CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE

AGENDA

22nd Meeting, 2020 (Session 5)
Thursday 24 September 2020

The Committee will meet at 9.00 am in a virtual meeting and will be broadcast on www.scottishparliament.tv.

1. **Decision on taking business in private:** The Committee will decide whether to take item 4 in private.

2. **Future relationship negotiations: internal market:** The Committee will take evidence from—

   Professor Catherine Barnard, Professor of European Union and Labour Law, University of Cambridge;

   Professor Michael Dougan, Professor of European Law and Jean Monnet Chair in EU Law, University of Liverpool;

   Professor Michael Keating, Director, Centre on Constitutional Change.

3. **Consideration of evidence (in private):** The Committee will consider the evidence heard earlier in the meeting.

4. **Correspondence:** The Committee will consider draft correspondence.

5. **Committee adviser (in private):** The Committee will consider candidates for the post of adviser on international trade.

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The papers for this meeting are as follows—

**Agenda item 2**

Note by the Clerk | CTEEA/S5/20/22/1
PRIVATE PAPER | CTEEA/S5/20/22/2 (P)

**Agenda item 4**

PRIVATE PAPER | CTEEA/S5/20/22/3 (P) (to follow)

**Agenda item 5**

PRIVATE PAPER | CTEEA/S5/20/22/4 (P)
Culture, Tourism, Europe and External Affairs Committee

22nd Meeting, 2020 (Session 5), Thursday 24 September 2020

Future Relationship Negotiations: Internal Market

Note by the Clerk

Background

1. In July 2020, the UK Government published a consultation paper on a UK Internal Market. This was followed by the publication of the United Kingdom Internal Market Bill on 9 September 2020. Following the publication of the consultation paper, the Committee agreed to hold an evidence to compare the principles proposed currently for the UK Internal Market with the principles which underpin the operation of the EU Single Market.

Evidence session

2. The Committee will take evidence on the principles that underpin the EU Single Market and those proposed for the UK Internal Market from—
   - Professor Catherine Barnard, Professor of European Union and Labour Law, Cambridge University;
   - Professor Michael Dougan, Professor of European Law and Jean Monnet Chair in EU Law; and
   - Professor Michael Keating, Director, Centre on Constitutional Change.

Supporting documents

3. Written submissions have been received from Professor Dougan and Professor Keating and these are provided at Annex A to this paper. In addition, a written submission has been received from the Law Society of Scotland and which is provided at Annex B to this paper.

4. A briefing note from Fabian Zuleeg, the Committee’s adviser on EU Constitutional Law is provided at Annex C this paper.

5. The House of Commons Library has produced a briefing on the UK Internal Market Bill which can be accessed at—

6. SPICe have also produced a briefing on the Bill which can be accessed at—
ANNEXE A

Written Submission from Professor Michael Dougan

1. This briefing paper examines those provisions of the United Kingdom Internal Market Bill ("UKIM" / "the Bill") specifically relating to internal UK trade; together with their potential impacts upon the devolution settlements in Scotland and Wales.

The Bill contains other important and controversial provisions: e.g. permitting the UK Government directly and deliberately to breach key provisions of the legally binding Withdrawal Agreement insofar as it relates to Northern Ireland; e.g. allowing the UK Government to dispense new public funding across the entire UK regardless of the existing devolution arrangements; e.g. concerning the reservation to the UK Parliament of powers relating to the control of public subsidies. However, those issues are not addressed in this briefing paper.

UKIM: Background and Context

2. The regulation of internal UK trade was not considered a significant issue or problem until the UK’s decision to leave the European Union (including the Customs Union and the Single Market). After all, when the UK first joined the European Economic Communities, there was no system of devolution allowing Scotland or Wales to engage in their own distinctive legislative activities. And when devolution did occur in the late 1990s, the application of common EU rules helped to structure not only the UK’s trade relations with other Member States but also the internal operation of the UK market itself.

3. However, the UK’s withdrawal from the EU now makes it important to decide how far regulatory differences across the constituent territories of the UK will impact upon internal trade in goods and services.

On the one hand, the problem is most certainly genuine: in any state where autonomous regulatory competences are allocated to different territories, the resultant legislative divergences are capable of creating barriers to trade and distortions of competition that need to be addressed and managed.

On the other hand, it is also true that the precise scale of this problem remains (for the time being) uncertain – not least given the novelty of the situation now facing the UK, in which the definition and functioning of the UKIM is only one of a number of relevant but open variables.

However, there are sound reasons to believe that the issue of UK regulatory divergence, and the consequent need for internal market management, will indeed become a real and practical matter: after all, the UK Government has itself promised that Brexit will lead to a significant expansion in devolved competences; while the UK’s rejection of any close future relationship with the EU means that there will be no coherent external reference point for the future evolution of internal UK trade.
4. Different theories of cross-border trade offer very different views about how far regulatory differences between constituent territories should be regarded as a "problem" that needs to be addressed. Moreover, trade law provides us with a "toolkit" of different principles that can be employed – in different combinations and to different degrees – in order to manage potential disruption to cross-border trade in goods or services. For example, harmonisation of laws is very effective at removing barriers to trade and distortions of competition, since it establishes common rules for the participating territories – though for that reason, it comes with considerable costs in terms of accommodating different preferences and respecting local democracy.

5. In the absence of harmonisation, two major principles provide alternative solutions to the problem of cross-border trade. First, non-discrimination between domestic and imported goods / services. Such discrimination may be direct (the application of a blatant criterion that places imports at a disadvantage, e.g. imports must bear a label that domestic goods need not); or indirect (the application of a prima facie neutral criterion that nevertheless places imports at a particular disadvantage in practice, e.g. service providers must speak a certain language, have a certain qualification or reside in a particular locality).

Non-discrimination is generally seen as a "baseline" requirement for cross-border trade: it eliminates blatant inequalities. But it does not tackle the core problem of cross-border trade, i.e. that the mere existence of different rules (even if neither directly nor indirectly discriminatory) has the effect of partitioning the market along territorial lines.

6. That is why the second major alternative to harmonisation, as provided by our trade law "tool box", is so important. Mutual recognition is the principle that, if good or service X is lawful in Territory A, then good or service X should also be capable of lawful provision in Territory B – even if the latter has different regulatory standards and still expects its own producers / providers to respect them.

Mutual recognition is an extremely effective tool for promoting cross-border trade: after all, it successfully addresses many (non-discriminatory) barriers to trade; and does so without the need for regulatory harmonisation. But mutual recognition is also a more controversial trade principle: it means that Territory B has to live with the practical consequences (in terms of freely imported goods and services) that result from other territories following different and indeed lower regulatory standards. In practice, cross-border trade based on mutual recognition might remove barriers to trade while exaggerating distortions of competition; as well as significantly limiting Territory B's ability to enforce its own economic and social preferences even within its own jurisdiction.

7. For that reason, many trade systems that rely on mutual recognition (including, most notably, the EU Single Market) also incorporate multiple safeguards into its application. In particular: the system needs to carefully define the scope of the rules / choices that should be amenable to mutual recognition in principle (e.g. excluding various public services). Moreover: the system needs to accommodate an appropriate range of justifications, so that Territory B can indeed insist upon
enforcing its better / higher regulatory standards against incoming goods / services *in practice* (eg to protect public health, the environment, consumers and workers etc).

8. In addition, any given trade system needs to address a series of related questions, over and above which precise trade law principles it wishes to employ and adapt from the standard “toolkit”. That is particularly true when mutual recognition is involved: the duty of Territory B to accept the extra-territorial effects of choices made by Territory A, implies the need for a high level of mutual trust: e.g. that Territory A will not engage in unfair competition; or, e.g. that Territory A can be held to account for breaking the “rules of the game”.

9. So the EU system, for example: places heavy emphasis on “flanking” policies to prevent unfair competition based on social dumping through the lowering of labour / environmental / consumer standards etc; and also on the existence of independent and impartial decision-making and dispute resolution processes, so that each Member State has confidence in the rules being defined and then applied equally and fairly. For those reasons, the Member States are also comfortable with the Single Market rules having a strong system of legal enforceability: they can be invoked directly before the national courts, to challenge decisions that unlawfully breach the Single Market rules.

10. Finally, it is crucial that the principles of trade law chosen from our standard “toolbox” take into account the unique features of the specific internal market under consideration. The needs and preferences of the US are very different from those of Australia; while the situation of and challenges facing Canada are very different from those of and facing the EU.

11. In the context of the post-Brexit UKIM, the overriding and undeniable feature that needs to be recognised and addressed is, of course, the relative size of the English population and economy; as well as the political and constitutional dominance of the Westminster Parliament over other parts of UK. Principles that might work well in an internal market such as the EU will simply not operate in the same manner in the context of the UK.

For example: an extensive system of mutual recognition (wide scope of application, limited scope for derogations) means that – whatever the competences of the devolved institutions on paper – the ability of English goods and services freely to access the markets in Scotland or Wales will make it much more difficult in practice for the devolved institutions to adopt or enforce different / higher regulatory standards of their own. Such standards will effectively disadvantage domestic producers / suppliers; while the potential scale of English imports would, in many circumstances, simply negate any prospect of Scotland or Wales delivering on their desired public interest objectives.

12. For those reasons, any UKIM “toolkit” should really incorporate proper and effective safeguards for the devolved institutions – enabling the latter to adopt different economic and social choices without the risk, not so much that London might directly and formally overrule them at will, as that the free market access of English goods or services might simply render autonomous devolved choices
redundant in practice. Otherwise, there is a serious risk that the UKIM will not merely reflect but positively reinforce and indeed magnify the empirical and constitutional facts of English dominance within the UK.

The legal “toolkit” proposed under the UKIM Bill: Key market access principles

13. Yet that is precisely the internal market model that the UK Government has proposed under its UKIM Bill: strong principles of mutual recognition, applying across large sectors of the economy, with strictly limited opportunities for the devolved institutions to enforce their own divergent laws against English imports.

14. This briefing paper will not seek to explain or analyse all of the Bill’s provisions in detail. Instead, we will highlight the key features of the UKIM as proposed under the Bill; then offer a series of (hypothetical) examples to illustrate the UKIM’s potential operation – using the provisions on trade in goods as our primary reference point. The proposals relating to trade in services, as well as the mutual recognition of professional qualifications, will not be addressed as such – though many of the same issues / criticisms obviously also arise in relation to those provisions.

15. The principles applicable to trade in goods can be summarised as follows:

- In the field of goods, the Bill proposes a system of UK market access based on the principles of mutual recognition (applicable to certain categories of rules) and non-discrimination (applicable to other categories of rules). The Bill contains specified restrictions on the scope of application of those market access principles, e.g. they only apply to sales / supplies of goods in the course of a business; do not apply to sales / supplies of goods made in the exercise of public functions; do not apply to powers of taxation; and are without prejudice to the specific regulatory regime applicable to chemicals.

- The principles of mutual recognition and non-discrimination are largely prospective in effect: they would not apply to existing rules that would otherwise be caught by the Bill’s system of UK market access. However, the Bill would kick in, if and when any existing provisions are amended in a significant way; and will obviously apply to any new regulatory requirements introduced by the competent authorities. That creates a powerful disincentive to engage in legal reform or innovation, in response to changing economic or social challenges or preferences.

- For new or substantially amended rules, the main market access principle is mutual recognition. The latter will apply to all rules governing (what in EU law terms would effectively be known as) product requirements: regulatory standards affecting issues such as ingredients, composition, packaging and labelling. Here, the Bill offers only very limited opportunities for Scotland etc to insist upon applying its own standards to English etc imports: 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.

- Besides the core principle of mutual recognition, the Bill also provides for the principle of non-discrimination to apply to another body of new / amended rules, i.e. not those governing product requirements per se; but instead (what in EU law terms would effectively be known as) selling arrangements such as advertising regulations, shop restrictions, licensing requirements, transportation and storage requirements etc. Here, 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 – taking into account, e.g. the availability of alternative measures.

- Although the Bill says that only specific provisions should be directly legally enforceable (i.e. at the behest of an individual trader invoking the UKIM rules before the domestic courts), the proposals would indeed give direct legal effect to the principles of mutual recognition and non-discrimination, i.e. so as to render any offending Scottish etc restrictions inapplicable to / unenforceable against protected traders / providers.

- Moreover, large parts of the UKIM system are subject to amendment by the UK Government in the exercise of delegated powers conferred under the Bill.

In some situations, UK Government ministers are obliged to consult the devolved institutions before exercising their powers, e.g. when proposing to change the definition of rules which are subject to either the mutual recognition or the non-discrimination principle.

In other situations, the UK Government may alter the UKIM rules without any obligation even to consult the devolved institutions, e.g. when proposing to change the range of justifications available in respect of a refusal of mutual recognition, or in respect of direct or indirect discrimination.

Examples to illustrate potential operation of UKIM principles

16. The potential application of the Bill’s core market access principles can usefully be illustrated through some (hypothetical) examples. These examples are intended merely to illustrate the scheme and operation of the Bill; they do not purport to reflect actual devolved competences or actual / planned legislation.

17. **Example One: Scotland has rules on minimum alcohol pricing but now wants to introduce a higher minimum price or to change the basis for the calculation**
Since the UKIM rules are largely prospective and do not apply to existing rules regulating the sale of goods unless those rules are substantively amended, we would need to decide whether the change in price / basis of calculation amounts to a substantive amendment. But arguably, any change in the scope or intensity of an existing regulation would / should automatically be considered substantive.

Assuming the amendments are indeed substantive, the new rules will become governed by the UKIM principles. That immediately raises an important question: are minimum price controls to be considered (in effect) a product requirement subject to full mutual recognition; or (in effect) a selling arrangement subject only to non-discrimination?

The Bill is not explicit on this. However, it would be entirely orthodox (in trade law terms) for minimum price controls to be characterised as a form of product requirement: to regulate the minimum price of a good is to determine one of its inherent characteristics, essential for that particular good to be placed lawfully on the market, in a manner directly akin to prescribing rules about its composition, packaging or labelling.

Assuming a minimum price control would be classified (in effect) as a product requirement and therefore fully subject to the principle of mutual recognition: imported English alcohol would not have to comply with any new Scottish requirements.

Once the mutual recognition obligation applies, there is virtually no scope for Scotland nevertheless to justify applying its new rules to English imports: mutual recognition can only be set aside on the basis of serious health threats arising from the internal movement of pests / diseases / unsafe foodstuffs.

So the basic effect of the UKIM would be to act as a powerful disincentive for Scotland to change its existing rules on minimum alcohol pricing, since any new rules might end up applying only to domestic goods, not English imports – and given the nature of the UK economy, that would effectively destroy the functioning of Scotland’s entire regulatory system.

18. Example Two: Scotland wants to introduce a ban on the sale of products packaged using single use, non-recyclable plastic

Since this is a new regulatory requirement, it would immediately become subject to the market access commitments contained in the UKIM rules.

This time, rules governing packaging would clearly be classified (in effect) as a product requirement and therefore fully subject to the principle of mutual recognition. So: imported English goods would not have to comply with the new Scottish requirements; and there is no relevant ground for Scotland to derogate from its mutual recognition obligation under the legislation.

So the basic effect of the UKIM would be a powerful disincentive for Scotland to exercise a devolved competence to regulate packaging on environmental
grounds, since any new rules would end up applying only to domestic goods, not English imports. Again, that would effectively render the entire regulatory objective and scheme inoperable.

19. **Example Three: Scotland wants to introduce a requirement that fireworks may only be purchased over-the-counter from licensed premises with proof of age**

- Since this is a new regulatory requirement, it would immediately become subject to the market access commitments contained in the UKIM rules. But since it is not (in effect) a product requirement, it will not be governed by the principle of mutual recognition.

- Instead, rules governing manner and place of sale (including a licensing requirement) would be governed by the principle of non-discrimination. The proposed rules do not directly discriminate against goods from England: on their face, they apply to all fireworks, regardless of origin. So the question is: might they instead indirectly discriminate against English imports?

- It is arguable that, by depriving English suppliers of their ability to sell goods to Scottish customers via the internet, the proposed Scottish rules place English goods at a particular disadvantage and have an adverse impact upon competition within the UKIM. However, the Bill calls for a complex economic analysis to verify those claims (see further below).

- Assuming that the Scottish restrictions do indirectly discriminate against English goods, Scotland would then have a limited opportunity to justify its rules: can they reasonably be considered a necessary means to protect human health or public safety?

- For those purposes, the Bill asks whether alternative options are available to protect health or safety. Traders might argue, e.g. that Scotland must also allow internet sales, where the online supplier is able to verify the customer’s age using reliable technological means.

- This example illustrates how Scottish rules might well end up being legal and enforceable – but they must still be scrutinised according to the UKIM rules, including a complex assessment of their potential market effects and public interest goals.

**Some key lessons to draw about the UKIM proposals**

20. The fact that the Bill’s principles are largely prospective but will apply to new rules as well as existing rules which are amended in any substantive way creates a significant disincentive to engage in legal reform or regulatory innovation.

21. Where the Bill does apply, its rules are based on a strong market dynamic: they have a wide scope of application, provide strict guarantees of market access capable of overriding / bypassing local regulatory choices, and offer only limited opportunities for exclusion or justification.
22. Even in the best of circumstances, the proposed UKIM rules would generate significant deregulatory pressures – making it much more difficult for one territory to choose / justify / enforce stricter levels of public regulation, in any situation where another territory follows more lax standards.

23. But in the particular context of the UK economy, the Bill’s principles and resultant pressures will simply not operate in a neutral manner across the constituent territories. Taming England’s relative size and power would challenge any internal market system. Instead, the Bill’s planned regime would positively magnify England’s inherent advantages yet further and risk rendering the exercise of many devolved powers redundant in practice. After all: English choices would be able to produce their full effects within Scotland and Wales, on a scale that could simply overwhelm the latter’s own preferences.

24. Moreover, the Bill also needs to be viewed within its wider regulatory and constitutional context. Unlike the EU system: there are no guarantees that the UKIM will operate according to certain minimum common standards in fields such as health, environment, consumer and employment protection. Indeed, the Bill is explicit that a good marketed in England even in the total absence of any relevant public interest regulation, is still entitled to benefit from the principle of mutual recognition when it comes to sale or supply in Scotland.

And again unlike the EU system: there is no attempt to combine the new UKIM principles with reforms to the UK’s overall governance structures, e.g. so as to create more independent and impartial fora for decision-making and dispute resolution between the constituent territories.

Conversely, the conferral of direct legal enforceability upon the core market access principles contained in the Bill can only serve to render its potential impacts and problems even more potent in practice – certainly compared to a system wherein the management of internal trade barriers might indeed be reserved to a system of inter-institutional dialogue and dispute resolution.

25. So on paper, devolution might continue to look the same. Indeed, it might even look more extensive (as the UK Government has repeatedly promised after Brexit). But in practice, the operation of the UKIM has real potential to limit the capacity of the devolved institutions to pursue different economic or social choices from those made in London.

**Other issues arising from the UKIM Bill**

26. Besides those “big picture” issues raised by the Bill for devolution, the UK Government’s UKIM proposals also raise a series of more technical – though still relevant and important – questions about the detailed operation of the core market access principles.

27. For example: the definition of indirect discrimination is not the same as that generally used elsewhere in the EU or UK legal system. Rather than employing a relatively mechanical legal test (is the rule likely to affect more imports than
domestic goods, and does it place imports at a relative disadvantage compared to domestic goods?), the Bill’s definition of indirect discrimination incorporates a surprising and complex economic assessment of the relevant markets and their competitive conditions. That sort of test is especially burdensome, when one considers that it must be used by the courts to decide whether or not any given rule is or is not indirectly discriminatory – and therefore whether or not that rule should be legally enforceable or unenforceable against any given trader.

28. Similar problems of excessive complexity and uncertainty apply also in relation to the Bill’s proposed exclusions from the principle of mutual recognition: individual traders would be able to call upon the courts to evaluate, e.g. whether the potential movement of a pest / disease from England would pose a serious health threat in Scotland, whether the Scottish authorities have provided an adequate, evidence-based assessment for their actions, and whether the relevant measures can reasonably be considered necessary to address the relevant threat.

29. In any case, the Bill would also benefit from clarification of certain provisions. We mentioned above the failure explicitly to categorise minimum price controls as either (in effect) product requirements subject to full mutual recognition or (in effect) selling arrangements subject only to non-discrimination. And there will surely be other situations in which the courts will be called upon to decide where / how to classify a particular type of regulatory requirement.

And yet even such guidance as is offered by the Bill might make it difficult to extract a coherent and persuasive “trade theory” that will help to understand and apply the UKIM’s core distinctions and provisions. For example, provisions concerning the inspection, assessment, registration, certification, approval or authorisation of goods appear to be listed simultaneously as falling within the scope of (in effect) product requirements subject to full mutual recognition and (in effect) selling arrangements subject only to non-discrimination. And there will surely be other situations in which the courts will be called upon to decide where / how to classify a particular type of regulatory requirement.

**How might the Bill be improved?**

30. It is arguable that the underlying problems affecting the UKIM Bill lie in its apparent starting assumption: that regulatory differences capable of creating any barrier to trade are inherently objectionable and must be suppressed in practice. By contrast, this briefing paper has argued that the real problem with the UKIM is not the ability of Scotland or Wales to do certain things differently; the real problem is the sheer empirical fact that, without proper constraints and processes, a strong UKIM system will magnify England’s existing economic and constitutional dominance yet further – and do so to the clear cost of the existing devolution settlements.

31. Even as it stands, the proposed system could be improved in several ways. For example: the legislation could include a much wider system of derogations and justifications, allowing an individual territory to refuse mutual recognition where its local regulations are justified for the protection of a much broader range of public
interest objectives – including the twin grounds of environmental and consumer protection, that occupy such a central role in the management of trade within other internal markets such as the EU Single Market.

32. Going further, one might propose that the unique characteristics of the UKIM are best reflected in avoiding a system of direct legal enforceability at the behest of individual traders / providers; in favour of an effective system of pre-legislative dialogue between the competent authorities from across the UK – allowing potential internal trade problems to be identified and resolved even before they arise; while insisting that any potential barriers which are eventually enacted in law must then be accepted as a fact of economic and regulatory life by all relevant traders and providers.

33. Ideally, there would also be an agreed definition of the minimum “flanking policies” required to prevent principles such as mutual recognition from morphing into a tool for unfair trade practices and harmful social dumping. The existing constitutional fundamentals of the UK might (as ever) make it difficult to enforce such agreed minimum standards in the face of a Westminster Parliament determined to legislate otherwise and regardless of the consent of Scotland or Wales. But a common definition of minimum regulatory standards could still provide the basis for decision-making and dispute resolution within a system of pre-legislative inter-institutional dialogue.
1. Internal Market

An internal market (also known as single market) is an economic concept rather than a precise legal category and can be interpreted in different ways. It is usually seen as a stage in economic integration of territories, beyond a free trade area and a customs union. The main feature is the removal of regulatory barriers to the free movement of goods, services, capital and workers. This may be achieved by deregulation, harmonization of regulations, or mutual recognition of regulatory standards.

The scope of an internal market will vary from one case to another as a result of political judgements about the boundaries between matters that should be subject to market competition and those that should be managed according to social, cultural, environmental or other criteria. Decisions about which items should be in the latter categories and so exempt from internal market rules are often contentious and depend on individual beliefs about the scope of public action.

It has sometimes been said (as in the UK Government’s Internal Market White Paper) that a UK internal market has existed since the Acts of Union.¹ This is misleading, for three reasons:

   a) The concept of an internal market is only relevant in a modern, regulatory state or union;
   b) Such regulatory differences as existed were not all removed by the unions;
   c) The unions abolished the parliaments in Scotland and Ireland², which would have been the main sources of regulatory divergence.

Devolution in 1999 established legislatures in Scotland, Northern Ireland and Wales but only the Northern Ireland Act stipulated that there should be an internal market. Instead, Scotland and Northern Ireland were granted competences on the ‘reserved powers’ model, according to which they can exercise any powers not expressly reserved; this has since been extended to Wales. In addition, all three legislatures and governments were obliged to operate within the constraints of EU law. This includes the laws and judgements arising from the EU Internal Market, which itself evolves over time. It is thus the EU Internal Market that, in many fields, secures an internal market within the UK.

2. The EU Internal Market

The original Treaty of Rome committed the (then) European Economic Community to a common market. The Single European Act (1986) committed to completing the internal market, following a White Paper proposing a ‘single market’. The term now used is ‘internal market’, which has generally replaced references to common market and single market in the treaties. This is a broad concept, aimed at covering matters not included in the old common market formulation. It has steadily extended from

² As well, to be accurate, as that of England
goods to cover services, financial services in particular and, more recently, the digital economy. There have been regular reviews and action plans. A Single Market II Act was proposed in 2012 as a further series of measures to be taken forward.

The internal market is developed over time in directives and regulations of the EU and by judicial interpretation. Directives require member states to take action, while regulations are directly effective. Directives and regulations are formulated by the ‘community method’, in which the Commission takes the initiative, the Council of the European Union approves and the European Parliament gives or withholds consent. In order to facilitate internal market legislation in the 1980s, the EU adopted Qualified Majority Voting. Measures must gain the support of 55 per cent of member states covering 65 per cent of the population. There are also decisions taken by the Commission in individual cases, within the scope of EU law. Directives and regulations are subject to the principles of subsidiarity (decisions must be taken at the lowest level possible) and proportionality (must be only as detailed as necessary). This is to safeguard the interests of member states and, since the Lisbon Treaty, sub-state governments.

Judicial interpretation is ultimately the responsibility of the Court of Justice of the European Union. Some of the most important decisions on the internal market have come from the Court, including the landmark Cassis de Dijon case on mutual recognition. There is a large body of jurisprudence.

Regulatory differences that might hinder trade are addressed in two ways. One is harmonization of regulations and the EU level. The second is mutual recognition, by which, if a good, service or professional qualification is approved for one member state, the good or service can be marketed in any other member state. The aim is to avoid the need for excessive and time-consuming harmonization of regulations at the EU level. Mutual recognition is not universally applicable and there are exceptions including public safety, health or the environment. It can be invoked by businesses denied access to markets because of domestic rules.

Internal market rules and their interpretation can be politically sensitive and controversial. There may be political disagreement over the scope of application of market competition as opposed to public regulation. The minimum pricing of alcohol in Scotland, introduced as a public health measure, was appealed all the way to the Court of Justice of the EU on the grounds that it violated internal market principles, but was ultimately upheld. Matters that have gone to the Court of Justice of the EU include higher education and health services.

3. The UK internal market after Brexit

After the end of the transition (‘implementation’) period, there will be no internal market provision for Great Britain.\(^3\) It is widely agreed that there may be a need for some regulatory harmonization, hence the current discussions about frameworks in key policy fields including agriculture/food standards and the environment. These might not cover all the matters which could be seen as part of an internal market. In the EU, the internal market is a living principle, interpreted over time in relation to

\(^3\) Northern Ireland raises other issues which I do not address here.
current ideas and circumstances. New issues might also arise from international trade agreements, in which partners expect access for their products to all parts of the United Kingdom, irrespective of local regulations, including those set in Scotland in pursuit of dynamic regulatory alignment with the EU.

The UK Government’s Bill on the internal market addresses these issues. The key elements are non-discrimination and mutual recognition in goods, services and professional qualifications. Discrimination could be direct (banning goods, services and professionals from other parts of the UK) or indirect (making rules which in practice could not be met by producers or professionals elsewhere. Mutual recognition means that if a good, service or professional qualification is accepted in one part of the United Kingdom it must be accepted in the other parts. The Scottish and Welsh Governments have raised concerns that this could undermine devolution because, while they could still set their own rules, they could not apply them to incoming goods and services.

4. Who defines the internal market?

The EU internal market is not a static provision but is developed by the European Commission in fulfilment of treaty provisions. The aim is progressively to reduce barriers to trade. The Court of Justice also plays a key role in interpreting the provisions.

The aim of the UK Internal Market Bill is not to create an internal market but to preserve one that purportedly exists. It is striking that nowhere in the White Paper, the Bill or the explanatory notes is the concept of an internal market defined. Instead, there are references to trade, movement of people and general economic integration.

The UK Government will define the scope and content of the internal market. It will be assisted in this by the Competition and Markets Authority (CMA), which is appointed by, and responsible to, the UK Government. It might have been expected that such an advisory body would jointly appointed by the UK and devolved governments.

The White Paper states that ‘Certain social policy measures with little Internal Market impacts, and pre-existing differences and policies, will not be affected.’ The Bill expands on this to include existing provisions and measures aimed at:

(a) The protection of the life or health of humans, animals or plants:
(b) The protection of public safety and security.

This looks like a rather limited set of considerations. The environment is not included.

UK ministers can add or remove exemptions from the list, through a statutory instrument with affirmative resolution of Parliament. A schedule to the Bill lists areas that will be exempt from non-discrimination, mutual recognition or both. Most of these are, in fact, reserved. Exemptions among devolved matters include the health and social services and the practice of law. One item that is included in mutual
recognition is labelling of products, so any such regulation would have to be justified under the narrow terms of (a) or (b) above. Thus, devolved governments would not only be unable to ban products not conforming to their standards (but meeting those elsewhere in the UK); they would not be able to require warnings to be displayed.

The relevant provision for exemptions in the EU is much wider, drawing on the clause in the European Treaties referring to:

*grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.*


5. Who legislates for the internal market?

European internal market rules are set by intergovernmental negotiation and qualified majority voting. There is a large role for judicial interpretation.

The UK internal market rules will be set by the UK Government and Parliament. Before making regulations the Secretary of State must consult the devolved administrations but there is no consent requirement or mechanism.

The Act will be a protected enactment, meaning that devolved legislatures cannot alter its provisions in relation to devolved matters.

6. How are the rules applied, adjudicated?

EU single market rules are interpreted and enforced by the EU Commission, which is independent of member states and can bring legal proceedings against member states. There is no equivalent in the UK constitution or the Internal Market Bill.

The UK internal market rules will be monitored by the Competition and Markets Authority (CMA). Either the UK or a devolved government may request that the CMA investigate any alleged breach of the principles. The subsequent report must be laid before the two Houses of Parliament and the three devolved legislatures. The CMA will not have authority itself to order a change in regulations or bring legal proceedings. It is unlikely that the CMA will be as active as the European Commission in interpreting the internal market principles but we really do not know.

Ultimately, EU internal market rules are decided by the courts, culminating in the Court of Justice of the EU (CJEU). The CJEU is a specialised body, with a lot of experience in this field and is very pro-active in developing the Internal Market programme. It has been criticized for over-zealous interpretation and enforcement of competition requirements, against other public policy considerations. Enforcement of the UK internal market will fall to the courts, although they have little experience in this field, apart from cases arising under EU law. If the UK courts were given the
brief to develop and enforce the internal market without a corresponding brief to defend social or environmental brief, this could similarly bias the system.

7. What are the principles for regulation?

The EU operates according to the precautionary principle, meaning that goods have to be demonstrated to be safe. Other jurisdictions reverse this and require objectors to prove harm. If the precautionary principle were to be relaxed at UK level and for England, this could pose problems for other UK countries wishing to retain it.

8. Implications of mutual recognition

EU mutual recognition rules apply in principle to cross-border trade and do not stop countries regulating their own producers. In practice, it has proved difficult to make a distinction with domestic trade. There are, however, exceptions. As Stephen Weatherill writes: A State is not inevitably obliged to open up its market to a product or service which does not conform with local laws. It may appeal to its tougher standards of health protection, its more assiduous concern for consumer protection or its particular fastidiousness in the area of environmental protection – and it will need to be judged, ultimately by a Court, whether the State has a strong enough justification of this type to place obstructions in the way of the impulse towards market integration. National rules, practices and standards that impede inter-state trade are in this way routinely put to the test.


The mutual recognition provisions in the UK Internal Market Bill would not stop the devolved legislatures from imposing their own regulations, binding on their own producers. These could, however, be undermined if producers from other parts of the UK could sell goods produced to lower standards. Given the size or the respective markets, it is likely that producers based in England would adopt English standards for goods sold across Great Britain.

Mutual recognition would also mean that goods approved for importation from outside the UK would have to meet the rules of only part of Great Britain. As the UK Government will negotiate future trade deals, it could also agree on English standards as the benchmark for these.

The White Paper states that the UK has, and will continue to have, high regulatory standards. This cannot be binding on future UK parliaments or governments. In the EU, by contrast, regulatory standards are embodied in EU law and individual governments cannot derogate from them or change them unilaterally.

9. Constitutional Implications

The UK devolution settlement has always been open to two interpretations. One is that the United Kingdom remains a unitary state in which Westminster has merely 'lent' powers to Scotland, Wales and Northern Ireland and can take them back any time. Evidence for this is the declarations in the devolution statutes that
Westminster’s ability to legislate is unaffected and the Supreme Court Ruling in the *Miller* case that the Sewel Convention, that it would normally do this only with the consent of the relevant devolved legislature, is merely a ‘political’ convention with no binding force. The other interpretation the UK is not a unitary state but a union of nations. In this interpretation, devolution builds on that and represents a major constitutional reform, taking the UK in federalizing direction, if not quite creating a federation. Evidence for this is the rather clear division of powers, with Westminster only having reserved powers and everything else being devolved. Provisions in the revised Scotland and Wales Acts, which recognize the Sewel Convention in statute and pledge their parliaments are permanent features which can be abolished only by referendums in those nations, give further credence to this interpretation.

The Internal Marker Bill follows the former logic. Indeed, White paper declares that ‘The UK is a unitary state with powerful devolved legislatures as well as increasing devolution across England.’

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. This is how the EU Internal Market provisions work, but the constitutional context there is different, involving a range of actors, including the Commission, the Council of the EU representing states and the European Parliament in which no one state has a majority of members. 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.

Two other items represent a return to a unitary conception of the state. ‘Subsidy control’ (I the White Paper) or ‘Regulation of distortive or harmful subsidies’ (in the Bill) is reserved to Westminster after a dispute as to whether it was already reserved or devolved. This is defined broadly to cover payments in any form which distort competition between, or otherwise causes harm of injury to, persons supplying goods or services in the course of a business, whether or not those persons are established in the United Kingdom.

At the same time, UK ministers are given wide powers to spend in devolved fields. This changes the previous assumption that they would spend only in reserved fields and that, with a few exceptions, financial transfers to the devolved administrations would go through the Block allocation governed by the Barnett Formula.

**10. Costs and Benefits**

The EU has done extensive studies on the economic gains of the Internal Market. The White Paper attempts to calculate the economic benefits of the UK internal market and costs of leaving. As the internal market is currently assured by EU these should perhaps be expressed as the cost of leaving the EU.

There is also a calculation of internal market costs in Germany. This suggests that the UK Government is aiming for less regulatory divergence than is found in Germany, which in turn suggests a curtailment of devolution.
Economic costs are not the only factors to be taken into account when appraising internal market provisions. Regulatory measures may be justified on social, environmental or cultural grounds even when they do have an economic cost.

11. Internal Market Provisions Elsewhere

The same types of issues have arisen in other federal or decentralized countries, although the terminology differs. Internal market provisions exist in several federal and devolved countries. Typically, these are agreed in intergovernmental negotiations. There is no case where a central government can unilaterally determine what constitutes the internal market and how it should be interpreted.

In 2017 a Canada Free Trade Agreement was negotiated between the federal government and the provinces, building on earlier agreements. It provides for provinces to agree on mutual recognition of standards but allows exceptions and specifies that provinces can legislate to protect legitimate public policy objectives including public health, social services, safety, consumer protection, cultural diversity, the environment and workers’ rights. There is a dispute resolution procedure, including arbitration.

Switzerland comes closest to the EU model as it adopted an Internal Market Act to allow compliance with the EU Single Market. It is based on non-discrimination and mutual recognition but in practice is developed in intergovernmental negotiations. It is monitored by the Competition Commission and can, in the last instance, be enforced by the courts. Measures are subject to a subsidiarity test.

The United States does not have an internal market act but relies on the Interstate Commerce clause in the Constitution, as interpreted by the courts.

Spain’s Law on the Unity of the Market act was introduced in 2013 but the Catalan government took it to the Constitutional Court, which ruled that a mutual recognition clause was unconstitutional as it allowed autonomous communities to legislate for things happening in other regions (extraterritorial jurisdiction). It establishes a Council for the Internal Market, nominated by the central and regional governments, with an independent secretariat. Matters of dispute may be referred to the intergovernmental Sectoral Conferences and, only in the last resort, to the courts.
Written Submission from Law Society of Scotland

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland’s solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Constitutional Law and Obligations Law Sub-Committees, Trade Policy and Post-Brexit Working Parties have the following comments to make on the United Kingdom Internal Market Bill.

General Comments

PRELIMINARY COMMENT

Recently the bill has attracted considerable attention because of clauses 40-45 in respect of those provisions which will be inconsistent or incompatible with international or other domestic law.

The bill should, as a matter of principle, comply with public international law and the rule of international law, pacta sunt servanda (agreements are to be kept) should be honoured. Adherence to the rule of law underpins our democracy and our society. We believe that to knowingly break with the UK’s reputation for following public international law could have far-reaching economic, legal and political consequences and should not be taken lightly. The Government should reflect on the terms of these clauses and their effect as the bill passes through Parliament.

PART 1

UK MARKET ACCESS: GOODS

Introductory

1. Purpose of Part 1
Our Comment

Part 1, if passed will create the UK market access principles of mutual recognition (MRP) and non-discrimination (NDP). Clauses 2-14 provide further detail on these principles and their application to the free movement of goods within the United Kingdom. In this respect the clauses approximate to but importantly differ in a number of respects from rules of EU law found in articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (which prohibit quantitative restrictions on imports and exports between Member States), Regulation 2019/515 on the mutual recognition of goods lawfully marketed in another Member State and decisions of the European Court of Justice (CJEU).

Accordingly a) the impact on devolved competences will not be the same and b) in some cases it is difficult to work out what its impact might be. Furthermore, aspects of the bill where it impacts on the legislative or executive competences will engage the Legislative Consent Convention and in relation to the Scottish Parliament and Scottish Ministers Section 28(8) of the Scotland Act 1998 which recognises ‘that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament’ will apply.

Mutual recognition: goods

2. THE MUTUAL RECOGNITION PRINCIPLE FOR GOODS

OUR COMMENT

We refer to our comments in relation to clause 1.

Clause 2 applies the MRP to goods which have been produced in or imported into one part of the UK and comply with any relevant statutory requirements so they can be lawfully sold in that part can then be sold in any other part of the UK without compliance with any statutory requirements which apply in that other part.

3. RELEVANT REQUIREMENTS FOR THE PURPOSES OF SECTION 2

Clause 3 defines “relevant requirement” for the purposes of the MRP as it applies to the sale of goods in the UK. It also includes a prohibition on the sale of goods. These requirements, if complied with in the part of the UK where the goods were produced or imported into, do not then need to be complied with when they are sold in another part of the UK.

Clause 3(7) empowers the Secretary of State to amend (by adding to varying or removing any aspect of) clause 3(4) which provides detail about statutory requirements in the scope of MRP. Clause 3 (4) includes statutory requirements regarding the characteristics of the goods, their presentation, production, identification or tracing, inspection and registration, documentation and any other requirements not otherwise referred to.
Our Comment

This is a very wide power and regulations are subject to affirmative resolution procedure. The Secretary of State must consult the devolved administrations before making such regulations.

We are concerned at the level of Parliamentary scrutiny applicable to clause 3 regulations. Changing the scope of the mutual recognition principle may have significant consequences and we believe that the appropriate procedure should be super affirmative resolution procedure which enables longer consultation and for the views of stakeholders to be taken into account.

The obligation on the Secretary of State to consult with the devolved administrations is welcome but the clause lacks a) detail about the timescale for consultation and b) any obligation on the Secretary of State to report the outcome of the consultation with reasons for the decision. The Government should make clear what the consequences will be if a Devolved Administration does not agree with the outcome of the consultation.

4. EXCLUSION OF CERTAIN REQUIREMENTS EXISTING ON THE RELEVANT DAY

Clause 4 excludes existing requirements from the scope of the MRP in areas where different regulatory requirements exist in different parts of the UK before clause 4 comes into force.

Our Comment

This provides a significant degree of clarity and certainty about the law and how the bill will affect the sale of goods across the UK. Future changes to existing statutory requirements (other than re-enactment without substantive change) will be subject to the MRP.

We note that “substantive” is not defined in clause 4. The Government should explain what it interprets as “substantive change” during the bill’s passage.

Clause 4 does however mean that certain regulatory divergences which currently exist and will continue to be able to be enforced against goods produced in, or imported into, other parts of the UK would not be able to be so enforced were they to have been introduced after the MRP comes into force. The Government should explain why divergent regulations are or are not problematic in terms of the operation of the internal market simply because of the date at which they are introduced.

Non-discrimination: goods

5. THE NON-DISCRIMINATION PRINCIPLE FOR GOODS

Clause 5 makes provision for the NDP, that the sale of goods in one part of the UK should not be affected by directly or indirectly discriminatory relevant requirements due to a relevant connection that the goods have with another part of the UK. This
reflects aspects of CJEU jurisprudence and identifies parts of the UK as “originating” or “destination” according to their relationship to “incoming goods”. Clause 5(3) makes clear that a relevant (statutory) requirement (see clause 6) is of no effect if it directly or indirectly discriminates against incoming goods.

Our Comment

It would appear that the effect of clause 5(3) will be to render a statutory provision in devolved legislation of “no effect” but to make this clear there should be an amendment to this effect to section 29 of the Scotland Act 1998. It is also not clear what is the effect, if any, of clause 5(3) if the statutory provision is in an Act of Parliament. It is suggested that these matters should be clarified.

We take the view these statutory provisions could be challenged by private parties. It will presumably also be a basis for challenging devolved legislation (assuming the inability to modify the bill under clause 49, will in all cases prohibit legislation that is contrary to its principles – presumably that is the intention but it is not the clearest way that outcome could have been achieved).

However, what is the effect of clause 5(3) in relation to an Act of Parliament? The Government should state how a statutory requirement contained in an Act of Parliament under clause 6 is affected by this subsection.

6. RELEVANT REQUIREMENTS FOR THE PURPOSES OF THE NON-DISCRIMINATION PRINCIPLE

Clause 6 defines “relevant requirement” for the purposes of the NDP.

Clause 6(5) empowers the Secretary of State to amend (by adding to varying or removing any aspect of) clause 6(3) which provides detail about statutory provisions in the scope of NDP. Clause 6(3) includes statutory provisions regarding the circumstances of the sale of goods, their transportation storage etc., inspection and registration etc., and conduct or regulation of businesses that engage in the sale of certain goods.

Our Comment

This is a very wide power and regulations are subject to affirmative resolution procedure. The Secretary of State must consult the devolved administrations before making such regulations.

We are concerned at the level of Parliamentary scrutiny applicable to clause 6 regulations. Changing the scope of the mutual recognition principle may have significant consequences and we believe that the appropriate procedure should be super affirmative resolution procedure which enables longer consultation and for the views of stakeholders to be considered.

The obligation on the Secretary of State to consult with the devolved administrations is welcome but the clause lacks a) detail about the timescale for consultation and b)
any obligation on the Secretary of State to report the outcome of the consultation with reasons for the decision.

7. THE NON-DISCRIMINATION PRINCIPLE: DIRECT DISCRIMINATION

Clause 7 explains “direct discrimination” for the purposes of clause 5. Direct discrimination occurs where relevant requirements apply to incoming goods in a way that they do not apply, or would not apply, to local goods putting incoming goods at a disadvantage.

Our Comment

We have concerns about the definition of “local goods” which for the purposes of clause 7 include “actual or hypothetical goods”. There is no definition of “hypothetical goods”. The Government should explain what it means by using this term.

8. THE NON-DISCRIMINATION PRINCIPLE: INDIRECT DISCRIMINATION

Clause 8 provides for the principle of indirect discrimination.

Our Comment

Our comment on articles 34–36 TFEU in relation to clause 1 has relevance to clause 8.

Clause 8(1)(d) excludes from relevant requirements a statutory provision which is a necessary means of achieving a legitimate aim. This has to be read with clause 8(9), “with regard in particular to (a) the effects of the requirement in all the circumstances and (b) the availability of alternative means of achieving the aim in question”.

Our Comment

The list of legitimate aims defined in clause 8(6) is shorter than those in Article 36 TFEU. Clause 8(6) defines a “legitimate aim” as “(a) the protection of life or health of humans, animals or plants or (b) the protection of public safety or security”.

Article 36, on the other hand allows additional prohibitions or restrictions on the grounds of “public morality”, “public policy”, “protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property”. We suggest that clause 8 is amended accordingly.

Clause 8(7) empowers the Secretary of State to amend (by adding to varying or removing an aim) clause 8(6). This is a very wide power and regulations are subject to affirmative resolution procedure. Unlike other order making powers earlier in the bill the Secretary of State is under no obligation to consult the devolved administrations before making such regulations. The Government should explain why clause 8 adopts a different approach to the earlier clauses in this respect.

We are concerned at the level of Parliamentary scrutiny applicable to clause 8 regulations. Changing the definition of “legitimate aim” may have significant
consequences. We believe that the appropriate procedure should be super affirmative resolution procedure which enables longer consultation and for the views of stakeholders to be considered. The Government should explain why it excluded the other “legitimate aims” found in article 36.

9. **EXCLUSION OF CERTAIN PROVISION EXISTING AT THE PASSING OF THIS ACT**

Clause 9 excludes existing requirements from the scope of the NDP in areas where different regulatory requirements exist in different parts of the UK before clause 9 comes into force.

**Our Comment**

This provides a significant degree of clarity and certainty about the law and how the bill will affect the sale of goods across the UK. Future changes to existing statutory requirements (other than re-enactment without substantive change) will be subject to the NDP. As with the provisions of clause 4 we note that “substantive” is not defined in clause 9. The Government should explain what it interprets as “substantive change” during the bill’s passage. Our comments to clause 4 also have relevance to this clause.

*Exclusions from market access principles*

10. **FURTHER EXCLUSIONS FROM MARKET ACCESS PRINCIPLES**

Clause 10 (2) provides that the Secretary of State may by regulations amend schedule 1 of the bill.

**Our Comment**

This is a very wide power and regulations are subject to affirmative resolution procedure. Unlike other order making powers earlier in the bill the Secretary of State is under no obligation to consult the devolved administrations before making such regulations. The Government should explain why clause 10 adopts a different approach to earlier clauses in this respect.

*Supplementary*

11. **MODIFICATIONS IN CONNECTION WITH THE NORTHERN IRELAND PROTOCOL**

We have no comments to make.

12. **SALE OF GOODS COMPLYING WITH LOCAL LAW**

We have no comments to make.
13. INTERPRETATION OF REFERENCES TO “SALE” IN PART 1

Clause 13 interprets references to “sale” in part 1. Paragraph clause 13 (4) defines “sale” as

(a) agreement to sell,
(b) offering or exposing for sale, or
(c) having in possession or holding for sale.

Our Comment

The Sale of Goods Act 1979 defines a contract for sale as “a contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price” and further defines “agreement to sell” as a contract of sale “for the transfer of the property in the goods is to take place at a future time or subject to some conditions later to be fulfilled”.


Furthermore, clause 13(5) Part 1 applies to other means of transferring possession or property which are unrelated to sale including barter for exchange leasing or hiring and gift. The Government should explain the reasons for extending the bill to such transactions.

14. INTERPRETATION OF OTHER EXPRESSIONS USED IN PART 1

We have no comments to make.

PART 2

UK MARKET ACCESS: SERVICES

15. Services: overview

Our Comment

The bill introduces a system for the recognition of professional qualifications across the UK. The EU Single Market Regulated Professions Database lists 550 professions covering many occupations: https://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=professions. Part 2 of the bill allows professionals qualified in one UK nation to access the same profession in another nation without requalification in much the same way as the EU provisions for Mutual Recognition of qualifications applies at present.

Clause 15(5)(c) excludes existing legislative requirements from the scope of authorisation or regulatory requirements where those requirements are in force before clause 15 comes into effect.
This provides a significant degree of clarity and certainty about the law and how the bill will affect regulation of services across the UK. Future changes to existing statutory requirements (other than re-enactment without substantive change) will be subject to the bill. We note that “substantive” is not defined in clause 15. The Government should explain what it interprets as “substantive change” during the bill’s passage.

### 16. SERVICES: EXCLUSIONS

Clause 16 sets out the exclusions of certain services (including legal services) from the bill with reference to schedule 2.

Clause 16(2) requires the Secretary of State to keep schedule 2 under review. It also provides that the Secretary of State may by regulations amend schedule 2 by removing, amending and adding entries to the schedule.

**Our Comment**

The regulations are subject to affirmative resolution procedure. Unlike some other order making powers earlier in the bill the Secretary of State is under no obligation to consult the devolved administrations before making such regulations. The Government should explain why clause 16 adopts a different approach to earlier clauses in this respect.

We also note that 16(4) provides that for the first three months following part two coming into force the Secretary of State may make regulations subject to made affirmative resolution procedure.

Made affirmative procedure is a procedure for subordinate legislation, which needs to be carefully scrutinised. The House of Lords Constitution Committee, in its “Fast-track Legislation: Constitutional Implications and Safeguards” report, said:

“The made affirmative procedure is often used in Acts where the intention is to allow significant powers to be exercised quickly. It is a kind of ‘fast-track’ secondary legislation... If the made affirmative procedure is used then the instrument is effective immediately.”

The report went on to say:

“Instruments laid as made instruments almost inevitably place a serious time pressure on those drafting them. The JCSI’s 8th report of this session drew the special attention of both Houses to three statutory instruments which had been laid as made affirmatives ... ‘revisions were being made to the terms of the instruments down to the moment that they were made’”, and there had been “serious time pressure” in the making of the instruments. Parliamentary counsel and the solicitors in Government Departments are expert in drawing up instruments and rarely make mistakes but policies which require speed of scrutiny require those carrying out that scrutiny to be additionally careful about the legislation they are considering.
Why is there no requirement on the Secretary of State to consult the devolved administrations when proposing to change schedule 2?

17. SERVICES: MUTUAL RECOGNITION OF AUTHORISATION REQUIREMENTS

Clause 17 establishes a system of mutual recognition of authorisation requirements in the UK.

We have no comments to make.

18. DIRECT DISCRIMINATION IN THE REGULATION OF SERVICES

Clause 18(1) prohibits direct discrimination by a regulator against the service provided by ensuring that a regulatory requirement that discriminates is of no effect.

Our Comment

It would appear that the effect of clause 18(1) will be to render a statutory provision in devolved legislation of “no effect” but to make this clear there should be an amendment to this effect to section 29 of the Scotland Act 1998. It is also not clear what is the effect, if any, of section 18(1) if the statutory provision is in an Act of Parliament. It is suggested that these matters should be clarified.

We take the view these statutory provisions could be challenged by private parties. It will presumably also be a basis for challenging devolved legislation (assuming the inability to modify the bill under clause 49, will in all cases prohibit legislation that is contrary to its principles – presumably that is the intention but it is not the clearest way that outcome could have been achieved).

However, what is the effect of clause 18(1) in relation to an Act of Parliament? The Government should state how a statutory requirement contained in an Act of Parliament is affected by this subsection.

19. INDIRECT DISCRIMINATION IN THE REGULATION OF SERVICES

Clause 19 prohibits indirect discrimination by ensuring that the regulatory requirement that indirectly discriminates against the service provider is of no effect.

Our Comment

Our comments in respect of clause 18 apply equally in relation to clause 19.

Clause 19(2)(d) excludes from relevant requirements a regulatory requirement which is a necessary means of achieving a legitimate aim.

The list of legitimate aims defined in clause 19(6) defines a “legitimate aim” as “(a) the protection of life or health of humans, animals or plants, (b) the protection of public safety or security (c) the efficient administration of justice”.

28
Clause 19(7) empowers the Secretary of State to amend clause 19(6) (by adding, varying or removing an aim). This is a very wide power and regulations are subject to affirmative resolution procedure. Unlike other order making powers earlier in the bill the Secretary of State is under no obligation to consult the devolved administrations before making such regulations. The Government should explain why clause 19 adopts a different approach to the earlier clauses in this respect particularly as devolved ministers are defined as regulators under clause 20(2) (b), (c) and (d)?

20. DEFINITION OF REGULATOR

OUR COMMENT

We note that several justice agencies are excluded from the definition of “regulator” in terms of clause 20(3).

21. INTERPRETATION OF PART 2

We have no comments to make.

PART 3

PROFESSIONAL QUALIFICATIONS AND REGULATION

22. Access to professions on grounds of qualifications or experience

Clause 22 provides when professional UK resident qualified in one part of the UK is to be treated as professionally qualified in another part of the UK.

Our Comment

We note the terms of clause 22(2) provides that a qualified UK resident is to be treated for the purposes of Part 3 as if the qualified UK resident had the qualifications or experience required to be able to practice the profession.

23. MEANING OF “QUALIFIED” UK RESIDENT

We have no comments to make.

24. EXCEPTION FROM SECTION 22 WHERE INDIVIDUAL ASSESSMENT OFFERED

We have no comments to make.

25 OTHER EXCEPTIONS FROM SECTION 22 OUR COMMENT

Clause 25(I) provides that section 22 does not apply to existing provisions but to those future provisions referred to in clause 25(3).
Clause 25(5) disapplies clause 22(2) in relation to provisions which limit the ability to practice in the legal profession. We agree with this provision as it will ensure that those who provide legal advice and litigation services to clients in each jurisdiction in the UK will be properly qualified in the law of that jurisdiction.

26 PROFESSIONAL REGULATION NOT WITHIN SECTION 22: EQUAL TREATMENT

OUR COMMENT

Whilst we support the provision of equal treatment generally we have no further comment on clause 26.

27 INTERPRETATION OF PART 3

We have no comments to make.

PART 4

INDEPENDENT ADVICE ON AND MONITORING OF UK INTERNAL MARKET

Reporting, advisory and monitoring functions

28 FUNCTIONS OF THE CMA UNDER THIS PART: GENERAL PROVISION

The Competition and Markets Authority (CMA) is an independent non-Ministerial government department established under the Enterprise and Regulatory Reform Act 2013 (2013 Act) and is the UK’s competition and consumer authority.

The CMA’s statutory duty is to promote competition, both within and outside the UK, for the benefit of consumers, and its mission is to make markets work well for consumers, businesses and the economy.

The CMA’s functions include:

- Investigating mergers that may lead to a substantial lessening of competition;
- Conducting studies, investigations or other work into markets where there are suspected competition and consumer problems;
- Investigating businesses and individuals to determine whether they have breached UK (and EU) competition law and if so, to end and deter such breaches, and pursue individuals who commit the criminal cartel offence;
- Enforcing a range of consumer protection legislation, tackling issues which suggest a systemic market problem, or which affect consumers’ ability to make choices;
• Promoting stronger competition in regulated industries (gas, electricity, water, aviation, rail, communications and health), working with the sector regulators;

• Conducting regulatory appeals and references in relation to price controls, terms of licences or other regulatory arrangements under sector-specific legislation;

• Giving information or advice in respect of matters relating to any of the CMA’s functions to the public, policy makers and to Ministers.

Our Comment

In our response to the Internal Market White Paper we recommended some precedents which could serve as models to provide oversight and monitoring: for example the National Audit Office established under the Budget Responsibility and National Audit Act 2011 or the Climate Change Committee established under the Climate Change Act 2008.

We envisaged:

I. a bespoke statutory Internal Market Independent Monitoring and Advisory Committee

II. members will be selected by the National Authorities (such as the Secretary of State, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive),

III. appointed by Her Majesty The Queen after an open competition

IV. with accountability to Parliament and the devolved legislatures.

The CMA meets some of these criteria but not all. The new role in relation to the UK Internal Market will require greater engagement with the devolved legislatures and administrations.

29 MONITORING AND REPORTING ON THE OPERATION OF THE UK INTERNAL MARKET

OUR COMMENT

With regard to clause 29(1) we believe that reviews should take place on a more regular basis than from “time to time”.

With regard to clause 29(2) we believe that there should be further definition about how the CMA may receive and consider proposals.

With regard to clause 29(7) the obligation to report to all legislatures in the UK will help keep elected representatives across the UK up to date with the CMA’s activities.
30 ADVISING ETC ON PROPOSED REGULATORY PROVISIONS ON REQUEST

OUR COMMENT

We note that the Secretary of State may request the CMA to provide a report for any part of the United Kingdom under clause 30(11)(d) but not apparently for the whole of the UK.

31 PROVISION OF REPORT ON REQUEST AFTER REGULATORY PROVISION IS PASSED OR MADE

OUR COMMENT

Our comment on clause 30 applies equally to this clause.

32 REPORT ON REQUEST ON PROVISION CONSIDERED TO HAVE DETRIMENTAL EFFECTS

We have no comments to make.

33 STATEMENTS ON REPORTS UNDER SECTION 32

We have no comments to make.

34 REPORTS UNDER THIS PART

We have no comments to make.

35 GENERAL ADVICE AND INFORMATION WITH REGARD TO EXERCISE OF FUNCTIONS

OUR COMMENT

We believe that the CMA should consult generally on the preparation of the general advice and information about how it expects to exercise of its functions under sections clauses 29–34 of the bill. The CMA should also consult on any revision or new advice or information before publication.

Information-gathering powers

36 INFORMATION-GATHERING POWERS

OUR COMMENT
We acknowledge that a notice under clause 36(8) may not require a “person to produce or provide any document or information which the person cannot be compelled on to produce, or giving evidence, in civil proceedings before the court”. This provision does not refer to legal professional privilege which would be appropriate for the purposes of clarity and consistency with other legislation.

37 INFORMATION-GATHERING POWERS: ENFORCEMENT

We have no comments to make.

38 INFORMATION-GATHERING POWERS: PENALTIES

We have no comments to make.

Interpretation

39 INTERPRETATION OF PART 4

We have no comments to make.

PART 5

NORTHERN IRELAND PROTOCOL

Northern Ireland's place in the UK internal market and customs territory

40 NORTHERN IRELAND'S PLACE IN THE UK INTERNAL MARKET AND CUSTOMS TERRITORY

We have no comments to make.

Unfettered access

41 UNFETTERED ACCESS TO UK INTERNAL MARKET FOR NORTHERN IRELAND GOODS

42 Power to disapply or modify export declarations and other exit procedures

Notifications under Article 10 of the Northern Ireland Protocol

43 Regulations about Article 10 of the Northern Ireland Protocol

44 Notification of State aid for the purposes of the Northern Ireland Protocol

45 Further provision related to sections 42 and 43 etc

Certain provisions to have effect notwithstanding inconsistency or incompatibility with international or other domestic law
Our Comment

We have the following comments in relation to clauses 40–45;

1. If passed, these clauses would empower Ministers to make regulations that are contrary to the Withdrawal Agreement (Protocol on Ireland/Northern Ireland). There are a number of views on this provision but we take the view that of themselves these clauses have the potential to breach the Withdrawal Agreement, by authorising such a breach and preclude challenge in the UK courts through clause 45.

2. The bill, if enacted, would breach Article 5 of the Withdrawal Agreement.

Given the acknowledgement by Northern Ireland Secretary, Brandon Lewis MP that parts of the bill “break international law in a very specific and limited way” we encourage the UK Government to reflect on the terms of these clauses as the bill passes through Parliament.

The bill should, as a matter of principle comply with public international law and the rule of international law, pacta sunt servanda (agreements are to be kept) should be honoured. Adherence to the rule of law underpins our democracy and our society. We believe that to knowingly break with the UK’s reputation for following public international law could have far-reaching economic, legal and political consequences and should not be taken lightly.

PART 6
FINANCIAL ASSISTANCE POWERS

46 Power to provide financial assistance for economic development etc 47

Financial assistance: supplementary

We have no comments to make.

PART 7
FINAL PROVISIONS

48 Regulation of distortive or harmful subsidies Our Comment

Paragraphs 55, 56 and 168-174 of the White Paper set out the UK Government’s proposals to “work with the devolved administrations to determine how subsidies should be given in a coherent way across the UK”. The Government’s objectives are to protect the coherence of the Internal Market, and to ensure the devolved administrations can continue to control their own spending decisions. The Government’s view is that this should be reserved (or excepted, in Northern Ireland) which will be achieved by clause 48.
Paragraph 175 stated “The devolved administrations will remain responsible for their own spending decisions on subsidies (how much, to whom and for what) within the architecture of any future subsidy control mechanism. We will continue to work closely with all the devolved administrations to seek to agree the shape of a UK-wide domestic subsidy control regime”.

In January 2019, the previous Government published the draft State Aid (EU Exit) Regulations [https://www.legislation.gov.uk/ukdsi/2019/9780111178768](https://www.legislation.gov.uk/ukdsi/2019/9780111178768) which would have established a domestic regime to be in place in the event that the UK left the EU without a Withdrawal Agreement being in place. The Regulations sought to transpose existing EU State aid legislation into UK legislation and would have created a domestic State aid regime consistent with the EU State aid regime.

Although the Regulations were debated in both Houses, they were not enacted. There was some debate about whether State Aid is a reserved or a devolved matter and the UK and Scottish Governments do not agree with each other on this point. The White Paper in paragraph 173 made it clear that the Government intended to legislate to reserve this area of the law and place the matter beyond debate so as to “guarantee that a single, unified subsidy control regime could be legislated for in the future”.

The White Paper states in paragraph 171 that the Government will move “away from the EU’s State Aid rules to create our own, sovereign subsidy control regime. This will build on our obligations under the WTO and other trade agreements”.

Paragraph 172 stated that the Government will set out their “policy for this new domestic regime separately in due course, but remain committed to developing an open, fair, and transparent subsidy control mechanism”.

Clause 48 generates the following questions:

1. As the EU State aid rules have a significant body of detailed EU State aid [jurisprudence][case law] developed by the EU courts, why not codify and replicate them as UK national law, redirected to: [see TFEU article 107] “in so far as it affects trade between different parts of the United Kingdom or trade between the United Kingdom and member states of the European Union or between the United Kingdom and contracting parties to the Agreement on the European Economic Area.” This should achieve de facto similarity.

2. Why adopt the WTO anti-subsidy rules as the jurisprudence under the WTO anti-subsidy rules remains relatively undeveloped?

49 PROTECTION OF ACT AGAINST MODIFICATION

OUR COMMENT

It is clear that this provision would prevent the Scottish Parliament from seeking to modify the bill but it is not clear whether this would prevent the Scottish Parliament from legislating to enact something which the bill provides is of “no effect” as in clause 5(3).
50 FURTHER PROVISION IN CONNECTION WITH THE NORTHERN IRELAND PROTOCOL

We have no comments to make.

51 REGULATIONS: GENERAL

52 Regulations: references to parliamentary procedures

We have stated consistently throughout the bill that we believe more use should be made of super affirmative procedure to enhance stakeholder engagement and Parliamentary scrutiny.

53 INTERPRETATION: GENERAL

We have no comments to make.

54 EXTENT, COMMENCEMENT AND SHORT TITLE

We have no comments to make.

SCHEDULES

Schedule 1 — Exclusions from market access principles

We have no comments to make

Schedule 2 — Services exclusions

Our Comment

The exclusion of “legal services” is limited to Part I - “provision of legal advice, litigation services”. The impact of this on conveyancing and executry would appear to depend upon whether “those services” in clause 17 is to be interpreted as treating the presentation of an application for Confirmation as the same service as the presentation of an application for Probate. Likewise, for the presentation of a document to a land registry for a different part of the UK from that of the service provider. The Government should confirm whether this interpretation is correct.

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ANNEXE C

Key features of the European Single Market and the UK Internal Market Bill

Legal framework

1. The European Single Market (SM) is ultimately based on Treaty provisions, in particular on the foundations set out in the Treaty of Rome, establishing the free movement of goods, services, capital and labour, and the Single European Act (SEA), which set the objective of establishing a single market by 31 December 1992.

2. Establishing new Treaties requires a unanimous vote of all member states. The SEA extended Qualified Majority Voting (i.e. removing the ability of individual states to veto new legislation) to new areas to facilitate further economic integration, within the framework of the Treaties. All legal provisions underpinning the SM are thus based on the consent of the member states (as well as the European Parliament), following the relevant legislative procedure prescribed by the Treaties.

3. The final and highest arbitrator for the interpretation of these provisions and legal principles is the European Court of Justice (ECJ). Individuals and economic actors have rights and obligations under these provisions, which are enforced directly through their national courts which refer relevant cases to the ECJ. The jurisprudence of the ECJ is an important component of the European Single Market.

A level playing field

4. To ensure the free movement of goods the Single Market is based on a customs union, i.e. a free trade area with a common external tariff. However, the most challenging aspect is how to deal with potential Non-Tariff Barriers (NTBs), for example red tape or specific health or environmental provisions that hinder or prevent cross-border market access. Where national regimes differ, legal provisions pursuing legitimate national policy objectives (e.g. public health provisions) may also distort the level playing field and prevent market access.

5. Different standards on horizontal framework policies, such as consumer protection or data protection, can also distort the market, leading potentially to countries gaining an unfair competitive advantage by undercutting standards, ultimately leading to a race to the bottom. In addition, unless there is horizontal competition policy and provisions to limit/prevent state aid, which are uniformly enforced, companies or countries can gain an unfair competitive advantage.

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4 This note does not discuss the issues raised by the UKIM Bill for the UK-EU relationship, in particular the admission by the UK Government that the bill breaks international law.
6. A further complication can arise in the cross-border provision of services, for example if there are significant differences in professional qualifications or if there are specific differing professional registration requirements.

7. The European Single Market also provides for an opening of public procurement across borders, where non-domestic EU companies have to be treated equally to domestic ones.

**Potential policy approaches to create a Single Market**

8. **Harmonisation** – legislation which is identical across the whole single market territory - removes the risk of regulatory divergence but does not allow for differing policy preferences.

9. **Minimum standards** – a form of harmonisation requiring only a minimum level, e.g. of environmental standards, leaving it to individual countries to exceed these minimum levels if politically desired. While this can prevent dumping, it can be tricky to define the minimum standard required and it can lead to market fragmentation.

10. **Non-discrimination** - Under EU law, a Member State measure is not permitted if it is a quantitative restriction or a measure having equivalent effect to a quantitative restriction (MEQR). The ‘Dassonville Formula’ (Case 8-74) set out by the ECJ determines an MEQR as ‘all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade’. This rule is subject to important exceptions.

11. **Mutual recognition** - products lawfully marketed in one Member State can be sold in other Member States whether or not they comply with the national technical rules of these Member States. This principle is recognised and well-practised within the EU Framework (Case 120/78 Cassis De Dijon) particularly to manage areas where harmonisation does not exist in order to keep the internal market functional and operational. Again, this rule is subject to important exceptions.

**Possible justifications for provisions that might hinder cross-border trade**

12. Under EU law, Article 36 TFEU (goods) and Article 45 TFEU (services) allow Member States to derogate from the rules of non-discrimination and mutual recognition where this is justified by policies aiming for protection in areas such as health, environment, and for consumers and workers. Article 36 TFEU also includes exceptions for the protection of national treasures, protection of industrial or commercial property, public morality, public policy, public security and public health. In addition to Article 36 TFEU, EU law recognises additional exceptions to the mutual recognition principle (‘imperative requirements in the public interest’) which were outlined in Cassis and include important exceptions such as protection of the environment, workers’ rights and fiscal supervision.
13. 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 law relating to provision of services follows similar, but not identical lines, particularly as regards the grounds on which freedom to provide services may be restricted by national measures, and the rules regarding mutual recognition of professional qualifications.

The European Single Market: complex and balanced

14. The European Single Market has developed significantly over time, and is still in the process of changing, for example with continuing discussion and legal cases aiming to determine whether different corporate tax arrangements are unjustifiable distortions of competition.

15. The uniform application and enforcement of horizontal policies, such as public procurement, competition law and state aid control, are crucial for the creation of a Single Market. In addition, there is also a need to address cooperation outside the four freedoms in so-called flanking areas, including Budgetary Matters, Civil Protection, Company Law, Consumer Protection, Cultural Affairs, Education, Training and Youth, Employment and Social Policy, Environment, Gender Equality, Anti-Discrimination and Family Policy, Health and Safety at Work and Labour Law, Public Health, Research and Innovation, Single Market Policies and Tools and Statistics.  

16. 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.

17. 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

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6 Taken from https://www.efta.int/eea/policy-areas/flanking-horizontal-policies
Commission’s Guide to the application of Treaty provisions governing the free movement of goods.\(^7\)

18. Crucially, the enforcement of the SM provisions is not in the hands of politicians. Rather the opposite, the SM constrains political administrations in those areas where competences have been transferred to the European level. Without such an impartial and overarching implementation, the SM would simply not work.

**UK Internal Market (UKIM) Bill in contrast with the European Single Market**

19. While the proposals for the UK internal market use some of the same terminology as the SM (mutual recognition and non-discrimination), there are many crucial differences. For example, Sir David Edward has noted that “the White Paper omits any reference to the principles of proportionality\(^8\) and subsidiarity which are essential ways of balancing and reconciling conflict.” He also observed that “the principles of mutual recognition and non-discrimination are not simple matters.” He has pointed to a huge volume of European case law and other writing on what he calls a “highly complex and sophisticated subject”.\(^9\)

20. There are many differences in the UKIM bill to the European SM provisions, ranging from the scope of exceptions listed (e.g. Schedule 1 of the UKIM Bill establishing the exceptions on goods (Clause 10) does not include protection of national treasures, protection of industrial or commercial property, public morality, public policy, or public security unlike Article 36 TFEU) to the possibility that the exceptions may be amended by the Secretary of State under the affirmative resolution procedure (a parliamentary procedure applying to statutory instruments which demands approval from the House of Commons and the House of Lords) (Clause 10(2)-(3)).

21. Certain crucial horizontal powers are allocated to the UK Government, for example the power to provide financial assistance in areas which, under the EU Structural Funds, the devolved administrations had discretion on how it was spent. Under the UK Shared Prosperity Fund the UK Government has direct control over how financial assistance is allocated in devolved areas including: water, sewerage, railway facilities, roads and other transport facilities, health, education, cultural and sports facilities, courts, housing. (Clause 46 and 47). Under Clause 48 the devolution statutes are to be amended to reserve State Aid solely for the UK Government.

22. There is also a governance gap. A new independent Office for the Internal Market will be set up within the Competition and Markets Authority (CMA) and

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\(^8\) Neither the proportionality nor the subsidiarity principle are mentioned also within the UKIM Bill.

\(^9\) As quoted by Michael Russell https://www.theyworkforyou.com/sp/?id=2020-07-30.1.0
given a monitoring function under the UKIM Bill. It will be given powers to monitor and report on the operation of the UK internal market (Clause 29), advise on proposed regulation (Clause 30), provide reports on already passed regulations (Clause 31), and has certain information-gathering powers in which it can enforce penalties for a failure to comply (Clauses 36 – 38). But, unlike the Commission, there are no enforcement powers for the CMA. Disputes and regulatory differences between the UK Government and the Devolved Administrations, according to the White Paper, are to be resolved at the political level in the Joint Ministerial Committee and through the Common Frameworks.

23. In conclusion, the UKIM Bill only superficially resembles the European Single Market. There are crucial omissions and differences to the legal framework and its enforcement. In particular, the UKIM Bill appears to strike a different balance, strongly prioritising internal trade and mutual recognition over subsidiarity and proportionality considerations, which are omitted altogether. In addition, the governance differs significantly, with the SM overarching, objective enforcement and arbitration not replicated in the UKIM Bill.

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