Culture, Tourism, Europe and External Affairs Committee

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BY E-MAIL

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UK Internal Market Bill

Dear Bruce,

I am writing to you regarding the UK Government’s Internal Market Bill and the related legislative consent process which the Finance and Constitution Committee has lead responsibility for. I hope that the views of the Committee will be of value in your Committee’s scrutiny of the Bill. I am writing on behalf of a majority of Committee members.¹

The Committee notes that the consultation period on the UK Government White Paper in advance of the Bill lasted for four weeks during the Scottish Parliament’s summer recess period and recognises that the timescale for consideration of the Bill itself is extremely limited. Accordingly, the Committee has limited its consideration of the Bill to comparison of the operation of the European Single Market with the proposals contained in the UK Internal Market Bill. This submission is based on the evidence we have taken from academic experts, advice from the Committee’s adviser on EU constitutional law and from SPICe.

The Committee notes that there has been very limited time for consultation on the UK Government White Paper or for scrutiny of the Bill. Given that this response is situated in the context of comparison with the European Single

¹ Dean Lockhart MSP and Oliver Mundell MSP are not signatories to this letter.
Market the limited timescales for consideration of the Bill stand in marked contrast to the approach taken to legislating within the European Union where the provisions of the Single Market have developed over three decades.

The Bill seeks to address issues of considerable complexity with significant implications for the operability of the devolution settlement arising from Brexit. On that basis, the Committee considers that the timescales provided for scrutiny of the Bill are regrettable.

European Single Market

The European Single Market is based on a legal order underpinned by the European Treaties. Of particular relevance in this context is the Treaty of Rome establishing the free movement of goods, services, capital and labour and the Single European Act (1987) which set the objective of establishing a single market by 31 December 1992. The Committee considers it important to stress that the EU Single Market is a dynamic entity that has developed over the last 30 years and continues to constantly evolve. As the Committee’s adviser notes—

“...The development of the Single Market has had to rely on the consent of the member states, respecting their regulatory and policy competences and political preferences while at the same time ensuring that there are no undue impediments to cross-border trade. This has required striking a balance between principles such as harmonisation and mutual discrimination, and proportionality and subsidiarity.

The resulting regulatory framework is rather complex. To illustrate this complexity, it is illuminating to simply look at the number of headings, principles, exceptions and special provisions that are listed in the European Commission’s Guide to the application of Treaty provisions governing the free movement of goods.”

Professor Catherine Barnard compared the European Single Market and the proposed UK internal market, in tabular form in a written submission to the Committee, which is reproduced in Annexe A to this paper.

Principles

In contrast to the European Single Market which seeks to guarantee the ‘four freedoms’ of goods, services, capital and labour, the UK Internal Market Bill seeks to legislate to achieve the narrower objective of providing ‘market access’ in relation to goods and services whilst ensuring the mutual recognition of qualifications across the UK. In this regard the Bill seeks to introduce the principles of ‘non-discrimination’ and

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‘mutual recognition’. These principles are common to the operation of the European Single Market and to trade law more generally. However, the European Single Market seeks to qualify the operation of these market access principles with a wider set of principles and safeguards which seek to allow Member States to be able to achieve wider public policy objectives. Notably, in the context of the devolution settlement, the European Single Market also requires the operation of the principles of ‘proportionality’ and ‘subsidiarity’ alongside, and equal to, the ‘market access’ principles. These principles are defined in Article 5 of the Treaty on European Union. The Committee’s adviser summarised these principles as follows—

“EU Internal Market Law relies heavily on the principles of proportionality and subsidiarity when determining whether a measure is in contravention to regulation:

a. Subsidiarity: In areas not falling within its exclusive competence, the Union shall only act if the objectives being pursued cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but by reason of the scale or the effects of the envisaged action, rather be better achieved at Union level.

b. Proportionality: The principle of proportionality requires that the content and form of Union action must not exceed what is necessary to achieve the objectives being sought.”

The Committee’s adviser observed when comparing the principles underpinning the EU Single Market to the UK Internal Market proposals that the “Bill appears to strike a different balance, strongly prioritising internal trade and mutual recognition over subsidiarity and proportionality considerations, which are omitted altogether”. Professor Michael Keating noted that the proportionality and subsidiarity principles were intended to safeguard the interests of Member States and, since the Lisbon Treaty, of sub-state governments. He went on to comment that—

“the wide potential scope of internal market provisions in the EU is balanced by the principles of subsidiarity and proportionality. There is no equivalent in the UK devolution legislation”.

Justifications limiting market access

The European Single Market provides for a range of justifications limiting market access in order to achieve wider public policy objectives. Article 36 of the Treaty on the Functioning of the European Union (TFEU) on the prohibition of quantitative restrictions between member states allows for justifications with regard to policies aiming for protection in areas such as health, environment, and for consumers and workers in relation to goods and services. In addition, Article 36 of the TFEU also includes exceptions for the protection of national treasures, protection of industrial or commercial property, public morality, public policy, or public security.

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4 Fabian Zuleeg, Committee adviser on EU constitutional law, Briefing note – ‘Key features of the European Single Market and the UK Internal Market Bill’, para.13, September 2020.
5 Ibid, para.23.
6 Professor Michael Keating, Written Submission, p.6.
In addition, the European Union pursues a wide range of ‘flanking’ measures in order to ensure minimum standards outside of the implementation of the ‘four freedoms’. These ‘flanking measures’ are intended to prevent unfair competition based on social dumping through the lowering of a wide range of standards such as labour, environmental and consumer standards. The Committee’s adviser summarises these ‘flanking’ measures as including—


In contrast, the UK Internal Market Bill sets out a far more limited set of exemptions and derogations to mitigate the market access principles. In terms of the proposed ‘mutual recognition’ principle this would impact upon regulations rules governing ‘product requirements’ such as the ingredients, composition, packaging and labelling of goods. Professor Micheal Dougan summarised, in a written submission, the proposed exemptions to this principle as set out in the Bill as follows—

“Mutual recognition can be denied only to prevent the spread of pests / diseases / unsafe foodstuffs; and even then, only under strictly controlled conditions, e.g. the potential spread must pose a serious health threat, in respect of which the Scottish authorities have provided an adequate, evidence-based assessment, demonstrating also that the relevant measures can reasonably be considered necessary to address that threat. There is no wider system of justifications or derogations, e.g. even for general threats to public health; let alone issues such as environmental, consumer or employment protection”.8

The proposed principle of ‘non-discrimination’ would apply to ‘selling arrangements’ such as advertising regulations, shop restrictions, licensing requirements, transportation and storage requirements. In these circumstances, Professor Dougan summarises the exemptions set out in the Bill to this principle as being—

“if there is direct discrimination against other UK goods, it can only be justified on the grounds of a “public health emergency” posing an “extraordinary threat” to human health. If there is indirect discrimination against other UK goods, then it can be justified if the measures can reasonably be considered a necessary means to protect either human / animal / plant health or public safety / security”.9

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7 Fabian Zuleeg, Committee adviser on EU constitutional law, Briefing note – ‘Key features of the European Single Market and the UK Internal Market Bill’, para.15, September 2020.
8 Professor Michael Dougan, Written submission to the Committee, p.6-7. Accessible at—https://www.parliament.scot/S5_European/Meeting%20Papers/20200921_InternalMarket_MDouganSubmission.pdf
9 Ibid, p.10.
Professor Dougan reflected on the policy implications of the principles contained in
the Bill in the following terms—

“The bill would be highly problematic in any internal market, because it is saying
in effect, “We are going to let market forces determine regulatory standards in
practice. You can all pick your own standards, but we are going to let the market
decide which of those standards will prevail.” That is the effect of the absolutist
mutual recognition that is embodied in the bill”.

The experts we have taken evidence from were unanimous that the effect of the
market access principle would not be to stop the Scottish Government from pursuing
separate policies. However, non-Scottish traders based within the UK would not be
required to follow these policies when exporting goods and services into Scotland and
given the relative size of the English market compared to Scotland that these traders
would be unlikely to adopt Scottish standards. Professor Michael Keating outlined this
position as follows—

“The bill will not prevent Scotland from making its own regulations, but it will
mean that goods and services that meet English regulations will have to be
marketable in Scotland. England is much bigger, so for manufacturers’ product
lines, it will be cheaper to follow English regulations for the big market than to
run a separate product line for Scotland, because the goods will be allowed in. England’s standard might become the default standard”.

The Committee considers that the market access principles contained in the Bill
lack the necessary safeguards to condition the operation of market forces. In
particular, the Committee emphasises the importance of the principles of
proportionality and subsidiarity which are central to the operation of the
European Single Market and are absent from the UK Government proposals. In
addition, the European Single Market also provides for a far wider set of
justifications to limit the operation of the market and enable the pursuit of wider
social and environmental policy objectives and of wider ‘flanking measures’ to
protect against unfair competition. All of these measures are absent in the Bill.

The Committee does not suggest that the UK should seek to implement the
European Single Market approach in its entirety. However, in the Committee’s
view, the Bill utilises the language of the European Single Market without
operationalising the substance. In this regard, the Bill represents a significant
departure from the current rules governing trade within the UK which would
result in the reification of market forces above wider social, environmental and
public policy considerations.

Governance

Critical to the consent of Member States allowing the Single Market to develop has
been robust governance structures. It is worth briefly summarising these governance
structures here. The ratification of new EU Treaties requires the unanimous

10 Culture, Tourism, Europe and External Affairs Committee, Official Report, 24 September 2020,
Col.24.
11 Ibid, Col.5.
agreement of all Member States. The extension of the Single Market into new areas of economic integration, within the framework of the EU Treaties, is subject to Qualified Majority Voting in the appropriate Council of the European Union. In addition, the consent of the European Parliament, as a co-legislator with amendment powers, is required. Ultimately, the Court of Justice of the European Union is the final and highest arbitrator for the interpretation of the legal provisions of the Single Market. Lastly, the European Commission, independent of Member States, monitors the operation of the Single Market with the ability to undertake enforcement.

It is also important to note the *ex ante* process of consultation that the European Union undertakes prior to formally legislating in relation to the European Single Market. Professor Barnard summarised this process, in evidence to the Committee, as follows—

“Under EU directives, there is an obligation that before draft technical standards get adopted, they must be notified to the Commission and to the member states. Member states then have an opportunity to raise objections about the technical standards. It is an *ex ante* approach to governance, rather than a *post hoc* challenge, which is what we have in the internal market bill".\(^\text{12}\)

**EU governance measures and safeguards not contained in the UK proposals**

The UK internal market proposed in the Bill would be defined in scope and content by the UK Government and Parliament. Exemptions to the market access principles would be the responsibility of the UK Government and Parliament. On occasion, in exercise of Ministerial powers to lay regulations, the Bill requires the UK Government to consult with devolved administrations and on other occasions not. The Bill requires, at Clause 3(9), UK Ministers to consult with the devolved administrations when considering relevant requirements in relation to the application of the mutual recognition principle with regard to goods. In relation to the scope of the non-discrimination principle and goods, the Bill at Clause 6(3) requires UK Ministers to consult Scottish Ministers. However, Schedules 1 and 2 of the Bill provide for UK Ministers to amend the list of exclusions from the mutual recognition and non-discrimination principles for goods and services. In both cases, the Bill does not currently contain any requirement for UK Ministers to consult the devolved administrations.

As noted above, the European Commission acts as an independent monitoring and enforcement authority in relation to the European Single Market whilst the Court of Justice of the European Union provides a means of direct redress for individuals and economic actors. In addition, the jurisprudence of the Court also has a critical role in the evolution of the Single Market. The Bill proposes the creation of an independent, advisory body termed the ‘Office for the Internal Market’ (OIM) within the Competition and Markets Authority (CMA). The Explanatory Notes to the Bill suggest that the OIM will “provide all administrations, legislatures, and external stakeholders with published reporting on developments in the UK internal market” (EN, para.79). In addition, clauses in Part 4 of the Bill appear to provide that the UK Government, Scottish Ministers, Welsh Ministers and Northern Ireland departments may request that the CMA provide a report on the impacts of a regulation implemented by another

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\(^\text{12}\) Ibid, Col.7.
administration. The OIM would be a purely advisory body with no enforcement powers with any disputes relating to the internal market requiring to be settled via the courts. In evidence to the Committee, Professor Barnard compared the governance structure of the EU’s Single Market with that proposed for the UK Internal Market as follows—

“The Commission can bring proceedings against a state that, for example, does not comply, for example, with article 34 of the TFEU, and individuals can bring cases. In either instance—an individual claim or the Commission bringing enforcement proceedings—the case is likely to end up before the European Court of Justice, which is an independent court that will adjudicate on what is going on between the individual nations.

Again, such a structure is not clearly set up in the Internal Market Bill; all it has is the Competition and Markets Authority and, within it, the office for the internal market. That will simply carry out investigations and write reports, but those reports can sit and collect dust on the shelves. It is a broader and very weak governance context compared with that in the EU”.

The Committee notes that the Bill provides very limited input for the devolved administrations and legislatures into the operation and oversight of the proposed UK Internal Market. Instead, the scope and content of the Internal Market would be a matter for the UK Government and Parliament despite the interaction of the Bill’s provisions with devolved competences. The Committee considers below the impact of the Bill upon the devolution settlement.

The Committee considers that the robust governance structures that underpin the European Single Market are a key means of building trust in the operation of the Single Market. The Committee considers that the weak governance and enforcement provisions proposed in the Bill are insufficient to build trust with the devolved administrations, legislatures and the people they represent.

Impact on the Devolution Settlement

The Bill seeks to add, at Clause 48, a new ‘reserved’ matter to Schedule 5 of the Scotland Act of ‘subsidy control’ which is understood to refer to State Aid. In addition, the Bill, at Clause 49, seeks to modify Schedule 4 of the Scotland Act to ensure that the Bill would be an ‘entrenched enactment’ and therefore ensure that devolved legislatures cannot amend the contents of the Bill, including in areas where the Bill deals with devolved competences. The Committee has not taken evidence on these provisions and we therefore do not consider them in this letter. Instead, the Committee has focussed attention on the impact of the wider provisions of the Bill, in particular of the proposed ‘market access’ principles, upon devolved competences.

The Bill, as discussed above, prioritises market access over other public policy priorities in a manner that differs significantly from the rules currently governing trade within the UK as part of the EU. The powers in the Bill are forward-looking whilst existing variations in practice between the constituent parts of the UK would remain in place. In this sense, the Bill would only impact on devolved competences where

13 Ibid, Col.10.
changes were sought to existing or new policies. The Committee is aware of examples being cited of policy areas which could be impacted by the provisions in the Bill such as, building standards, food labelling, minimum unit pricing of alcohol and levies on plastic carrier bags. Professor Dougan considered, based on the Bill as introduced, the example of minimum unit pricing of alcohol, in the scenario that the minimum price is changed, as follows—

“The worked-out example of minimum alcohol pricing shows how the operation of the bill means that Scotland could insist that its own domestically produced alcohol has a revised minimum price, but that would be unenforceable on imported English alcohol. In that case, what would be the point of having the rule? All you would be doing is penalising your own producers by raising the price of their good while not being able to enforce the public interest objective that the rule exists to serve in the first place.”

In this sense, the Bill could act to limit policy change or policy innovation with regard to devolved competences. The evidence we have received, with regard to the impact on the devolution settlement, has emphasised the distinction between the existence of powers and the exercise of powers. In this sense, the impact of the Bill upon the devolution settlement is not to add or remove powers from the devolved legislatures but to potentially render a range of devolved competences inoperable. For example, Professor Dougan observed—

“The UK Government is correct to say that the devolved powers will continue to exist on paper and, thanks to Brexit, they may even increase in certain areas. However, in practice, it is an entirely different proposition to say, “By the way, if you exercise some of those devolved competences, you will be able to enforce them only against your own producers and traders, and you cannot enforce them against imported goods coming from the rest of the UK”. For all of the reasons we have discussed, there will be a significant difference between what devolution looks like on paper and how devolution operates in practice thanks to the bill.”

In a similar vein, Professor Barnard commented—

“The devolved competences exist and, on paper, it is shown that all of those have gone to Scotland and Wales. However, the bill significantly constrains the exercise of those competences and, because of the absence of a robust and well-rounded range of exceptions, particularly in the application of the mutual recognition principle, exercise essentially undermines existence.”

For Professor Keating, the Bill “introduces a new principle into the devolution settlement by providing broad, transversal powers for UK ministers to enforce internal market provisions, cutting across devolved fields”.

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15 Ibid, Col. 28.
16 Ibid, Col.29.
The Committee notes the dynamic nature of the European Single Market and considers that the same would be true of the UK Internal Market. The Committee considers that the Bill provides for new constraints on the devolution settlement to be applied, via the market access principles, which would significantly constrain the exercise of current devolved competences.

Common frameworks

The Committee notes that there has been discussion regarding the possibility that common frameworks could provide a means to address many of the issues that the Bills seeks to address. The Bill itself is silent on the common frameworks programme being taken forward by the UK Government and the devolved administrations. However, the Explanatory Notes to the Bill state that—

“the UK Government is: engaging in a process to agree a common approach to regulatory alignment with the devolved administrations. The Common Frameworks Programme aims to protect the UK internal market by providing high levels of regulatory coherence in specific policy areas through close collaboration with devolved administrations”.

Generally, the evidence the Committee has taken considered that the common frameworks approach would provide an appropriate mechanism to address the issues that the Bill seeks to legislate for. For example, Professor Keating stated—

“Some of the common frameworks will be legislative, but the idea is that a few as possible will be legislative and that other mechanisms will be used. If they are legislative, they will be subject to the Sewel convention. Again, the UK Government could override that, although there is no evidence that it would do so.

It seems to me that they will cover most issues. If something arises that is not covered by the common frameworks, there should be a mechanism for dealing with that. The bill seems to be far too drastic in giving the UK Government enormous powers to address what might just be a marginal problem that arises in unstipulated circumstances. There should be a mechanism that is linked to the common frameworks to deal with issues that were not anticipated at the time when the frameworks were created, as they come up, and that should be subject to the same principles of negotiation and consent”.

The Committee welcomes the progress being made to develop common frameworks by the UK Government and the devolved administrations. That this process involves negotiations between all the governments of the UK is to be welcomed. The Committee considers that it is also essential that all the legislatures of the UK have the opportunity to scrutinise and consider whether to consent to common frameworks that have been agreed inter-governmentally.

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18 Explanatory Notes to the Bill, para.8.
The Committee considers that the common frameworks programme has the potential to render the purpose of the UK Internal Market Bill unnecessary. The Committee is therefore unclear as to why the UK Government has considered it necessary to pursue this legislation.

Concluding remarks

The Committee recognises the need for arrangements to be put in place to govern the operation of trade within the UK post-Brexit. The Committee considers that there are significant lessons to be learned from the operation of the European Single Market which should inform the UK Government’s approach. These include the need for transparency, consent, trust and respect for existing constitutional arrangements for jurisdictions that are subject to internal market provisions. The existence of robust governance mechanisms alongside opportunities for genuine debate and scrutiny including individuals and non-governmental actors is also essential.

The Committee considers that the operation of the European Single Market underlines the complexity of the issue which the UK Internal Market Bill seeks to address. The Bill however whilst adopting some of the language of the European Single Market lacks the EU checks and balances that currently apply to trade. The Committee considers that alternative mechanisms, such as common frameworks, that allow for dialogue and include consent should be pursued rather than the approach proposed in the Bill.

Yours sincerely,

Joan McAlpine MSP
Convener, Culture, Tourism, Europe and External Affairs Committee
### Comparison of European Single Market and UK Internal Market proposals

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<tr>
<td>• Customs union and single market</td>
<td>• No rules on TBs (tax, customs expressly excluded)</td>
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<tr>
<td>• Mutual recognition principle applies to all legislation even predating EU membership</td>
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<td>• Conditional mutual recognition</td>
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<td>• Market access - residual catch all; explains scope of Art. 34</td>
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Source: Professor Catherine Barnard, Written Submission to the Committee, p.12.  
[https://www.parliament.scot/S5_European/Meeting%20Papers/20200921_InternalMarket_CBarnardSubmission.pdf](https://www.parliament.scot/S5_European/Meeting%20Papers/20200921_InternalMarket_CBarnardSubmission.pdf)