislative provisions which do not envisage a dynamic role for judicial or administrative interpretation.

So, in short, the fundamental question which animates the design of the EU and the UK internal markets is the same - how far to restrict the regulatory autonomy of the constituent elements in order to promote unimpeded trade? But the answer given is different. In the UK the restriction of autonomy is greater than in the EU.

Designing an internal market: answering the questions

Both EU and UK internal market law are both structured around two distinct questions. First, is there a barrier to trade within the internal market caused by a rule applied by one of the constituent elements? Second, if so, is that rule justified? If it is not justified, it may not be applied to goods and services arriving from another of the constituent elements. If it is justified, its application is permitted notwithstanding the impediment to trade within the internal market caused by it (and attention then turns to the political process to determine whether some other way may be found to promote trade while also attending to the concerns which justified intervention in the market by the regulating constituent element, most obviously the adoption of common rules dealing with the matter throughout the entire internal market).

On question one, EU and UK law are largely (but not entirely) the same. The 'market access' principles under the UK Act closely resemble EU free movement law. On question two, they are not the same. Both systems envisage that justification for trade-restrictive rules is permitted, but EU rules permitting justification are significantly more generous than UK rules. That is important in itself. It means that respect for local regulatory autonomy is stronger in the EU than it is in the UK. But it also has implications for the turn to the political process, because it means that in the UK there is less need than in the EU to make that turn because, given the narrower scope envisaged to justify rules, unimpeded trade is more likely already to have been achieved in its internal market by requiring the setting aside of obstacles to intra-UK trade.

What this means in concrete terms

In the EU …

Imagine Ruritania, a Member State of the EU, prohibits the marketing of single-use plastics. First question, is there a barrier to trade within the EU internal market? Yes: consider the exclusion the rule causes to such goods made in another Member State which has no such prohibition. Second question, is the prohibition justified? It would likely need to be litigated to explore the detail, but plausibly so, because the Court of Justice has long accepted that environmental protection is a recognized justification for rules which obstruct cross-border trade in the EU internal market. (And in consequence there is an impetus to seek common solutions through the political process, eg harmonized EU rules governing single-use plastics).

Imagine Ruritania, a Member State of the EU, prohibits the sale of (defined) fatty foods on premises open to minors in order to protect young people from the risk of obesity caused by their consumption. First question, is there a barrier to trade within the EU internal market? Probably not, provided the prohibition does not grant an advantage to locally produced Ruritanian foods. Imported foods are not kept out of the Ruritanian market, rather the way in which they are sold is limited - but so is the way in which all foods are sold.

Imagine Ruritania, a Member State of the EU, prohibits the sale of (defined) fatty foods unless they are labelled to warn of the risk of obesity caused by their consumption. First question, is there a barrier to trade within the EU internal market? Yes: consider the exclusion the rule causes to such goods made in another Member State which has no such prohibition. Second question, is the prohibition justified? It would likely need to be litigated to explore the detail, but plausibly so, because the Court of Justice has long accepted that public health protection, broadly understood to cover much more than contagious disease or contaminated food, is a recognized justification for rules which obstruct cross-border trade in the EU internal market. (And in consequence there is an impetus to seek common solutions through the political process, eg harmonized EU rules governing suppression of obesity).

In the UK ….

Imagine Scotland prohibits the marketing of single-use plastics. First question, is there a barrier to trade within the UK internal market? Yes: consider the exclusion the rule causes to such goods made in (most probably, most obviously) England which has no such prohibition. Second question, is the prohibition justified? No. The UK Internal Market Act recognizes justifications for such obstructive measures which are rooted in the need to control the movement of pests, disease or unsafe food or feed or to address a public health emergency, and there are also exceptions foreseen in particular limited contexts in the case of chemicals, fertilisers, and pesticides and more broadly for taxation, but it does not recognize any room to justify measures based on their contribution to environmental protection. The rules may be applied to Scottish producers but not to goods sourced outside Scotland where the rules are different. (And in consequence there is no impetus to seek common solutions through the political process, eg harmonized UK rules governing single-use plastics).

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Imagine Scotland prohibits the sale of (defined) fatty foods unless they are labelled to warn of the risk of obesity caused by their consumption. First question, is there a barrier to trade within the UK internal market? Yes: consider the exclusion the rule causes to such goods made in (most probably, most obviously) England which has no such prohibition. Second question, is the prohibition justified? No. The UK Internal Market Act recognizes justifications for such obstructive measures which are rooted in the need to control the movement of pests, disease or unsafe food or feed or to address a public health emergency, and there are also exceptions foreseen in particular limited contexts in the case of chemicals, fertilisers, and pesticides and more broadly for taxation, but it does not recognize any room to justify measures based on their contribution to broader notions of public health policy. The rules may be applied to Scottish producers but not to goods sourced outside Scotland where the rules are different. (And in consequence there is no impetus to seek common solutions through the political process, eg harmonized UK rules addressing the risk of obesity).

Drawing the lessons

The lesson is that EU and UK internal market law run in close alignment in deciding whether a measure amounts to a restriction on trade within the internal market. Both preserve the regulatory autonomy of constituent elements in circumstances where there is no demonstrated hindrance to trade between the constituent elements but rather merely hindrance to trading freedom within the regulating constituent element. So Scotland, like Ruritania, may put age limits on permitted access to retail premises. But EU and UK internal market law diverge in deciding whether, once an obstacle to

trade of the required type is shown to exist, it may be justified. The UK internal market is much less receptive to justification than is the EU internal market. So Ruritania, but not Scotland, may call on environmental protection and public health protection to justify its regulatory preferences.

There is, moreover, no scope to appeal to the judiciary in the UK to draw inspiration from the EU model and to interpret the 2020 Act in a manner that is more generous to Scottish (and Welsh) regulatory autonomy than the text permits. The Act is the legislative settlement: available justifications are drawn (narrowly). There is room to alter the Act's design, but only through the political process. It is provided in section 10 (for goods) and section 18 (for services) that a Minister may by the adoption of secondary legislation grant force to agreed common frameworks, which might conceivably cover an agreement to set aside the market access principles in favour of an acceptance that diversity in regulatory choice shall prevail and that intra-UK trade restrictions will be tolerated. But there is no obligation on the UK government to agree a common framework and the political appeal of a common framework in London is not evident, given the deregulatory taste of the UK government directed at internal practice and also its eagerness to be able to offer access on as unrestricted terms as possible to the entire UK market as an inducement to third countries interested in concluding trade deals (a matter reserved to the UK government). In the absence of any such agreement, the market access principles bite without any modification. Moreover the Internal Market Act itself provides that it is not open to the devolved administrations to legislate in a way that contradicts it. Therefore the priority established by the Act makes plain that stricter rules preferred by one part of the UK must be set aside in so far as they contradict one of the market access principles, unless they fall within one of the currently applicable and very narrow exceptions or justifications.

What does this mean?

It means that the UK Internal Market Act 2020 contains a structural bias in favour of market access, and against local regulatory culture.

A regulator within the UK assessing the virtue of a legislative intervention into goods or services markets knows that if what is planned is (i) a measure subject to the Act’s market access principles, (ii) not within a defined exception and ineligible to claim justification and (iii) likely to be undercut by products or services arriving from another part of the UK where such intervention does not exist, then the likely consequence is that such an initiative will place a burden on local traders which will not be shouldered by others elsewhere. And mitigation achieved through the political negotiation of common frameworks is unlikely to come to the rescue.

Assume a legislative act of the Scottish Parliament causes an obstacle to trade within the UK in the manner envisaged by the Act. By far the most likely situation to arise is one in which a product or service originating in England may not be sold in Scotland where the rules are different and more restrictive. Assume the matter does not fall within one of the very limited justifications recognized by the Act. The result is that the

Scottish measure may be applied to goods/ services produced in Scotland but not to those sourced from England. The measure is not unlawful but it is inapplicable to goods/ services coming from outside Scotland.

That calls into question the worth of introducing such a Scottish rule. Its policy objectives are not likely to be met, given that it will be undermined by non-compliant imports from England. It will add costs to Scottish producers that will not be faced by their English competitors. It may induce traders to shift production from Scotland to England in search of lower costs, with no diminution in access to Scottish markets. There arises an obvious chilling effect on new regulatory initiatives. So in form the 2020 Act does not deprive the Scottish Parliament of regulatory power, but in substance it does. Rules made in Scotland no longer apply to all traders active in Scotland.

Precisely because it entertains a narrower understanding of permitted justification for trade-restrictive measures, the UK internal market is built on a more aggressively deregulatory foundation than the EU's. The design of the UK internal market shows far more disrespect for the regulatory autonomy of the constituent elements than does the EU's.

In similar vein, it shows the limitation of a Scottish preference to pursue persisting alignment with EU rules. Where Scottish rules mimic EU rules but where English producers operate according to lower standards, the UK Internal Market Act prevents the application of those rules to imports from England, unless exceptionally they address one of the matters recognized as allowing room for justification by the Act.

The further that England moves away from EU standards, the sharper this problem will become - and that trajectory of moving away seems politically likely.

The Act’s scheme makes it likely and normal that the constituent element of the UK with the lowest level of regulation – which may be no regulation at all – sets the weather for the other constituent elements. For reasons of economic size and political preference that probably means the weather will be English.

A word about Northern Ireland

The Protocol on Ireland and Northern Ireland, which is attached to the EU-UK Withdrawal Agreement, does not cover services, so the UK Internal Market Act applies to the provision of services in and to Northern Ireland in the same way as it applies to the rest of the United Kingdom. But the regulation of goods in Northern Ireland is fundamentally different from the regulation of goods in England, Scotland and Wales. Northern Ireland is locked by the Protocol into a dense network of alignment with EU rules and procedures, including supervision by the Court of Justice. This has been agreed in order to ensure that the border on the island of Ireland may remain soft. It entails that the border between GB and NI must be hardened. In important respects, then, Northern Ireland remains part of the EU internal market, rather than the part of the UK internal market, and in areas covered by the Protocol the UK Internal Market

Act 2020 is in reality a GB Internal Market Act. The terms of the UK's withdrawal from the EU therefore include a direct partition of its internal market into two blocs, Northern Ireland and Great Britain.

Goods which do not comply with EU rules must be kept out of Northern Ireland. The consequence is checks on GB - NI trade. The further that GB diverges from EU standards, the more important the checks. But goods which do not comply with Scottish rules cannot be kept out of Scotland (unless one of the narrow justifications under the Act applies). Scotland may choose to follow the EU regulatory model to which Northern Ireland is bound, but the consequences for trade in goods within the UK internal market are not the same. Those in Northern Ireland who would wish for full participation in the UK internal market are left disappointed, while those in Scotland and Wales who would wish to prioritise local variation over full participation in the UK internal market as shaped by the Act are left disappointed. The political friction is real. What sort of 'United' Kingdom is this?

Written submission from Professor Nicola McEwen, 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

How devolution is being impacted by the new constitutional arrangements arising from the UK internal market.[7]

1.1 The United Kingdom Internal Market Act 2020 (UKIMA) represents the key legal underpinning of the internal market. The centrepiece of the legislation is the two market access principles: mutual recognition and non-discrimination.

1.2 Mutual recognition means that goods entering the Scottish market from other parts of the UK are no longer required to satisfy new regulations set by the Scottish Parliament or Scottish Ministers after the date on which UKIMA came into force, where these concern the production of the goods. This includes requirements with respect to any characteristics, including ingredients, composition, packaging and labelling, as well as mandatory conditions relating to production covering issues such as site of manufacture, record-keeping, inspection and approval. There are very few permissible exceptions, and these relate to highly specific problems, i.e. combating the spread of pests, diseases or unsafe foodstuffs, and even then, only under strictly controlled conditions. In contrast to the EU's internal market law, there is no wider system of justifications or derogations to promote environmental or health objectives, or consumer or employment protection.

1.3 The principle of non-discrimination, covering both direct and indirect discrimination against goods with a 'relevant connection' to another part of the UK, applies to selling arrangements – such as advertising regulations, shop opening restrictions or licensing requirements, as well as mandatory conditions relating to circumstances of sale covering issues like conditions of storage or transportation. Permissible exceptions in the case of direct discrimination are again narrowly drawn to include combating the spread of pests or diseases or responding to a 'public health emergency' posing an 'extraordinary threat' to human health. Indirect discrimination against other UK goods may be justified according to a lower threshold, i.e. where the measures can reasonably be considered a necessary means of achieving a legitimate aim, defined in the

[7] A fuller explanation of UKIMA and its effects on devolution can be found in M. Dougan, J Hunt, N McEwen and A McHarg, *Sleeping with an Elephant: Devolution and the United Kingdom Internal Market Act 2020* (available on request).

legislation as the protection either of the life or health of humans, animals or plants, or of public safety and security.

1.4 Mutual recognition and non-discrimination principles also apply to services, other than those listed in Schedule 2 of UKIMA, and there are provisions requiring recognition of professional qualifications obtained in other parts of the UK (again subject to exceptions).

1.5 UKIMA prioritises unfettered market access over the law-making autonomy of the UK's political institutions. This could have a profound effect on devolution and the ability of the devolved institutions to set their own regulatory standards in pursuit of their own policy goals. The Act does not prevent the Scottish Parliament from continuing to set standards as it sees fit, but these would generally not apply to goods or services entering the Scottish market from other parts of the UK. This is the first time that laws passed by the Scottish Parliament within its law-making competence would not apply to all activity taking place within Scotland. As well as making it more difficult to use regulation in pursuit of policy goals, these measures could generate deregulatory pressures to avoid putting Scottish businesses at a competitive disadvantage, especially in light of the size and scale of the English market and Scotland's large trade deficit with England.[8]

1.6 The Act applies to new regulations, not to those already in place, unless these are substantively amended. The impact is therefore expected to be felt more keenly in the medium to longer term. On the other hand, the Act arguably creates a powerful disincentive to engage in legal reform or policy innovation, in response to changing social and economic or preferences, as any new or substantively amended regulatory initiatives would fall within the scope of the market access principles. What constitutes a 'substantive' amendment is not defined in the Act.

1.7 The Act may also influence the regulatory choices made by the Scottish Government and Scottish Parliament in other ways. For instance, whereas regulations affecting the *production* or *sale* of goods are subject to the market access principles, regulations affecting the *use* of goods are not. Similarly, Schedule 1 para 11 provides that the market access principles in respect of goods do not apply to the imposition of taxes, rates, duties, or similar charges. And section 10 permits (but does not require) the Secretary of State to exempt matters subject to a Common Framework Agreement from the market access principles.

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[8] A. Greig, M. Spowage and G. Roy, *UK Interregional Trade Estimation: Estimates of trade between Northern Ireland, Scotland, Wales and England* (2020), ESCoE Discussion Paper 2020-09.

1.8 During EU membership, all legislatures in the UK were subject to the discipline of the comparable EU free movement principles, and to ensuring that regulatory choices did not create unlawful hindrances to trade within the EU, unless justified by the terms set out in internal market law. For example, minimum alcohol pricing, though a potential hindrance, was eventually judged to be justified on public health grounds.[9] However, whilst the new UK regime resembles that of the EU, the principles are different, both in terms of what is first judged a potential hindrance and then whether it can be justified. It is therefore difficult to predict how exactly the market access principles will be applied, how the Office of the Internal Market will interpret the principles when exercising its reporting functions under the Act, and what approaches will be taken by businesses and regulatory authorities when issues arise as to the enforceability of devolved regulations.

1.9 There are very few legislative commitments in the current programme for government that are likely to be affected by the Act. The proposed Fireworks and Pyrotechnics Bill, as well as the Fireworks (Scotland) Amendment Regulations 2021 that came into force in June, include regulations concerning the conditions of sale of Fireworks, and so are subject to the principle of non-discrimination. Other policy commitments included in the shared programme accompanying the Cooperation Agreement between the Scottish Government and the Scottish Green Party Parliamentary Group, could be subject to both market access principles, including the regulation of single-use plastics, a regulatory framework for zero emissions heating and energy efficiency, new buildings regulations, and new regulations for the aquaculture industry. The discretionary powers in the UK Withdrawal from the European Union (Continuity) (Scotland) Act to enable Scottish Ministers to align devolved Scots law with EU legislation would also on occasion intersect with the market access principles in UKIMA.

1.10 The impact of UKIMA on devolved competence should be seen alongside the impact of Common Frameworks. Common Frameworks represent mechanisms designed to avoid barriers to trade and mobility within the domestic market that might otherwise result from the increased policy divergence that is theoretically possible now that there is no obligation to comply with EU law. They are much narrower in scope than UKIMA's market access principles. Frameworks are best understood as processes of intergovernmental cooperation. They are not policy documents or regulatory rulebooks, nor do they appear to set out common policy approaches. Rather, they establish principles of engagement and ways of working that *might lead to* common approaches - or 'Common Framework Agreements' - where these are deemed to be necessary or desirable. Depending on their scope and content, such common framework agreements could commit

[9] Case C-333/14 *Scotch Whisky Association* ECLI:EU:C:2015:845

the Scottish Government to shared or minimal standards and rules, potentially limiting the scope for action of the Scottish Parliament.

Scrutiny, transparency and accountability challenges – including how the Parliament can best address these challenges.

2.1 Scrutiny of the UK Internal Market Act was hampered by the speed with which it was introduced: a White Paper published in July 2020 was followed by a four-week consultation period, introduction of the Bill on 9 September and Royal Assent just over three months later. The legislation was enacted despite none of the three devolved legislatures giving their consent, after it had been sought according to the Sewel convention.

2.2 The Act gives considerable power to the Secretary of State to amend the legislation, for example, to change the scope of the market access principles or alter the list of legitimate aims for which indirect discrimination could be permitted – currently 'the protection of the life or health of humans, animals or plants' and 'the protection of public safety or security'. Consent must be sought from Scottish ministers, but it is not required. The Secretary of State can proceed without consent after one month, publishing the justification to do so. This consent process is not the same as the Sewel process. The legislation does not assume a role for the Scottish Parliament in considering a consent motion, nor does it provide much time to facilitate consultation with key stakeholders. These discretionary powers could therefore have a detrimental impact on the Parliament's scrutiny function. We recommend that the Committee seek assurances from the Scottish Government that there is a process that can be deployed in the event of such consent requests, and that the Scottish Parliament will be fully involved in decisions over the granting or withholding of consent.

2.2 Evaluation of Common Frameworks is hampered by the lack of transparency in the Frameworks process. Of the 32 Frameworks announced by the UK Government, only 11 have been published, ten of which appear to be provisional. Some information was reported in the last parliament in evidence sessions from the then Cabinet Secretary. More frameworks have been published since then.[10] The Committee may wish to ensure that these are shared with relevant portfolio committees. Strengthening engagement with sister committees in the Senedd and the Northern Ireland Assembly may also enhance the capacity for scrutiny.

The challenges and opportunities in domestic policy divergence including the risks/rewards of policy divergence between the four parts of the UK and the EU.

[10] https://www.gov.uk/government/collections/uk-common-frameworks

3.1 Policy divergence emerges when legislatures and administrations sharing a political space decide to exercise their political autonomy in a way that diverges from the legislative and/or policy decisions made by others. The ability to do things differently was a central motivation for devolution. Among the attractions are the ability to: reflect local preferences and thereby strengthen democratic accountability; reflect distinctive institutional frameworks; and respond to distinctive demographic, economic and geographic needs and concerns. Divergent policies can also spark policy innovation, and new ideas introduced in one territory might be picked up by, and/or adapted to, other territories within and beyond the state.

3.2 Policy divergence can, however, produce effects that may be regarded as adverse. Divergence in public services generates distinctive rights and entitlements within the same country which some may consider unfair. Divergence can also introduce distortions of competition and create barriers to trade and mobility. Increased burdens, in the form of higher taxes or regulatory standards, could put some businesses at a competitive disadvantage, increasing their compliance costs. Attempts to avoid such an outcome might lead to deregulatory pressures - sometimes referred to as ‘a race to the bottom’. Conversely, higher standards, better services and quality of life could make a territory more attractive to some businesses and workers, and potentially induce a ‘race to the top’.

3.3 Internal regulatory divergence may also make it more difficult to strike external trade deals if the central government is unable to commit to trade rules that will apply throughout the state. In some federal countries, sub-state governments are involved in discussions surrounding trade negotiations to help avoid implementation problems once deals are reached. However, UKIMA facilitates the striking of new trade deals by providing that the market access principles apply not only to goods *produced in* other parts of the UK, but also to goods *imported into* other parts of the UK.

3.4 All internal markets, whether federal or multi-level states or international treaty systems, have to strike a balance between regulatory divergence and economic unity. How that balance is struck is a matter of political choice. Whereas devolution prioritized political autonomy and the ability to do things differently, the UK Internal Market Act prioritises unfettered market access. It does not prevent policy divergence, but it limits its impact by disapplying regulatory standards for incoming trade.

The relationship between the Protocol on Ireland and Northern Ireland and the operation of the UK internal market – including whether this poses challenges for Scotland.

4.1 Section 47 of UKIMA guarantees unfettered access to the UK Internal Market for Northern Ireland Goods - though subject to the minor checks and processes on trade from NI to GB contained in the Protocol on Ireland/Northern Ireland. With respect to trade from GB into NI, the principle of unfettered access, and the Act's market access principles more generally, apply subject to the more extensive restrictions and processes contained in the Protocol (rules which are currently the subject of dispute and possible renegotiation between the EU and the UK).

4.2 The Protocol is expected to affect trade between Scotland and Northern Ireland, but the precise nature and extent of these effects will only become clearer over the coming months and years. NI goods have extensive access guarantees to the GB market, whereas GB goods do not enjoy reciprocal access guarantees to the NI market, at least in accordance with the explicit terms of the Protocol as originally agreed between the EU and the UK. This suggests goods from NI could have an apparent asymmetrical advantage over Scottish and other UK goods. The Protocol (as was widely anticipated before its entry into force and as the available trade statistics now seem to suggest) has also disrupted established supply chains from GB to NI in favour of new trading relationships between NI and the Republic of Ireland/the wider EU market. However, continued uncertainty over the application of the Protocol - whether through threats by the UK Government unilaterally to disapply or suspend some of its key elements, or through regular calls for its amendment or renegotiation, or through uncertainty about whether the Protocol will be renewed when the consent of the NI devolved institutions is sought - is also reportedly having a detrimental impact upon trading relationships across GB, NI and further afield.

What the establishment of the UK internal market and the increasingly interconnected nature of devolution means for intergovernmental and interparliamentary relations – including what opportunities and challenges they present.

5.1 Recent developments, from the 2016 devolution settlement to Brexit, have blurred the boundaries between devolved and reserved powers. The 2016 settlement increased the powers of the Scottish Parliament but, at the same time, heightened its exposure to UK Government decisions that had an impact on devolved competences. The UK Government used its authority to sign the UK-EU Withdrawal Agreement and the Trade and Cooperation Agreement on behalf of the UK as a whole, but these agreements have an effect on devolution. These developments led to increased calls, including from the Scottish Parliament

Finance and Constitution Committee and the cross-party Smith Commission, for reforms to intergovernmental relations and for the political autonomy of the devolved institutions to be complemented by increased 'shared rule'.

5.2 In recognition of the need for intergovernmental reforms, the Joint Ministerial Committee, in its plenary format, initiated a review in March 2018. The review has yet to complete, but a progress update issued by the UK Government in March 2021 gave in indication of the likely framework if agreement can be reached between the administrations. This suggests a new three-tier structure for interministerial meetings, an independent secretariat, and an improved dispute resolution process. This process is separate from, and has been adversely affected by, the new constitutional arrangements introduced to underpin the UK internal market.

5.3 There are two broad ways to manage an internal market: by regulation; and by intergovernmental agreement. UKIMA follows the former process, and in doing so, especially in the face of opposition from the devolved institutions, has undermined intergovernmental relations. The Common Frameworks process follows the latter approach, creating new principles of intergovernmental engagement for officials working in narrowly defined areas. However, *the frameworks process is <u>not</u> an example of shared rule*. Frameworks concern areas of devolved competence only, and potentially constrain autonomous action on the part of the devolved institutions. Conversely, shared rule would enable the devolved institutions to influence those areas of reserved competence to which devolution is exposed.

The impact of the EU-UK Trade and Cooperation Agreement and other bilateral trade agreements on the operation of the UK internal market and devolution.

6.1 As noted above, one reason for concern about internal regulatory divergence is its impact on the ability of the UK Government to strike trade deals with the EU and other trade partners. The UK Parliament can, by implementing trade deals in primary legislation, give effect to their rules throughout the UK. However, such legislation, to the extent that it impinges on areas of devolved competence, engages the Sewel Convention, thus risking conflict between the UK and devolved governments. Moreover, unless such legislation itself is protected against subsequent modification, it may not prevent future regulatory divergence. The Secretary of State has powers under sections 35 and 58 of the Scotland Act 1998 to veto Bills or action by the Scottish Ministers which are incompatible with international obligations, but again these veto powers (which have not so far been used) risk creating conflict between the two governments.

6.2 The EU-UK Trade and Co-operation Agreement was incorporated into domestic law via the European Union (Future Relationship) Act 2020 which was enacted in the face of refusal of devolved consent from all three devolved legislatures.

6.3 Since the TCA is not based on regulatory alignment between the EU and the UK, there are hardly any requirements for specific regulatory standards to be enacted across the UK in order to meet the obligations undertaken under the TCA (there are only limited exceptions to this, e.g. as regards social security coordination). Instead, the UK largely agreed to more general and generic regulatory standards across various fields (competition, state aid, labour rights, tax regulation etc) that will need to be created and maintained as a matter of internal law and in accordance with the division of competence between the UK's domestic authorities. These are principally in reserved areas. The Subsidy Control Bill (and the prior reservation of subsidy control by UKIMA) enables the UK Parliament to legislate in compliance with the subsidy control provisions in the TCA.

6.3 Other trade deals may include commitments to specific regulatory standards. However, as noted in para 3.3, UKIMA reduces the necessity for overt conflict between the UK governments as the market access principles apply to imported goods as well as to goods produced within the UK. This could foster further deregulatory pressures for imports, as well as for domestically-produced goods, to avoid local businesses being put at a competitive disadvantage.

6.4 Although the provisions within the Act can ease the implementation of trade agreements by avoiding potential conflict over the scope and implementation of any regulations included within them, this has been achieved by redefining the scope of devolution and recentralising political authority. The overall impact of these measures may have a destabilising effect on the UK's territorial constitution.

Constitution, Europe, External Affairs and Culture Committee

12th Meeting, 2021 (Session 6), Thursday, 2 December

UK Internal Market Inquiry: analysis of written evidence and key themes

Introduction

The Committee is conducting an inquiry on the UK internal market with the aim of considering the implications of the UK internal Market for Scotland, including on how devolution works. The inquiry builds on the work the Committee has started in this area by issuing guidance on the UK internal market to subject committees on scrutiny of the impact of the UK internal market on devolved policy areas.

Overview of evidence received

As part of its inquiry into the UK internal market the Committee issued a call for views which closed on 29 October 2021.

Eighteen written submissions were received. Ten of the responses received were from individuals and eight from organisations. A number of respondents provided a written submission which related to a distinct policy area but did not answer all of the questions asked by the inquiry. Two further written submissions, those from Professor Weatherill and Billy Melo Araujo, were received in advance of the Committee's evidence session on 2 December 2021 and are also included in this analysis.

The purpose of this paper is to draw out key themes from the evidence received by the Committee. As such, where respondents made points which were not relevant to the inquiry, or where responses were not explained in any detail, these are not included in this analysis. Similarly, where extensive factual background information was provided, for example on the UKIMA, it is not covered in this paper.

This paper is structured to follow the key headings under which respondents to the call for views gave their views.

The impact on devolution

The impact of the UK Internal Market Act 2020 (UKIMA) and the operation of the internal market on devolution were explored in a number of submissions.

Responses ranged from discussion on the legal framework which the UKIMA introduces to examples of specific policy areas which may be affected by the market access principles contained within it. Three key themes emerged from the evidence.

1. The interconnected nature of constitutional arrangements

A number of the submissions received were from organisations with particular interest and knowledge in one policy area. The submission from Professor Nicola McEwen, Professor Aileen McHarg, Professor Jo Hunt and Professor Michael Dougan[1] and the submissions from the Institute for Government and the Law Society of Scotland did, however, explore the interconnected nature of the constitutional arrangements in place relevant to the operation of the UK internal market.

The Institute for Government helpfully summarised the constitutional position, stating:

"There are now three key elements to the arrangements managing the UK's internal market: the common frameworks programmes, the UK Internal Market (UKIM) Act 2020 and the Ireland/Northern Ireland Protocol. There are also external factors such as international trade agreements that have implications for the internal arrangements governing the UK internal market.

"These arrangements do not change the terms of the devolution settlements – under the terms of the European Union (Withdrawal) Act 2018, devolved powers previously exercised at EU level returned to the devolved legislatures. But they have significant implications for how these devolved powers may be exercised, and therefore for devolution itself. Common frameworks place some voluntary constraints on their exercise of devolved powers"

Professor McEwen et al suggested that the impact of UKIMA on devolution should not be viewed in isolation, but rather with reference to common frameworks and their potential impact. The submission from Professor McEwen et al explained that:

"The impact of UKIMA on devolved competence should be seen alongside the impact of Common Frameworks. Common Frameworks represent mechanisms

[1] 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.

designed to avoid barriers to trade and mobility within the domestic market that might otherwise result from the increased policy divergence that is theoretically possible now that there is no obligation to comply with EU law. They are much narrower in scope than UKIMA's market access principles. Frameworks are best understood as processes of intergovernmental cooperation. They are not policy documents or regulatory rulebooks, nor do they appear to set out common policy approaches. Rather, they establish principles of engagement and ways of working that might lead to common approaches - or 'Common Framework Agreements' - where these are deemed to be necessary or desirable. Depending on their scope and content, such common framework agreements could commit the Scottish Government to shared or minimal standards and rules, potentially limiting the scope for action of the Scottish Parliament."

In written evidence Stephen Weatherill, Emeritus Jacques Delors Professor of European Union Law at the University of Oxford set out the position between the UKIMA and common frameworks:

"It is provided in section 10 (for goods) and section 18 (for services) that a Minister may by the adoption of secondary legislation grant force to agreed common frameworks, which might conceivably cover an agreement to set aside the market access principles in favour of an acceptance that diversity in regulatory choice shall prevail and that intra-UK trade restrictions will be tolerated. But there is no obligation on the UK government to agree a common framework."

In its submission Alcohol Focus Scotland cited alcohol labelling as a real-world example of where a policy commitment, internal market legislation and common frameworks overlap, explaining:

"The Scottish Government has made clear its preference for mandatory labelling across the UK but has supported the UK Government's attempts to encourage voluntary approaches by the industry. The Scottish Government's Alcohol Framework, however, reserved the right to legislate: "if insufficient progress is made by the time of the UK Government's deadline of September 2019, the Scottish Government will be prepared to consider pursuing a mandatory approach in Scotland"

"The Act [UKIMA] limits the capacity of the Scottish Parliament to regulate on alcohol labelling without the agreement of UK government. Labelling will be subject to common frameworks... The Food Compositional Standards and Labelling provisional common framework was presented to parliament in March 2021, however progress on this has stalled due to the pandemic. This has led Food Standards Scotland to comment that "the resultant legislative landscape is therefore messy and challenging to navigate."

2. The ability of the Scottish Government to drive effective policy reform and the ability of the Scottish Parliament to legislate effectively

The market access principles set out in the UKIMA do not change the competence of the Scottish Parliament or Scottish Ministers. They will, however, have an impact in practice. As the Committee's Guidance on the UK Internal Market notes in relation to the UKIMA internal market rules:

"The Act does not introduce any new statutory limitations on the competence of the Scottish Parliament or Scottish Ministers. But in practice, regulatory competition may constrain the ability of the devolved authorities to exercise their executive and legislative competences. Specifically, UKIMA may not affect the Scottish Parliament's ability to pass a law, but may have an impact on whether that law is effective in relation to goods and services which come from another part of the UK."

A number of submissions noted the effect of new constitutional arrangements on the ability of the Scottish Parliament to legislate effectively. The Institute for Government's submission explained this, saying:

"These arrangements do not change the terms of the devolution settlements – under the terms of the European Union (Withdrawal) Act 2018, devolved powers previously exercised at EU level returned to the devolved legislatures. But they have significant implications for how these devolved powers may be exercised, and therefore for devolution itself."

The Institute went on to explain the impact of UKIMA, stating that:

"each government of the UK will retain the ability to regulate goods and services in their part of the UK, but not all of that regulation will be enforceable against goods and service providers from other parts of the UK. This could undermine the ability of each administration to successfully implement certain policies."

The Law Society of Scotland made a similar point, noting that:

"The Act does not prevent the Scottish Parliament from exercising its legislative powers but provides that the relevant requirements or statutory provisions are of no effect when applied to goods or service providers entering Scotland where these goods or service providers had met statutory regulations in another part of the UK. It is argued by some, including the Scottish Government, that this undermines devolution."

OneKind, an animal welfare charity, also highlighted the gap between the legislative position and the practical effect of the UKIMA, writing:

"The Act undermines devolution and will limit the ability to the Scottish Parliament and Government to improve farmed animal welfare standards. An important point of the Act is the unique mechanism by which it has practical effect. It does not invalidate any laws in any part of the UK but it renders them of no effect in relation to

certain goods. That is important as any part of the UK can pass whatever legislation it wants but in practice there is no point in making rules that can be avoided."

Professor Nicola McEwen et Al gave the view that the UKIMA could have a longer-term chilling effect on legal and policy reform within Scotland, saying:

"The Act applies to new regulations, not to those already in place, unless these are substantively amended. The impact is therefore expected to be felt more keenly in the medium to longer term. On the other hand, the Act arguably creates a powerful disincentive to engage in legal reform or policy innovation, in response to changing social and economic or preferences, as any new or substantively amended regulatory initiatives would fall within the scope of the market access principles. What constitutes a 'substantive' amendment is not defined in the Act…

The submission added that the UKIMA *"may also influence the regulatory choices made by the Scottish Government and Scottish Parliament in other ways."* Highlighting that, for example, regulations affecting the production or sale of goods are subject to the market access principles but those affecting the use of goods are not.

Professor Stephen Weatherill stated that *"the UK Internal Market Act 2020 contains a structural bias in favour of market access, and against local regulatory culture".* Going on to explain this further Professor Weatherill wrote:

"Assume a legislative act of the Scottish Parliament causes an obstacle to trade within the UK in the manner envisaged by the Act. By far the most likely situation to arise is one in which a product or service originating in England may not be sold in Scotland where the rules are different and more restrictive. Assume the matter does not fall within one of the very limited justifications recognized by the Act. The result is that the Scottish measure may be applied to goods/ services produced in Scotland but not to those sourced from England. The measure is not unlawful but it is inapplicable to goods/ services coming from outside Scotland.

"That calls into question the worth of introducing such a Scottish rule. Its policy objectives are not likely to be met, given that it will be undermined by non-compliant imports from England. It will add costs to Scottish producers that will not be faced by their English competitors. It may induce traders to shift production from Scotland to England in search of lower costs, with no diminution in access to Scottish markets. There arises an obvious chilling effect on new regulatory initiatives. So in form the 2020 Act does not deprive the Scottish Parliament of regulatory power, but in substance it does. Rules made in Scotland no longer apply to all traders active in Scotland."

Respondents in specific policy areas were also concerned about the implications of the UK internal market on the ability of the Scottish Parliament and Scottish Ministers to shape policy and legislate effectively.

Alcohol Focus Scotland's (AFS) submission states:

"It is our view that the UK internal market substantially undermines devolved regulatory autonomy and limits the ability of devolved governments to implement measures to improve public health…The non-discrimination principle for goods could also impede the ability of devolved administrations to legislate for public health."

AFS also felt that the market access principles could have a chilling effect on policy innovation in Scotland as well as disincentivising significant change, highlighting:

"serious concerns that the effect of the mutual recognition principle for goods will be to significantly reduce the benefits of introducing new devolved measures to protect public health. Such requirements will be inapplicable to trade from outside Scotland, and as such they will place local Scottish trade at a disadvantage. The net effect is likely to be to stifle policy innovation and to curb the ability to make different public health policy choices at the devolved level. Improvements to pre-existing requirements are also likely to be disincentivised, as any substantive update to such requirements may bring them within the scope of the legislation."

Scottish Health Action on Alcohol Problems (SHAAP) expressed similar concern at the impact of internal market legislation, saying the UKIMA:

"does not identify the circumstances within which the Scottish Parliament can continue to exercise legitimate devolved powers that can affect the free movement of goods within the UK internal without infringing the principle of non-discrimination or of mutual recognition. In particular, it is unclear in which cases Scottish rules seeking to regulate the trade in alcohol and affecting when the latter is sold or how it is priced would be consistent with the principle of non-discrimination or of mutual recognition."

SHAAP went on to set out its concerns that the UK internal market posed a threat:

"for the integrity of the regulatory prerogatives that the Scottish authorities enjoy…in the area of public health and especially alcohol control policy. These concerns will remain unless clarity on the exact limits to UK Ministers' powers is provided, whether this by via legal ruling or by the enactment of further legislation."

It was suggested by SHAAP that "*an approach such as that of the "regulatory action defence" taken in Canada, could ensure greater certainty as to the boundaries between the UK authorities' power to ensure the good functioning of the UK internal market and the devolved administrations' powers".*

SHAAP also raised concerns about the role of the Office for the Internal Market (OIM), stating that:

"it is unclear whether and to what extent…the OIM's functions may affect areas of competence within the Scottish Parliament such as alcohol control policies designed to improve public health. It is acknowledged that the OIM enjoys mainly monitoring and advisory functions and that its role is focused on measuring the impact of different regulatory regimes on intra-UK trade. However, it may be difficult to separate the analysis of this mainly economic impact from an examination of the implications that these differentiated regimes have for the attainment of the policy objectives to which they aim. Accordingly, there is a concern that the OIM's practice

might create uncertainty around the assessment of the "strict necessity" of a devolved measure affecting trade vis-à-vis the fulfilment of one of the legitimate aims listed in Section 8(6) of the Act."

Scottish Environment Link expressed similar concerns that the market access principles set out in the UKIMA could affect Scotland's ability to legislate effectively on environmental issues:

"The new constitutional arrangements risk actions to go 'above and beyond' environmental standards in one part of the UK being stymied by legal challenge from another part. For example, given the urgent need to reduce our carbon footprint and protect precious peatlands, eNGOs have suggested a ban on the production and sale of peat in compost for horticulture. The UKIM Act could pose challenges for Scotland's ambition to implement a ban on the sale of peat for horticulture in this parliamentary session."

The Food and Drink Federation (FDF) and the Northern Ireland Food and Drink Association (NIFDA) said that the impact of the UKIMA on devolution was yet unknown, but highlighted the importance of a well-functioning internal market and the challenges which differing legislation could create for their sector:

"It is too early to fully understand how Scottish devolution will be impacted by the Internal Market Act from a food and drink production perspective…

"Multiple legal jurisdictions with multiple rules is likely to result in all nations of the UK facing the same challenges NI business is currently experiencing as a result.

…many food and drink businesses have multiple factories across the UK, where different productions standards may be legally mandated by their respective parliaments either currently or in the future. Any functioning Internal Market Act should be able to smooth out such problems to avoid business duplication, additional costs and critically to ensure that Scottish businesses are not disadvantaged."

Professor McEwen et al commented on the different regime which the UKIMA creates when compared to the previous EU free movement principles, explaining: that:

"During EU membership, all legislatures in the UK were subject to the discipline of the comparable EU free movement principles, and to ensuring that regulatory choices did not create unlawful hindrances to trade within the EU, unless justified by the terms set out in internal market law. For example, minimum alcohol pricing, though a potential hindrance, was eventually judged to be justified on public health grounds…However, whilst the new UK regime resembles that of the EU, the principles are different, both in terms of what is first judged a potential hindrance and then whether it can be justified. It is therefore difficult to predict how exactly the market access principles will be applied, how the Office of the Internal Market will interpret the principles when exercising its reporting functions under the Act, and what approaches will be taken by businesses and regulatory authorities when issues arise as to the enforceability of devolved regulations."

The submission went on to highlight areas in the Programme for Government and Cooperation Agreement which could be affected by the market access principles of the UKIMA.

"There are very few legislative commitments in the current programme for government that are likely to be affected by the Act. The proposed Fireworks and Pyrotechnics Bill, as well as the Fireworks (Scotland) Amendment Regulations 2021 that came into force in June, include regulations concerning the conditions of sale of Fireworks, and so are subject to the principle of non-discrimination. Other policy commitments included in the shared programme accompanying the Cooperation Agreement between the Scottish Government and the Scottish Green Party Parliamentary Group, could be subject to both market access principles, including the regulation of single-use plastics, a regulatory framework for zero emissions heating and energy efficiency, new buildings regulations, and new regulations for the aquaculture industry. The discretionary powers in the UK Withdrawal from the European Union (Continuity) (Scotland) Act to enable Scottish Ministers to align devolved Scots law with EU legislation would also on occasion intersect with the market access principles in UKIMA."

The Institute for Government explained that whilst all four governments of the UK would need to be cognisant of the internal market rules, the impact in terms of constraint would be felt most by devolved administrations:

"The arrangements governing the UK internal market will require each of the four governments of the UK to take into account rules and regulations in force in other parts of the UK when exercising their powers to an extent that was not required before. However, given the market dominance of England – accounting for 86% of the UK's GDP – the constraining effect of the UK internal market arrangements will be greater for the devolved administrations."

3. The impact of the internal market on standards

The matter of standards was raised by some respondents as a potential impact of the UK internal market. This was of particular concern to respondents in the environment sector.

Scottish Environment LINK suggested that thought be given as to how common frameworks can *"be best used to ensure steps taken to raise standards in Scotland will not be undercut by goods and services of a lower standard from other parts of the UK"* and stated that a key risk is a *"race to the bottom"* where *"each part of the UK is incentivised to lower its regulatory standards in order to remain competitive within the internal market."*

Scottish Environment LINK thought that common frameworks could in fact be the answer to maintaining standards, arguing that:

"If strong common frameworks are agreed collaboratively by the four governments of the UK, there is an opportunity to agree new minimum standards for the

environment. Setting a new baseline for standards of air, water, soil quality amongst many others, would reduce the risk of deregulation as part of a race to the bottom."

Fidra, an environmental charity working to reduce plastic waste also warned against a *"race to the bottom"* on standards, arguing for permitted divergence where this was in the public interest. The submission highlighted a number of areas (for example cotton bud legislation and single use carrier bag charge) where divergence had allowed for legislation in one nation of the UK which then drove change in other nations. Fidra's submission argued that:

"post-Brexit policy must create a framework that encourages progressive environmental initiatives and protects against deregulation and the erosion of existing standards. To prevent a 'race to the bottom', where individual nations can force lower environmental standards to be accepted across the UK, the 'common floor' of EU environmental standards must be replaced with a legally binding commitment to uphold existing standards as a minimum. And, to ensure the Internal Market Bill promotes positive policy change across the UK, the 'principles of mutual recognition and non-discrimination' must include a provision that enables positive divergence for the public interest."

OneKind highlighted its concern that the UKIMA may *"have a freezing effect in keeping the same laws for animal welfare which relate to goods in place as it would be difficult for any part of the UK to increase animal welfare standards while others could simply choose to comply with lower standards"*. The charity suggested that *"Cooperation between different parts of the UK on animal welfare will be very important, to provide a structure for lifting standards and avoiding a freezing effect."*

OneKind also noted the potential future impact of trade deals on standards, saying:

"There is a dichotomy between a reserved issue, trade and its impact on a devolved issue, animal welfare; the scrutiny process for trade deals under CRaG [Constitutional Reform and Governance Act 2010] is a huge problem for animal welfare and environmental standards as negotiating mandates are very vague, the UK Parliament cannot stop any trade deals once they have been agreed and devolved legislative bodies have no say in them at all…The devolved governments should have an absolute role in setting the mandate for negotiations and there should be close consultations throughout the discussion and implementation of deals."

The submission from the FDF and NIFDA highlighted the impact on their members were standards to become an area of political dispute, saying:

"Any system which is arrived at must have minimal invasion on our member's operations. Mutual recognition on production standards (be it environmental, labour or animal welfare) must be agreed at political level. More cost, audits, bureaucracy will not be welcomed."

FDF/NIFDA stated its position that on food labelling *"there should be no impediments to products being sold in any part of the UK regardless of which UK nation's labelling*

is on it in future, should differing schemes emerge to ensure safety, authenticity and to minimise consumer confusion."

Scrutiny, transparency and accountability challenges

Not all of the submissions received commented on this broad area.

The submission from the Law Society of Scotland helpfully highlighted the scrutiny challenges identified by the expert legacy panel to the session five Finance and Constitution Committee. The submission also emphasised the scale of the challenge, particularly in relation to scrutiny of the Scottish Ministers' decisions on whether to keep pace with EU law:

"Even if Scottish Ministers were to adopt only a small fraction of the laws adopted by the EU this could be a significant undertaking."

Two key themes emerged from the evidence submitted.

1. The importance of intergovernmental and interparliamentary relations

In relation to intergovernmental relations, the Law Society suggested an agreement between governments and legislatures across the UK to aid scrutiny.

"Effective communication coupled with confidentiality means that discussions between the Governments are not subjected to proper scrutiny by the Parliament or the public…What is required however is an agreement between the Governments and Legislatures across the UK which will allow for transparency, scrutiny and openness so that the Legislatures can perform their functions of holding Governments to account."

The submission also suggested that divergence could be discussed and managed *"in a constructive and open manner through a formal intergovernmental system"*.

The submission from Professor McEwen et Al highlighted the lack of a role for the Parliament in the consent process within the UKIMA for changes to the market access principles:

"The Act gives considerable power to the Secretary of State to amend the legislation, for example, to change the scope of the market access principles or alter the list of legitimate aims for which indirect discrimination could be permitted – currently 'the protection of the life or health of humans, animals or plants' and 'the protection of public safety or security'. Consent must be sought from Scottish ministers, but it is not required. The Secretary of State can proceed without consent after one month, publishing the justification to do so. This consent process is not the same as the Sewel process. The legislation does not assume a role for the Scottish Parliament in considering a consent motion, nor does it provide much time to facilitate consultation

with key stakeholders. These discretionary powers could therefore have a detrimental impact on the Parliament's scrutiny function.

The submission went on to recommend that:

"the Committee seek assurances from the Scottish Government that there is a process that can be deployed in the event of such consent requests, and that the Scottish Parliament will be fully involved in decisions over the granting or withholding of consent."

The Committee may wish to note that consent requests under UKIMA are captured by SI Protocol 2.

Professor McEwen et all also noted the lack of transparency in the common frameworks process and suggested interparliamentary working as a means to improving scrutiny saying:

"Evaluation of Common Frameworks is hampered by the lack of transparency in the Frameworks process. Of the 32 Frameworks announced by the UK Government, only 11 have been published, ten of which appear to be provisional…The Committee may wish to ensure that these are shared with relevant portfolio committees. Strengthening engagement with sister committees in the Senedd and the Northern Ireland Assembly may also enhance the capacity for scrutiny."

Scottish Environment LINK stated that *"country-level decision-making has improved opportunities for scrutiny by devolved parliaments with greater involvement of NGOs".* The submission raised four key questions around scrutiny and transparency including:

"How will the Scottish Government, and subsequently parliament, be informed of any reviews of market access conducted by the Office for the Internal Market (OIM) in Scotland. What are the intergovernmental arrangements for this and what role might the committee have?"

The submission also raised the question of how intergovernmental mechanisms may be used to manage disputes in areas where there are new constitutional arrangements:

"In the event of a dispute arising from the UKIM Act or common frameworks, the joint ministerial committee structures are expected to be the primary forums to resolve issues. Can the UK or Scottish Government provide information as to how the dispute resolution process will work?"

2. The potential impact of divergence

One of the points raised in a number of submissions was the positive impact of divergence on policy innovation.

The Institute of Government, for example, stating that divergence can:

"act as a 'policy laboratory', allowing different parts of the UK to introduce different policies, evaluate their successes and learn from each other."

Professor McEwen et al making a similar observation, explaining that:

"Among the attractions are the ability to: reflect local preferences and thereby strengthen democratic accountability; reflect distinctive institutional frameworks; and respond to distinctive demographic, economic and geographic needs and concerns. Divergent policies can also spark policy innovation, and new ideas introduced in one territory might be picked up by, and/or adapted to, other territories within and beyond the state."

The environment charity, Fidra, made a similar observation on the positive benefits of divergence, noting that:

"it's vital that devolved administrations retain the ability to champion new and progressive legislation within their own areas of responsibility. Enabling devolved administrations to act quickly where emerging risks are identified or positive change can be implemented, promotes a system that is both agile and responsive, and draws on the expertise from the widest possible network."

Similarly, Alcohol Focus Scotland noted divergence as an opportunity to address particular challenges within nations of the UK, saying:

"The nature and extent of public health problems can vary across UK jurisdictions and devolution enables each to innovate in how it responds. This, in turn, can help to drive UK-wide public health improvements."

The joint submission from the FDF and NIFDA focused on the challenges which divergence creates for business, listing confusion for customers, competitive disadvantage, supply chain disruption and additional costs for businesses as challenges. The submission also raised the concern that producers are *""locked out" of our biggest export market – for Scotland this is England and the EU due to a divergence on food standards."*

The submission went on to highlight forthcoming Deposit Return System (DRS) for Scotland due to be implemented 1 July 2022 which would see a 20 pence deposit paid by consumers on each drinks container they purchase, noting that a similar scheme has been proposed for England and Wales. The submission stated:

"The legislation for a DRS in Scotland is already in place (and so would not be covered by the internal market rules) but by the time DRS legislation in England is brought forward these regulations would have to abide by internal market regulations. This means that there would be an impediment to placing bottle from England, Wales or Northern Ireland on the Scottish market (as it would need to be labelled and registered accordingly, or a fee paid) yet a Scottish bottle could be freely placed on the English market without having the same constraints – thereby increasing the potential for fraud. A way of decreasing fraud would be an aligned system design and timing across the UK".

The Committee may wish to note that the exemption in the UKIMA (section 4) for pre-existing legislation is for legislation which, on 30 December 2020 (being the day before the relevant section of the UKIMA came into force), would have applied in relation to the sale. Since the DRS in Scotland was not in force on that date it would not appear to be a pre-existing requirement.

Professor McEwen et al also explored the challenges of divergence, noting that:

"Policy divergence can, however, produce effects that may be regarded as adverse. Divergence in public services generates distinctive rights and entitlements within the same country which some may consider unfair. Divergence can also introduce distortions of competition and create barriers to trade and mobility. Increased burdens, in the form of higher taxes or regulatory standards, could put some businesses at a competitive disadvantage, increasing their compliance costs. Attempts to avoid such an outcome might lead to deregulatory pressures - sometimes referred to as 'a race to the bottom'."

The submission highlighted the tension between divergence and trade, explaining that:

"Internal regulatory divergence may also make it more difficult to strike external trade deals if the central government is unable to commit to trade rules that will apply throughout the state. In some federal countries, sub-state governments are involved in discussions surrounding trade negotiations to help avoid implementation problems once deals are reached. However, UKIMA facilitates the striking of new trade deals by providing that the market access principles apply not only to goods produced in other parts of the UK, but also to goods imported into other parts of the UK…All internal markets, whether federal or multi-level states or international treaty systems, have to strike a balance between regulatory divergence and economic unity."

The relationship between the Protocol on Ireland and Northern Ireland and the operation of the UK internal market

Due to the Protocol, any goods entering Northern Ireland must comply with EU standards in areas where Northern Ireland is required to apply EU law. This means that goods from England, Scotland or Wales will not automatically be acceptable for sale on the Northern Ireland market. However, most goods from Northern Ireland will be able to benefit from mutual recognition and non-discrimination in Scotland, Wales and England.

Billy Melo Araujo, Senior Lecturer in Law at Queen's University Belfast explained the protocol in written evidence, saying:

"To avoid a hard border, the EU and UK negotiated the Protocol, which requires Northern Ireland to comply with EU customs, internal market and value added tax laws. By keeping NI subject to the EU's customs and regulatory regime, the Protocol ensures that goods are traded between NI and the EU as if NI was still part of the

EU. The upshot is that by placing NI in a separate by customs and regulatory regime to that of the rest of the UK, the Protocol has created certain barriers to trade in goods between Great Britain (GB) and Northern Ireland. Barriers faced by GB goods being moved on to NI include (i) customs procedures and declaration requirements; (ii) the application of EU tariffs where GB or third-country imports goods are deemed at risk of being moved on to the EU; and (iii) regulatory compliance checks."

The submission from Professor McEwen et al explained:

"Section 47 of UKIMA guarantees unfettered access to the UK Internal Market for Northern Ireland Goods - though subject to the minor checks and processes on trade from NI to GB contained in the Protocol on Ireland/Northern Ireland. With respect to trade from GB into NI, the principle of unfettered access, and the Act's market access principles more generally, apply subject to the more extensive restrictions and processes contained in the Protocol."

There were again two central themes to come out of evidence on the relationship between the internal market and the Protocol.

1. Full effect as yet unknown

The submission from Professor McEwen et al went on to argue that the full effect of the internal market and protocol relationship are not yet known:

"The Protocol is expected to affect trade between Scotland and Northern Ireland, but the precise nature and extent of these effects will only become clearer over the coming months and years…The Protocol (as was widely anticipated before its entry into force and as the available trade statistics now seem to suggest) has also disrupted established supply chains from GB to NI in favour of new trading relationships between NI and the Republic of Ireland/the wider EU market. However, continued uncertainty over the application of the Protocol - whether through threats by the UK Government unilaterally to disapply or suspend some of its key elements, or through regular calls for its amendment or renegotiation, or through uncertainty about whether the Protocol will be renewed when the consent of the NI devolved institutions is sought - is also reportedly having a detrimental impact upon trading relationships across GB, NI and further afield."

The Law Society of Scotland described the Protocol as *"in flux"* whilst *"negotiations between the UK and the EU continue to refine its terms and application."*

The Institute for Government similarly highlighted that negotiations were ongoing on exactly what future checks would be required on goods entering Northern Ireland from the rest of GB, writing:

"Goods produced in Scotland will need to comply with EU law in areas covered by the protocol in order to be sold on the Northern Ireland market and be subject to checks and processes on entry. The exact nature of these checks remains under discussion in the UK-EU Joint Committee, which oversees the implementation of the withdrawal agreement, and the recently extended grace periods have delayed the

full implementation of EU law on medicines and parcels and the introduction of agri-food checks for supermarket and their suppliers."

The submission went on to say that the Protocol has introduced additional administrative costs for Scottish producers, highlighting the UK Government's commitment to meet some of these costs through the Trader Support Service for customs declarations, and the Movement Assistance scheme for agri-food certification.

The Institute also noted the potential for *"Scottish producers selling across the UK to have to comply with two regulatory regimes – the EU and the Scottish Government regimes – in areas covered by the protocol."* Saying *"this could increase production costs, and may disincentivise Scottish businesses from selling into the Northern Ireland market."*

The submission from OneKind grounded the protocol in policy terms explaining the effect on animal transports, explaining:

"Under the Withdrawal Agreement, the single animal health and veterinary zone is maintained across the island of Ireland, subject to the periodic consent of the Northern Ireland Assembly. This means that any animals or animal derived products travelling from Great Britain to the island of Ireland - whether it is traveling to Northern Ireland or Ireland - will have to undergo full inspections in line with EU rules. Businesses importing and exporting animal products have already been impacted by the need for sanitary and phytosanitary checks on meat and plant products, respectively, and by the requirement for signed export health certificates for each animal or food consignment even under the light-touch regulation scheme currently in place. This is already leading to delays and complexity which is likely to get worse as and when the UK introduces full checks."

The charity argues for a "*common veterinary area covering the EU and Northern Ireland on one side and Great Britain on the other"* as exists between Switzerland and the EU. Thus establishing *"a common space for the control of animal diseases, the trade in animals and products of animal origin and the import of these animals and products from third countries."*

The submission from FDF and NIFDA emphasized the *"continued lack of certainty around GB-NI trade"* which is described as *"destabilising".* The submission pointed to the latest survey from FDF/NIFDA which showed *"GB sales into NI are already down 15%"* which it concluded *"will get worse if there is no long term solution or if that solutions results in an increase in trade barriers."* The submission also highlighted the experience of the operation of the Protocol in terms of the challenges being faced noting that:

"The complexity arising from regional divergence in standards creates confusion. Already under the NI protocol, we are seeing businesses in GB misinterpreting the NI position, refusing to trade as a consequence and refusing to accept the NI business explanations. Legal recourse to resolve, without an Ombudsman type role is likely to be drawn out and expensive."

Billy Melo Araujo, Senior Lecturer in Law at Queen's University Belfast cited analysis by the Northern Ireland Department for the Economy *"on the potential long-term impact of the Protocol (in combination with a zero-tariff EU-UK trade agreement)"* which *"anticipates a 5.6% reduction in imports from GB and a 5.3% reduction in exports to the rest of the world."*

The submission also highlighted some of the likely effects of the Protocol on Scottish businesses and the Scottish economy, stating:

"The application of the Protocol means that goods being moved from Scotland to NI face increased barriers to trade in the shape of customs checks, regulatory checks and, in some cases, tariffs. As a result, it seems likely that Scotland will lose some market share in NI.

The UK's decision to apply a light-touch approach to checks between NI and GB may also lead to the diversion of RoI-NI trade to GB-NI. This is because the minimal checks applied at the Irish Sea border may create an incentive for RoI exporters of goods destined to Scotland to route those goods to Scotland via NI.

The Protocol may also lead to a reduction of the flow of goods in Scottish ports. Third-country goods that would have previously transited through Scotland on their way to NI may opt to enter NI directly to avoid being subject to dual customs and regulatory checks."

In addition, Billy Melo Araujo examined the potential impact of the Protocol on future trade agreements, writing:

"The fact that NI is subject to a separate customs and regulatory regime to the rest of the UK may reduce the UK's leverage in trade negotiations and, in turn, impact Scottish economic interests. This is because when negotiating trade agreements, the UK cannot guarantee its trading partners access to the NI market."

An example of a trade agreement which reflects the *"special legal status of NI"* was also cited in the submission:

"Article 2.4(a) of the UK Singapore Free Trade agreement provides that in the event of an inconsistency between the Protocol and the trade agreements, parties may adopt measures that are inconsistent with the trade agreement."

2. Complexity of relationship between the Protocol and other constitutional arrangements

The submission from the Institute for Government explained the complex relationship between UKIMA, common frameworks and the Protocol:

"There is significant overlap between common frameworks, the Northern Ireland protocol and the regulatory areas in scope of the UKIM Act. Of the 33 common framework areas set out in the most recently published analysis, 24 are areas where Northern Ireland is bound by EU law under the protocol, and 21 are areas that would

be within scope of the market access principles (MAPs) in the UKIM Act – mostly mutual recognition of goods."

Billy Melo Araujo explored the complexities associated with the *"asymmetric manner"* of requirements under the UKIMA and the Protocol, writing:

"The "qualifying goods" criteria are phrased in purposefully vague and broad language in order to avoid trade disruptions in the immediate aftermath of the UK's withdrawal from the EU. The UK government has, however, signalled that these rules are to be refined to ensure that only genuine NI businesses (businesses established in NI) benefit from unfettered access. This is to ensure that that EU imports destined for the GB market are not deliberately routed via NI in order to avoid UK customs checks.

The UK government had planned to publish the new rules on NI qualifying goods in October 2021 to coincide with the introduction of full border controls on EU imports. However, the full implementation of UK customs controls on goods moving from the EU to GB was postponed to January 2022 due to ongoing discussions with the EU regarding the potential renegotiation of the Protocol."

Exploring the relationship between the Protocol and other new constitutional arrangements such as frameworks, the submission continued:

"The Protocol may undermine the development of UK-wide minimum standards to the extent that it ties NI to the EU regulatory framework in relation to trade in goods. In NI, under the Protocol, EU law will prevail over domestic UK law meaning that common frameworks will only apply in NI to the extent that they do not conflict with applicable EU law. Any change in EU law or in any of the three administrations has the potential to lead to regulatory divergence.

It is worth noting that identifying and avoiding regulatory divergence with NI will be no easy task because of the sheer complexity of NI's post-Brexit regulatory regime. This regime is shaped by the interaction of EU law falling under the scope of the Protocol, the UK common frameworks, UK law, changes to retained EU law and NI law and policy."

It was also noted by Billy Melo Araujo that there was a link between the commitment of Scottish Ministers to keep pace with EU law, the Protocol, the UKIMA, and common frameworks:

"The commitment to align with EU law will minimise regulatory divergence between Scotland and NI. A clear benefit of regulatory alignment is that it will reduce regulatory burden for businesses involved in NI-Scotland trade…Regulatory alignment will not, however, remove regulatory barriers faced by Scottish business exporting to NI…it is worth noting that any decision by Scotland to align with EU law and, in doing so, diverge from the rest of GB may prompt the application the Common Frameworks processes and the application IMA."

What the establishment of the UK internal market and the increasingly interconnected nature of devolution means for intergovernmental and interparliamentary relations

One central theme – the need for improvement and transparency - emerged from the written submissions

The Institute for Government suggested that *"The need to manage the UK internal market post-Brexit has created a need for greater intergovernmental working"* noting this *"poses challenges for legislatures aiming to hold their governments to account, as the lack of transparency over the content of the discussions and negotiations between the government means fewer opportunities for influence."*

The submission also noted the "shared aim" of UK legislatures in seeking "*to understand the implications of the UKIM Act and how common frameworks are being applied in practice, and to hold their respective ministers to account for the decisions that are made in those forums."*

The Institute suggested that *"Better interparliamentary relations would allow relevant select committees in the different legislatures to share information that will help in the scrutiny of these frameworks and allow greater focus on specific issues relating to each nation"* and that "Policy changes could be best brought about by coordinated scrutiny and recommendations from multiple legislatures".

The Institute also highlighted its report on the UK Internal Market which set out options to improve interparliamentary working both at a formal and informal level. The recommendations included:

- Information sharing at official level
- Policy-specific chairs' forums to mirror inter-ministerial groups (including those proposed in the progress update on the review of intergovernmental relations in March 2021)
- Interparliamentary forum(s) on the internal market, building on the model established by the interparliamentary forum on Brexit.

OneKind argued in its submission that *"better coordination between the four devolved Governments"* was needed *"when developing animal standards to understand what the overall objectives are for moving forward."* The submission also highlighted that non-political stakeholders, such as veterinarians, farming bodies and non-governmental organisations should be involved in that initial process.

Scottish Environment LINK echoed the *"need for good intergovernmental communication and a commitment to take a collaborative approach to the challenges and opportunities of the internal market"* and stated its belief that *"developing strong common frameworks would contribute to this."*

The submission also noted that "*it would be helpful if government could set out the role, if any, for the Scottish Parliament in the event of a dispute over the operation of the UKIM."*

The Committee may wish to note that disputes are anticipated to be dealt with under existing intergovernmental mechanisms for dispute resolution. The Office for the Internal Market (OIM) will provide independent reports on the functioning of the internal market and offer advice to the four administrations, it is not anticipated to have a role in dispute resolution. On Tuesday 16 November 2021, the OIM gave evidence to the House of Lords Common Frameworks Scrutiny Committee during which Rachel Merelie, senior director, OIM stated:

"The OIM is not involved in dispute resolution. We are here to provide advice to government, using our economic and technical expertise. We understand that disputes will be managed through intergovenmental relationship procedures that will be agreed between the four Administrations. It is of course possible—I think this is what you are alluding to—that our reports are considered in some shape or form as evidence in support of that process, and we remain open to being used in that way."

The Law Society of Scotland stated that *"the current arrangements lack sufficient transparency and accountability"* adding that *"The Communiques from the JMC meetings are frequently commented upon for their lack of detail."*

The submission continued:

"It is essential that all legislatures in the UK have adequate information of the discussions within the JMC structure in order to hold Ministers, in all the administrations, to account. A helpful step towards providing further information is the recent publication of the reports on The European Union (Withdrawal) Act and Common Frameworks…The Inter-Governmental Relations written agreement between the Scottish Parliament and Scottish Government dated 10 March 2016 was considered to be a strong development in parliamentary scrutiny of inter-governmental relationships…It would however enhance parliamentary scrutiny if Ministers in all legislatures could provide an oral report (which goes beyond the relatively uninformative published communiques) soon after any JMC or specialised JMC meeting."

Professor McEwen et al noted that *"Recent developments, from the 2016 devolution settlement to Brexit, have blurred the boundaries between devolved and reserved powers" explaining that "The 2016 settlement increased the powers of the Scottish Parliament but, at the same time, heightened its exposure to UK Government decisions that had an impact on devolved competences. The UK Government used its authority to sign the UK-EU Withdrawal Agreement and the Trade and Cooperation Agreement on behalf of the UK as a whole, but these agreements have an effect on devolution."*

The submission from Professor McEwen and colleagues also noted the recognition of the need for intergovernmental reforms, citing the not yet complete review which was initiated in March 2018, and the progress update issued by the UK Government in March 2021 which suggested:

"a new three-tier structure for interministerial meetings, an independent secretariat, and an improved dispute resolution process."

The submission added:

"There are two broad ways to manage an internal market: by regulation; and by intergovernmental agreement. UKIMA follows the former process, and in doing so, especially in the face of opposition from the devolved institutions, has undermined intergovernmental relations. The Common Frameworks process follows the latter approach, creating new principles of intergovernmental engagement for officials working in narrowly defined areas. However, the frameworks process is not an example of shared rule. Frameworks concern areas of devolved competence only, and potentially constrain autonomous action on the part of the devolved institutions. Conversely, shared rule would enable the devolved institutions to influence those areas of reserved competence to which devolution is exposed."

The impact of the EU-UK Trade and Cooperation Agreement and other bilateral trade agreements on the operation of the UK internal market and devolution

The final area evidence was sought on was the interplay between the UK internal market and trade – both the EU-UK Trade and Cooperation Agreement (TCA) and other bilateral trade agreements. Trade is a reserved matter and there are legislative mechanisms to ensure that devolved administrations comply with any international agreements.

The three key themes which come through the submissions were as follows:

1.The tension between trade being reserved but the effect of trade agreements being felt in devolved areas.

The Institute for Government indicated that if the UK Government negotiated a trade agreement on the basis of some *"side bargains"* in the margins of trade negotiations and these were in devolved areas, the responsibility to implement those may sit with devolved administrations who may choose not to.

The Law Society of Scotland noted its *"concerns about the broader institutional framework contained in the TCA and the impact on devolution."* The Society's submission noted the establishment of the Parliamentary Partnership Assembly consisting of members of the UK and European parliaments and the lack of any mechanism for the devolved legislatures to be able to express views to either United Kingdom Parliament or the European Parliament. It suggested that:

"The Government should explain how the devolved legislatures and administrations will have a role in this process. It is important that the devolved legislatures are involved because under the various devolution statutes international relations including those with the European Union are reserved to the United Kingdom whereas the implementation of agreements in areas of devolved competence lie with the devolved legislatures and administrations."

Professor McEwen and colleagues also highlighted the powers of the Secretary of State (under sections 35 and 58 of the Scotland Act 1998) to veto Bills or action by the Scottish Ministers which are incompatible with international obligations. It was noted that these powers have not been used to date and, if they were to be used, would risk creating conflict between the two governments.

It was also noted by Professor McEwen and colleagues that *"UKIMA reduces the necessity for overt conflict between the UK governments as the market access principles apply to imported goods as well as to goods produced within the UK."*

2.The link between trade and regulatory regimes

The submission from Professor McEwen et al highlighted the link between trade and regulatory divergence, writing:

"one reason for concern about internal regulatory divergence is its impact on the ability of the UK Government to strike trade deals with the EU and other trade partners. The UK Parliament can, by implementing trade deals in primary legislation, give effect to their rules throughout the UK. However, such legislation, to the extent that it impinges on areas of devolved competence, engages the Sewel Convention, thus risking conflict between the UK and devolved governments. Moreover, unless such legislation itself is protected against subsequent modification, it may not prevent future regulatory divergence."

The Committee may wish to note that in some cases powers are being created in UK primary legislation to implement international agreements by secondary legislation. An example being section 31 of the European Union (Future Relationship) Act 2020 which allows implementation of the EU-UK Trade and Cooperation Agreement (TCA) as well as future agreements under the TCA by secondary legislation. Section 2 of the Trade Act 2021 similarly allows some international trade agreements to be implemented by secondary legislation. A similar power is also proposed in the Professional Qualifications Bill.

The submission also drew out the link between regulatory alignment and the TCA:

"Since the TCA is not based on regulatory alignment between the EU and the UK, there are hardly any requirements for specific regulatory standards to be enacted across the UK in order to meet the obligations undertaken under the TCA (there are only limited exceptions to this, e.g. as regards social security coordination). Instead, the UK largely agreed to more general and generic regulatory standards across various fields (competition, state aid, labour rights, tax regulation etc) that will need to be created and maintained as a matter of internal law and in accordance with the

division of competence between the UK's domestic authorities. These are principally in reserved areas."

Billy Melo Araujo, Senior Lecturer in Law at Queen's University Belfast explored in written evidence the link between the market access principles (MAPs) and regulation, stating:

"One of the main criticisms levelled at the IMA is that, by severely limiting the grounds for the invocation of exceptions to the MAPs, it generates a trend towards deregulation. Where a constituent part of the UK adopts high regulatory standards to achieve a public interest goal that is not recognised in the IMA, such regulatory standards will only apply to locally produced/manufactured goods. This places a higher regulatory burden on locally produced/manufactured goods and, therefore, places such goods at a competitive disadvantage."

3. Inclusion of stakeholders

Scottish Environment Link stated that *"The Agreement is broad and complex…The environment is a key aspect woven through several different parts of the Agreement."*

It suggested that *"the approach of a single advisory group, meeting 1-2 times per year, will not be effective to work through implementation issues"* and noted its argument that the group *"should not only ensure that a balance of civil society interests are represented, but that representation is balanced across the four nations of the UK. This will help to ensure the devolution aspects of TCA implementation are considered and the potential impacts on the internal market can be worked through jointly."*

The FDF and NIFDA's view is that *"it is too early to tell what the long-term impact of the Trade and Co-operation agreement is"* given the implementation phase and several elements have been delayed. The submission did note the view of FDF and NIFDA that *"trade deals should be developed in proper consultation with industry and amongst the four nations of the UK. This approach is most likely to ensure that relevant production standards are not undermined and that trade deals are better as a result."*

Sarah McKay, Senior Researcher, SPICe Research
16/11/2021