

UNITED KINGDOM INTERNAL MARKET BILL 2020

ECHR MEMORANDUM FOR THE BILL AS AMENDED IN HOUSE OF COMMONS COMMITTEE

Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act).

Alok Sharma, Secretary of State for Business, Energy and Industrial Strategy, has made the following statement:

“In my view the provisions of the United Kingdom Internal Market Bill are compatible with the Convention rights.”

The Bill

1. The purpose of the Bill is to promote the continued functioning of the internal market in the UK after the conclusion of the transition period provided for in the EU (Withdrawal) Act 2018.

Key Provisions

Mutual Recognition and Non-Discrimination for Goods and Services

2. The Bill establishes two UK market access principles for goods and services: the mutual recognition principle and the non-discrimination principle. These will interact such that the non-discrimination principle only applies where the mutual recognition principle does not, for example in relation to requirements relating to the transportation, storage, handling or display of goods.

3. In respect of goods, the Bill provides that a good produced or imported into one part of the UK, that can lawfully be placed on the market in that part of the UK, can be placed on the market in a second part of the UK (see clauses 2 - 4)¹. The Bill also provides that no good can be discriminated against either directly or indirectly based on where it comes from, with some specific exceptions in respect of indirect discrimination (see clauses 5 - 9).

4. In respect of services, the mutual recognition provides that a person authorised to provide services in one part of the UK is not required to meet additional authorisation requirements in another part of the UK (see clause 18). The mutual recognition

¹ Clauses numbered as for the Bill as amended in Committee

principle may only be disapplied in respect of an authorisation requirement to the extent it can be reasonably justified in response to a public health emergency (i.e. an event reasonably considered as posing an extraordinary threat to human health) (see clause 20). The Bill also prohibits discriminatory regulatory requirements to provide a service on the basis that the service provider (or its staff etc) is from another part of the UK. This is split into a direct and indirect discrimination test, whereby direct discrimination is only permitted to the extent it is a reasonably justified response to a public health emergency and indirect discrimination is only justified if can be reasonably considered a necessary means of achieving a “legitimate aim”.

5. Pre-existing requirements in force the day before the Bill comes into force are excluded from the principles for both goods (clauses 4 and 9) and services (clause 15). Other specified areas are excluded from the scope of the principles, as set out in detail in clause 10 and Schedule 1 for goods, and clause 16 and Schedule 2 for services.

Mutual Recognition of Professional Qualifications

6. The Bill establishes a process for the intra-UK recognition of UK professional qualifications or experience (see clause 22). This ensures that UK residents who can legally access their profession in one part of the UK can also access it in another part without needing to requalify.

Constitutional Embedding and Enforcement

7. The Bill contains provision to ensure that the legislation is a protected enactment which cannot be modified by the devolved legislatures (see clause 49), as well as to ensure that the devolved administrations (and the UK Government) cannot use existing powers to disapply the provisions of the Bill.

Subsidy Control Reservation

8. The Bill reserves to the UK Parliament the exclusive ability to legislate for a UK subsidy control regime, which will take effect once the UK ceases to follow EU State aid rules at the end of the Transition Period (see clause 48).

Spending Powers

9. The Bill creates new spending powers to enable the UK Government to provide funding to organisations to spend in the areas of infrastructure, economic development, culture, sport and international exchange (see clause 47).

Northern Ireland

10. The Bill includes a prohibition on the introduction of new checks and controls on Northern Ireland Qualifying Goods (NIQGs), unless required under the limited number of international agreements binding on the EU or the UK (see Clauses 11 and 12). The mutual recognition and non-discrimination principles also give effect to the requirement to provide unfettered access to NIQGs, thus meeting the Government's commitment to legislate for unfettered access and will guarantee Northern Ireland's access to the UK internal market. The Bill requires public authorities to have regard to Northern Ireland's place in the UK internal market and customs territory (clause 40).

11. The Bill contains provision enabling a Minister of the Crown to make regulations relating to the application of exit procedures to goods, when moving from Northern Ireland to Great Britain (clause 42) and the Secretary of State to make regulations regarding article 10 of the Northern Ireland Protocol (concerning state aid) (clause 43). Provision made in these regulations is able to have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent (clause 45).

Independent Body

12. The Bill will give the Competition and Markets Authority (CMA) acting as a new Office for the Internal Market (OIM) within the CMA advisory, reporting, monitoring and intelligence-gathering functions to assist with the effective operation of the UK internal market (see clauses 28-39). The CMA will be able to advise and give reports when requested by the UK Government and the devolved administrations on the economic impact of proposals for regulation in the areas covered by the Bill which might impact on the UK internal market, and on the economic impact of divergent regulation on the UK internal market which has been adopted where there are potential detrimental effects or issues of significant interest.

13. The CMA will both proactively and on request monitor and report on the health of the UK internal market and sectors of it and undertake annual and other periodic reviews. It will gather market intelligence and be able to call for evidence to assist its reporting and monitoring functions. It will be able to require the provision of information from individuals and businesses to enable it to carry out its functions. It will have no regulatory or enforcement role in the operation of the internal market and will concentrate on economic analysis and assessment.

EUROPEAN CONVENTION OF HUMAN RIGHTS

14. The Secretary of State proposes to make a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the convention rights.

15. The ECHR rights which are considered to be relevant to the Bill are A1P1, Article 14 (read with A1P1), A2P1, Article 6, and Article 8 and Article 13, each of which

is addressed below. The Department considers that the clauses of this Bill which are not mentioned below do not give rise to any issues under the ECHR.

A1P1

16. As explained in *Sporrong and Lönnroth v Sweden* [1983] 5 EHRR 35 at [61], A1P1 contains three rules:

- a) The general principle that there should be no interference with the peaceful enjoyment of property;
- b) The rule that persons can only be deprived of possessions if certain conditions are met; and
- c) The rule that the State is entitled to control people's use of property in accordance with the general interest by enforcing such laws as they deem necessary for the purpose.

17. The second and third of these rules are concerned with particular instances of the first rule and should therefore be construed in the light of that general principle (see *Case of the Former King of Greece and Others v Greece* (25701/94) at [50]).

18. In terms of what amounts to property or a possession under A1P1, this issue has been considered extensively by the ECtHR and in the Domestic Courts. There are a number of cases in which goodwill or a monetary value in a business or attached to a profession has been held to be a possession for A1P1 purposes, however this principle does not extend to the ability to earn a future income unless an enforceable claim to that income already exists:

- a) In *Van Marle v The Netherlands* (1986) 8 EHRR 483, the Court stated that "...by dint of their own work, the applicants had built up a clientele; this had in many respects the nature of a private right and constituted an asset and, hence a possession within the meaning of the first sentence of Article 1 (P1-1)...".
- b) In *Olbertz v Germany* 1999, ECHR a tax consultant's clientele were also considered to be assets and therefore possessions for the purposes of A1P1.
- c) In *Wendenburg v Germany* (Application no 71630/01) 2003, barristers claimed that removing their exclusive rights of audience in certain appellate courts was an interference with a possession. The claim for the future loss of income was held to be outside the scope of A1P1 but their law practices and clientele could be regarded as assets and possessions.
- d) In the UK case of *Countryside Alliance v Attorney General* [2005] EWHC 1677 (admin), which followed *Wendenburg*, the Court rejected the idea that the livelihood of a self-employed person, or their ability to earn future income, constituted a "possession" for the purposes of A1P1.
- e) In *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265, a GP was unlawfully suspended from an NHS performers list by the Trust and was no longer able to perform medical services under the NHS. The Court held that "while the assets of a business might include possessions for the purposes of article 1 of the first protocol in the form of clientele or goodwill, the mere prospect of future loss could not amount to a possession for that purpose where

such clientele/goodwill did not exist, and individual's monetary loss of future livelihood could not on its own constitute a possession". The case went on to state "the matter has, in any event, been put beyond doubt in my view by the ruling of this court in Countryside [2007] QB 305, which binds us, upholding the reasoning of the Divisional Court that an individual's monetary loss, in the sense of loss of future livelihood, unless based on loss of some professional or business goodwill or other present legal entitlement, cannot constitute a possession attracting the protection of article 1".

- f) In *Regina (Nicholds) v Security Industry Authority [2007] 1 WLR 2067*, the Court held that A1P1 protects only "goodwill", as a form of asset with a monetary value, and does not protect an expected stream of future income.

Aspects of the Bill that Engage and Potentially Interfere with A1P1

Mutual Recognition and Non-Discrimination

19. The Department's analysis suggests that A1P1 is not engaged in respect of the provisions of the Bill. This is because the effect of the Bill is to broaden the scope of what can be done with property, rather than to impose any limitations.

20. In respect of goods and services, the Bill does not impose any new requirements which goods or services must comply with. Instead, it ensures that goods which meet the requirements of one part of the UK (and comply with the other requirements in the Bill) are also able to access the markets of other nations in the UK. Similarly, in respect of services, the Bill limits the ability for regulatory requirements to be imposed preventing a service provider from providing those services in another part of the UK. As such, the provisions relating to goods and services are designed to widen market access rather than limit this, and are therefore not considered to interfere with property rights in a way that would come within the scope of A1P1.

21. The Department has considered whether the exclusions to the mutual recognition and non-discrimination principles set out in the Bill could engage A1P1. However, in these cases, whilst the existence of an exclusion means that the Bill is not actively widening market access in particular cases, it is still not itself imposing any limitations. In respect of both goods and services, exclusions exist for requirements already existing in legislation at the time when the Act is passed (see Clauses 4, 9 and 15) which were justified for public policy reasons and will not be affected by the passage of the Bill. There are also specific exclusions which apply to services (see Clause 16) but, again, this simply means that the Bill will not extend to the ability of service providers to provide services in other parts of the UK, rather than imposing any limitations. Reserved areas are included in the exclusions schedule, as they were excluded under the EU regime. Few reserved areas are likely to be caught by the principles in Part 2 but by listing them in the exclusions schedule, it helps to ensure that the existing scope of services regulation is preserved.

22. The Department has also considered whether the power to specify further exclusions could engage A1P1. However, as above, the conferral of this power does not involve any interference with the peaceful enjoyment of property as it simply means that the widening of market access provided for in the Bill may not extend to certain cases. In taking any decisions within the ambit of this power, the relevant Minister would of course have to have regard to A1P1 at the relevant time and would be bound by section 6 to act compatibly with the Convention rights. The Department is therefore satisfied that the simple conferral of the power does not engage A1P1. Determining what should be of excluded pre-eminently involves questions of public policy and judicial review is an adequate remedy for Article 6 purposes.

23. A similar analysis to that above applies to the clauses relating to the mutual recognition of professional qualifications. As with services, it may well not be the case that there is any property within the definition of A1P1 to consider in relation to these clauses, as qualifications are unlikely to amount to property and seem more akin to a future ability to earn an income than a pre-existing asset. However, even if qualifications could come within the scope of A1P1 in the sense of being property, it is difficult to see that anything is being taken away by this Bill, which operates to ensure mutual recognition rather than to limit it.

24. As such, the Department is of the view that there is no interference with A1P1 as a result of the provisions of this Bill. However, it is worth noting that, even were A1P1 engaged, this would at the very most amount to a control of the use of possessions which, under the third limb of the *Sporrong* principles, the UK would be entitled to do in the general interest.

25. The Department considers that the general interest test would be met in this case as the Bill performs a vital role in establishing a UK internal market and preserving the free movement of goods and services across the jurisdictions of the UK after the end of the Transition period. If it were considered that the Bill led to any control of use, the Department therefore considers that such controls would be both necessary and proportionate to the legitimate aim which the Bill is designed to serve.

Information-gathering powers and enforcement

26. Clause 36 confers powers on the CMA to require the production of information and documents from persons or businesses for the purpose of its functions as the independent reporting and monitoring body under the Bill. Clauses 37 and 38 confer powers to enforce and impose penalties respectively as described below in relation to Article 6(1). The Department considers that A1P1 may be engaged by the information-gathering power to the extent that it may interfere with the peaceful enjoyment of a person's information assets but that the clear parameters within which the power must be exercised and the safeguards on the imposition and enforcement of penalties are render them justifiable in the general interest served by the Bill and are both necessary and proportionate to the legitimate aim it is designed to serve; an effective and enforceable power to require information is key to the CMA's functions under the Bill. It is also noteworthy that these powers are preceded in sections 174 to 174E of the

Enterprise Act 2002 in relation to the CMA's market study and other functions under that Act.

Northern Ireland Protocol

27. The power to disapply or modify export declarations and other exit procedures and to make provision in relation to the interpretation and application of Article 10 of the Northern Ireland Protocol does not directly impose any new requirements which providers of goods or services must comply with.

28. Regulations made under clauses 42 and 43 disapplying or modifying rights, powers, liabilities, obligations, restrictions, remedies are capable of being also made in a manner which is compatible with A1P1. Since the purpose of any such regulations for A1P1 purposes would be to disapply or modify obligations to comply with export or exit summaries or to notify State aid or recover unlawful State arising from the application of the Northern Ireland Protocol it is difficult to see how any property would be interfered with compared to a counterfactual where the Regulations are not made. If such provisions do impose any new requirements on businesses they are capable of being justified by the legitimate aim of the need to ensure unfettered access for goods leaving Northern Ireland for the rest of the UK in the case of export declarations and certainty for businesses and aid givers in respect of State aid.

Assessed to be Compatible with the ECHR?

29. The Bill has therefore been assessed as compatible with A1P1 of the ECHR.

A2P1

30. The right to education in A2P1 extends to a right to recognition, in one form or another, of the studies which have been completed. This was explained in the *Belgian Linguistic Case (1747/62)* at [4] of the section of the judgment entitled "*The Law: Interpretation Adopted by the Court*":

"For the "right to education" to be effective, it is further necessary that, inter alia, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed."

Aspects of the Bill that Engage and Potentially Interfere with A2P1

31. The Bill arguably engages A2P1 through the provisions on the mutual recognition of qualifications.

32. However, the Department does not consider that the provisions of the Bill can be considered to interfere with A2P1. This is because, similarly to the above analysis in respect of A1P1, the Bill is designed only to allow for the mutual recognition of qualifications rather than to prevent recognition (see Part 3 which prevents provisions which limit qualified UK residents from being able to pursue professions from having effect).

33. As in respect of A1P1, the Department has considered whether the exclusion to the mutual recognition of qualification principles which is included in the Bill for pre-existing provisions could amount to an interference with A2P1. However, again, the Department is of the view that this exclusion simply means that the Bill is not widening the mutual recognition of qualifications in this particular respect, rather than amounting to any limitation.

Assessed to be Compatible with the ECHR?

34. The Bill has therefore been assessed as compatible with A2P1 of the ECHR.

Article 6

35. Article 6 contains provision to ensure the right to a fair trial in circumstances where a person faces the determination of his civil rights and obligations.

Aspects of the Bill that Engage and Potentially Interfere with Article 6

Mutual Recognition and Non-Discrimination

36. Article 6 appears to be engaged by the Bill, in the sense that it will create new bases on which traders can market or sell products, offer services or practice professions in a second nation within the UK. These appear to be civil rights within the meaning of Article 6.

37. The starting position is that the courts will not necessarily be involved in the assertion of those rights. The Bill's provisions would have the effect that those new rights apply automatically; any requirements that would have the contrary application are to be disapplied.

38. However, it is possible that courts will be involved in deciding matters under the UKIM Act regime. Any such court action will arise through existing court processes. The Bill does not create any new mechanisms for dispute resolution or procedures for that.

39. In terms of the extent to which Article 6 will be engaged by any court action, Article 6 is engaged where there is a dispute. There are two ways in which a relevant dispute (within the meaning of Article 6) may arise under the UKIM Act. Cases may

arise in other ways, such as references of competence questions to the Supreme Court, but those do not raise Article 6 issues. First, a business or individual may claim that a requirement passed by a legislator should be disapplied under the UKIM Act principles and seek a declaration from the court that that is the case. Second, a regulator may try to enforce a requirement against a business or individual, and that business or individual claims the enforcement action should not have been brought because it does not take account of the UKIM Act principles (and the disapplication of requirements).

40. In both cases, it appears that there is a 'right' (in terms of Article 6) in question; the right to sell, or provide services, or to practice a qualification.

41. In the first situation, where a business or individual wants to raise a court challenge against a public authority legislator on the basis that a requirement purports to cut across the UKIM regime, and the business or individual seeks declarator that it does not have that effect (allowing them to therefore proceed with their business unencumbered by the requirement in a second nation), they may do so by judicially reviewing the requirement. Such routes of challenge would be Article 6 compliant without the need for any further provision.

42. In the second situation, where a regulator tries to enforce against a business or individual a requirement that should be disapplied because of UKIM, then the business or individual would be able to assert that the operation of the UKIM provisions meant that those requirements are properly disapplied by the UKIM Act. Again, this does not give rise to any Article 6 issue. The regulator would be enforcing a regulatory provision, and a court would give a decision on the correct way in which that provision should be read in relation to the UKIM Act under the processes provided for by that provision. Any decision would be open to appeal, on the point of law that the requirement should be disapplied.

Monitoring of the UK Internal Market

43. The proposed imposition of a civil penalty for breach of the requirement to produce documents and information to the CMA in exercise of its functions under the Bill will also engage Article 6(1) of the ECHR. However, the Department considers that the limits within which a civil penalty may be imposed and the appeal procedure available together with the proportionate approach provided for in clauses 37 and 38 render this compatible with Article 6(1) of the ECHR. A civil penalty may only be imposed within limits to be specified by regulations made by the Secretary of State subject to the ceilings in the Bill of £30,000 for a fixed penalty and £15,000 for a daily rate and there is no risk of imprisonment. The government has said that the provisions relating to civil penalties will only be commenced if the Government considers that there is clear and credible evidence that there is a need to do so to enable the CMA to fulfil its internal market functions under the Bill.

44. These ceilings mirror those in section 174D of the Enterprise Act 2002 as penalties applicable to the CMA's market study function and will be part of a mechanism which is considered to be appropriate to ensure that the information-

gathering power is complied with. The power to impose civil penalties will it is envisaged be applied in a proportionate way by the CMA so it is not considered that the penalties could be classified as in effect criminal penalties. The CMA must prepare and publish a statement of its enforcement policy including the nature and amount of penalties after consultation and must have regard to it in deciding whether to proceed and on any prospective penalties. An appeal may be made against the imposition of civil penalties to the Competition Appeal Tribunal and from there on a point of law with permission to the Court of Appeal or the Court of Session.

Northern Ireland Protocol

45. A dispute may arise in connection with the application of any regulations made under clauses 42 and 43. For example if the Secretary of State makes provision in regulations providing that Article 10 is or is not to apply in relation to aid granted to persons in respect of activities outside Northern Ireland (clause 43(3)(c)(i) and the European Commission orders the recovery of unlawful aid a dispute may arise as to whether an aid recipient's activities falls within the prescribed circumstances and therefore whether there is an obligation for the Secretary of State to recover the State aid. The resolution of any such dispute will be through existing court processes. The Bill does not create any new mechanisms for dispute resolution or procedures for that.

46. Regulations made under Clauses 42 and 43 are capable of being judicially reviewed under public law grounds through existing court processes, for example on grounds of vires, rationality and legitimate expectation. The provisions of clause 45 relating to the grounds on which the regulations may be held to be lawful, notwithstanding relevant domestic and international law do not operate to oust the judicial review jurisdiction of the courts although they exclude the ability to find that that the regulations are unlawful on the grounds that they are incompatible with a rule of international or domestic law. A limitation period for seeking judicial review equivalent to the standard time limit for bringing actions for judicial review strikes the correct balance between the ability of any complainants to pursue a judicial review and legal certainty for exporters and recipients of State aid who rely on the validity of the Regulations.

Assessed to be Compatible with the ECHR?

47. The Bill has therefore been assessed as compatible with Article 6 of the ECHR.

Article 8

48. Article 8 sets out the right to respect for private and family life.

Aspects of the Bill that Engage and Potentially Interfere with Article 8

49. The CMA's proposed power to require information in connection with its advisory, reporting, monitoring and intelligence-gathering functions in relation to the UK internal market will be used to obtain information about economic trends and statistics concerning the regulation of goods and services and the mutual recognition of professional qualifications impacting on the operation of the UK internal market. It is virtually impossible to conceive of the power being used directly to obtain information from or about individuals concerning their private and family lives. As such, Article 8(1) will only very rarely be engaged (if at all). It is however just about possible that some information sought and obtained may very tangentially have a bearing on individuals' private and family lives. Clause 34 of the Bill which replicates section 238 of the Enterprise Act provides on a precautionary basis for the redaction for reports of information relating to the private affairs of an individual the disclosure of which could cause significant harm.

50. In the very unlikely event of any information which might have a bearing on individuals' private and family lives being properly sought and obtained in connection with the CMA's internal market functions, it would be held securely within the CMA and in conformity with the requirements of the Data Protection Act 2018. It would be held no longer than was necessary for the purpose of the CMA's relevant function. The CMA's Statement of Policy (CMA6 of January 2014) states in paragraph 8.9 that no personal data will be disclosed by the CMA unless that disclosure is compliant with the law (then the Data Protection Act 1998). As provided by clause 34 of the Bill any such information would be redacted from any report published by the CMA if its disclosure was considered by the CMA to be significantly damaging to an individual's interests.

51. As indicated above this is a precedented formula and as a public authority within section 6 of the Human Rights Act 1998 the CMA would be mindful, should the situation arise, of the need for a proportionate approach, weighing the public interest in the economic well-being of the country in favour of disclosure against any individual's Article 8(1) rights. Furthermore, by virtue of clause 36(8) the entirety of Part 9 of the Enterprise Act 2002 will be applied to Part 4 of the Bill. Part 9 contains a general prohibition on the disclosure of specified information relating to the affairs of an individual except as permitted under that Part in section 237 and it is an offence under section 245 to disclose information in contravention of that prohibition.

52. The Department is therefore of the view that any potential interference with Article 8(1) rights arising from the CMA's exercise of its functions under the Bill (which is very unlikely indeed) would be in accordance with the law, would pursue a legitimate aim in Article 8(2) i.e. the interests of the economic well-being of the UK, and would be undertaken within the parameters necessary in a democratic society.

Assessed to be Compatible with the ECHR?

53. The Bill has therefore been assessed as compatible with Article 8 of the ECHR.

Article 13

55. Article 13 is the right to an effective remedy so as to ensure that individuals can obtain relief at national level for interference with their Convention rights. Article 13 is not within the definition of a convention right in section 1 of the Human Rights Act 1998 and therefore not a right that is addressed by the Secretary of State in the statement of compatibility under section 19 of that Act but it is considered here for completeness.

55. The provisions of clause 45 are compatible with Article 13. For the reasons described in paragraph 28 above it is considered highly unlikely that any substantive ECHR right would ever be infringed by the disapplication of obligations under the Northern Ireland Protocol in respect of export declarations and other exit procedures or under powers to make provision in relation to the interpretation and application of Article 10 of the Northern Ireland Protocol, since the provisions will be deregulatory in so far as they have effect. In this context it is considered that judicial review on public law grounds (paragraph 46 above) would provide an effective remedy in the theoretical and limited scenarios in which regulations made under clauses 42 and 43 of the Bill might conceivably violate Convention rights.

Article 14

56. Article 14 is the right not to be discriminated against in *“the enjoyment of the rights and freedoms set out in the Convention”*.

57. However, Article 14 does not presuppose a violation of one of the other Articles of the Convention. Whilst the Department does not consider that the Bill interferes with A1P1 of the Convention, it is has therefore been necessary to consider whether Article 14 (when read with A1P1 or Article 6) is engaged in respect of the Bill.

Aspects of the Bill that Engage and Potentially Interfere with Article 14 (read with A1P1)

58. The Department considers that Article 14 may be engaged by the provisions on mutual recognition and non-discrimination in the sense that a person’s ability to market (and therefore use or enjoy) identical goods may vary depending on where those goods were produced or imported.

59. By way of example, a Welsh producer and English producer may make identical goods which are in compliance with English requirements but not the requirements for any other part of the UK. By virtue of the fact that their goods were produced in England (where they were in compliance with the rules), the English producer could then market those goods across the whole of the UK, whilst the Welsh producer would be limited to marketing their goods in England where they meet the relevant requirements.

60. The Welsh producer may therefore argue that they are being treated differently from the England producer, despite being in a relevantly similar situation.

61. Whilst the Department considers that these hypothetical circumstances could engage Article 14, in the highly unlikely case that they did, it also considers that such engagement would have an objective and reasonable justification such that there is no breach of Article 14. The difference follows from the public policy objective of devolving powers to different parts of the UK to regulate in respect of consumer protection etc locally in the way that best suits the needs of the local population.

62. It is appropriate that the standard for mutual recognition in respect of produced goods should stem from the place where they are produced, therefore. If the England and Welsh producers were not treated differently in the way set out above, and the Welsh producer was able to sell in Wales using English standards, the legitimate aim of consumer protection through effective regulation of goods would be significantly undermined. It is considered therefore that differences of treatment that derive from the way that legislative competence is exercised in different part of the UK does not amount to discrimination or alternatively if it does it is justified in the interests of maintaining the devolved constitutional settlement. The essence of the UKIM regime is that goods either have to meet the requirements of their home nation or of the nation in which they are being marketed in order to ensure that they are appropriately regulated and safe for consumers. This aim could no longer be served if goods which were, for example, produced in Wales and sold in Scotland were not required to meet the requirements of either the Welsh or the Scottish legal systems. The same arguments apply to any differences of effect in relation to services and MRPQ.

63. Various powers to make regulations under the Act are capable of being exercised in a manner that is compatible with Article 14. These are the powers to amend existing descriptions of relevant requirements relating to mutual recognition and non-discrimination for goods (clauses 3(4) and 6(5), the power to add, remove or vary an aim as a legitimate aim for indirect discrimination in relation to goods (clause 8(7)), powers to modify the application of services and regulatory requirements from the UK Internal Market principles of mutual recognition and non-discrimination (clauses 10(2), 16 and 19), powers of the independent body in relation to the enforcement of information gathering (clauses 37 and 38), a power to make provision related to unfettered access to the UK internal market for Northern Ireland goods (clause 41(5) and powers to disapply or modify export declarations and other exit procedures and to make provision in relation to the interpretation and application of Article 10 of the Northern Ireland Protocol (clauses 42 and 43).

Assessed to be Compatible with the ECHR?

64. The Bill has therefore been assessed as compatible with Article 14 (read with A1P1) of the ECHR.

Department for Business, Energy and Industrial Strategy

22nd September 2020