

LEGISLATIVE CONSENT MEMORANDUM
UNITED KINGDOM INTERNAL MARKET BILL

Introduction

1. The United Kingdom Internal Market Bill (“the Bill”) was introduced in the House of Commons on 9 September 2020. It is intended to: introduce new market access rules for goods and services in the UK based on the principles of mutual recognition and non-discrimination (including the recognition of professional and other qualifications); alter in domestic UK law the application of provisions of the Northern Ireland Protocol relating to trade and state aid; authorise financial assistance by UK Government Ministers, including on devolved matters (economic development, infrastructure, culture, sport and educational or training activities and exchanges); and reserve devolved powers relating to subsidy control.
2. This Memorandum has been lodged by Michael Russell MSP, Cabinet Secretary for the Constitution, Europe and External Affairs under Rule 9.B.3.1(a) of the Parliament’s standing orders. The Bill can be found at <https://services.parliament.uk/bills/2019-21/unitedkingdominternalmarket.html>
3. This Memorandum relates to the Bill as introduced.
4. The Scottish Government believes that the best future for Scotland is to become an independent country and member of the EU. People in Scotland voted overwhelmingly to remain in the EU in 2016, a position that was reinforced by the result of the December 2019 UK General Election, where 88% of seats in Scotland were won by candidates who endorsed remaining in the EU.
5. The Scottish Government also called for the UK Government to request an extension to the Brexit transition period because of the COVID-19 crisis. The UK Government, however, chose not to seek an extension. The Scottish Government, like all the UK administrations, is therefore being forced to prepare for the end of transition in just over three months’ time, including any necessary legislative steps.
6. The Scottish Government has therefore worked with the UK Government on withdrawal legislation, primary and secondary, in an attempt to ensure that it is legally effective and reflects, as far as possible, Scottish interests and concerns. The Scottish Government has also committed to develop a range of common UK frameworks to replace EU structures where necessary.
7. This Bill, however, is not necessary; nor does it reflect Scottish interests and concerns. Instead, it undermines both the devolution settlement and agreed processes that are already established to agree common frameworks and ways of working across the UK following EU exit. Contrary to its stated intention, it risks more uncertainty and confusion for business and consumers, and encourages harmful deregulation without democratic accountability or proper Parliamentary scrutiny. In addition, the Bill explicitly gives UK Ministers wide new powers in currently devolved

areas of economic support and allows for breaches of international law. **The Scottish Government cannot therefore recommend support for this Bill.**

Devolution since 1997: principles and practice

8. In 1997 the people of Scotland voted, by a decisive majority, for the establishment of a new devolved parliament, based on the detailed prospectus set out in the UK Government White Paper *Scotland's Parliament*¹. These proposals went significantly beyond those set out for a Scottish Assembly in the Scotland Act 1978. The then Secretary of State for Scotland, Donald Dewar, set out the key differences with the 1978 Act, which are important in the context of the United Kingdom Internal Market Bill:

“A ... crucial difference from 1978-I shall telescope this-is that we have moved to define the reserved rather than the devolved powers, to ensure maximum clarity and stability. Anyone looking at the 1978 Act would see a somewhat grudging document, which would have required frequent updating. There would have been a greater danger - I put it no higher than that - of arguments over *vires*. We wished to minimise the difficulties of interpretation and to allow for maximum flexibility in future. We have done so.

... [T]he Secretary of State for Scotland will not have what is sometimes called the governor-general role, which was at the heart of the 1978 Act and was put upon the shoulders of the Secretary of State. The Scottish Parliament and Scottish Executive will have their own direct relationships with the Crown, rather than using the Secretary of State as an intermediary.

Legislation passed by the Scottish Parliament will not need to go to the Secretary of State for consideration and approval before it is passed to the Queen for Royal Assent. It is important that we do not have such overriding decisions. It would have sullied the atmosphere and made for great difficulties. I am glad about that particular extension.”²

9. The devolution settlement endorsed by the people of Scotland in the 1997 Referendum was a reserved powers model, establishing that a power is devolved unless expressly reserved, and reducing significantly the scope for disputes over competence. Importantly, there is no hierarchy of governments in the UK, and UK Ministers have no oversight of the decisions of the democratically elected and accountable Scottish Parliament and Government in devolved areas (save for some very limited exceptions).

10. These proposals were endorsed by a large majority of the Scottish people on 11 September 1997, with 74% voting in favour of a Scottish Parliament and 63% voting for the Parliament to have powers to vary the basic rate of income tax³. The competence of the Scottish Parliament has expanded over the last 20 years to

¹ Cm 3658

² https://publications.parliament.uk/pa/cm/199798/cmhansrd/vo970731/debtext/70731-07.htm#70731-07_head0

³ <https://www.gov.uk/guidance/devolution-settlement-scotland>

include further tax powers and many aspects of social security policy, in a manner compatible with the model of devolution endorsed by the people of Scotland in 1997.

11. Devolution has been a huge benefit to the political, economic and social wellbeing of Scotland. Issues of fundamental economic, social and cultural importance to Scotland - such as land reform, smoking and alcohol, free personal care, access to higher education and medicines, stewardship of natural resources - have been addressed in ways that reflect Scotland's particular needs and circumstances, and the views of the people of Scotland.

The Internal Market Bill and devolution

12. The United Kingdom Internal Market Bill is fundamentally incompatible with the principles and practice of devolution in the UK's constitutional arrangements since 1997. The Market Access Principles of mutual recognition and non-discrimination cut across the clear reserved powers model to introduce wide ranging constraints on devolved competence, and in ways that are unpredictable and will lead to increased legal disputes. The mutual recognition principle, in particular, will reduce the ability of the Parliament to use its powers to pursue devolved social and economic objectives in Scotland for which it is accountable (see paragraphs 39 to 71 below). By obliging Scotland to accept standards of regulation set by the UK Government (and indeed the other devolved administrations) it effectively allows UK Ministers to legislate for Scotland in devolved areas, such as environmental standards or measures to promote public health.

13. The proposals in the Bill are also asymmetrical in two ways. First, they encourage deregulation or the lowering of standards as goods or services meeting the lowest requirements set in any part of the UK must be accepted across the UK as a whole, whatever the views of each administration or legislature on matters within their competence. The incentive is then to adjust all standards to this new lower threshold, or to disadvantage producers or service providers in each domestic market. There is no equivalent mechanism to impose higher standards on all, and any attempt by any administration to increase standards would again potentially disadvantage their own producers without achieving any actual practical benefit as goods and services from other parts of the UK would still need to be allowed on to the market. This could be particularly significant for key sectors of the Scottish economy, such as food and drink, where success is built upon the quality guarantee that comes with the Scottish brand.

14. In theory this is true for each part of the UK, so, for example the Scottish or Welsh Parliaments or Northern Ireland Assembly could effectively adjust standards in England by deregulating for their domestic markets. However, this illustrates the second asymmetry as, unlike devolved legislatures, the UK Parliament would retain the authority to use primary legislation to exclude the Market Access Principles for any sector if it does not support the consequences of deregulation in Scotland, Wales or Northern Ireland for producers in England. Indeed, it is inconceivable that MPs for English constituencies would accept the disadvantaging of English producers from changes in regulation elsewhere in the UK which the UK Parliament itself did not support. The relative size of England will also mean the Bill impacts more restrictively on the other UK nations as more goods and services from England

will be excluded from the effect of devolved laws. It is also relevant that only UK Ministers will have powers to adjust exclusions from the Market Access Principles under the provisions in the Bill.

15. The Bill also undermines the agreed process of negotiating and agreeing common UK frameworks where these are required to replace existing EU structures. The common frameworks approach provides all of the claimed objectives of the Bill in guaranteeing market access across the UK, while respecting devolved competence, and, crucially, effectively providing agreed minimum standards which all producers must meet, avoiding the risk of competitive deregulation while giving producers and consumers clarity and certainty. By contrast, the Bill would effectively allow four regulatory systems to exist simultaneously in each part of the UK, with different effects on different producers depending on which part of the UK they operate in: the opposite of the certainty and clarity the Bill claims to achieve.

16. The wide ranging consequences of this legislation require much more debate and scrutiny to ensure they are properly understood by stakeholders and citizens in Scotland and other parts of the UK. The UK Government has carried out a wholly inadequate consultation of such fundamental reforms (although the reaction at the time available raised serious questions about its proposals). In addition, inadequate time has been allocated in the UK Parliament to scrutinise these proposals – in marked contrast to the extensive consultation, Parliamentary scrutiny and public debate that led to the establishment of the Scottish Parliament in 1999 .

Legislative consent for the Bill

17. Given this, the Scottish Government recommends that the Scottish Parliament should not consent to the Bill, and should indicate its opposition to this set of measures that are incompatible with the devolution settlements in the UK, and that would fundamentally undermine the powers of the Scottish Parliament.

18. Moreover, the Scottish Government cannot recommend that the Parliament consent, given that the Bill contains provisions at clause 45 that are, by UK Ministers' own admission, in breach of international law. To do so would be incompatible with the fundamental principle, reflected in the Ministerial Code, that Ministers do not knowingly break the law⁴.

19. The Scottish Government does not therefore intend to lodge a legislative consent motion in relation to the Bill, but will invite the Parliament to debate the Bill in due course. In line with Rule 9B.3.3(d) of Standing Orders, the Scottish *Government's* reasons for not including a draft motion are set out in paragraphs 20 – 114 below.

⁴ <https://www.gov.scot/publications/scottish-ministerial-code-2018-edition/>

Background

The effect of EU exit on the UK's constitutional arrangements

20. The European Union (Withdrawal) Bill (“the EU Withdrawal Bill”) was introduced in the House of Commons on 13 July 2017. The purpose of the EU Withdrawal Bill, in the words of the accompanying Explanatory Notes⁵, was

“to provide a functioning statute book on the day the UK leaves the EU. As general rule, the same rules and laws will apply on the day after exit as on the day before. It will then be for Parliament and, where appropriate, the devolved legislatures to make any future changes. ”

21. The EU Withdrawal Bill contained a range of provisions relevant to devolved matters, including blanket provisions at clause 11 to constrain the powers of the Scottish Parliament and the Scottish Ministers in respect of retained EU law⁶. Following rejection of these proposals by devolved institutions as an unacceptable constraint on devolved competence, the Bill was eventually enacted as the European Union (Withdrawal) Act 2018 (“EUWA”) with regulation-making powers in section 12⁷ for UK Ministers ultimately to make unilateral decisions to constrain devolved competence in respect of retained EU law, without the consent of the devolved administrations or legislatures (in breach of one of the fundamental principles of the devolution arrangements across the UK). To date, these powers have not been used.

22. The Act was passed without the consent of the Scottish Parliament in 2018, but with the consent of the then Welsh Assembly. An intergovernmental agreement was signed by UK and Welsh Ministers in April 2018⁸ agreeing to the Bill’s provisions and to joint working on Common Frameworks (see below). The Scottish Government could not sign the agreement as the powers contained in section 12 of the 2018 Act were (and still are) fundamentally incompatible with the devolution settlements in Scotland, Wales and Northern Ireland.

23. The Scottish Government has, however, agreed to participate in the development of Common Frameworks where these are in Scotland’s interests, and where they are agreed and not imposed. The Scottish Government has also indicated that co-operation will cease on Common Frameworks in any areas where UK Ministers seek to use powers under section 12 of EUWA.

⁵ <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf>

⁶ See the Scottish Government’s Legislative Consent Memorandum to the Bill (September 2017) <http://www.parliament.scot/S5ChamberOffice/SPLCM-S05-10-2017.pdf>

⁷ <https://www.legislation.gov.uk/ukpga/2018/16/section/12/enacted>

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf

Common Frameworks

24. In October 2017, a statement of frameworks principles was agreed at Joint Ministerial Committee (JMC) (European Negotiations)⁹. The principles state that Common Frameworks will:

“set out a common UK, or GB, approach and how it will be operated and governed. This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued. Frameworks may be implemented by legislation, by executive action, by memorandums of understanding, or by other means depending on the context in which the framework is intended to operate.”

25. The principles go on to stipulate that frameworks may be necessary, *inter alia*, to “enable the functioning of the UK internal market, while acknowledging policy divergence”. They will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:

- be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent;
- maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules;
- lead to a significant increase in decision-making powers for the devolved administrations.

26. The principles also set out that frameworks will ensure “recognition of the economic and social linkages between Northern Ireland and Ireland and that Northern Ireland will be the only part of the UK that shares a land frontier with the EU, and that they will adhere to the Belfast Agreement”.

27. There has been, in other words, a process in place since 2017 for the four UK administrations to agree measures to manage the market effect of policy divergence in areas currently subject to EU law. Despite the need for far greater clarity from the UK Government on a range of matters relating to Common Frameworks, including the UK’s future relationship with the EU and the operation of the Northern Ireland Protocol, good progress has been made in developing these frameworks, of which there are now potentially around 40, with around 30 applying to Scotland. A revised delivery plan was agreed at JMC in September, with a view to seven frameworks (six in Scotland) being fully operational by the end of 2020, with the rest in place over the course of 2021. The Scottish Government has committed to operating as if the full frameworks were in place until they are finalised, and urges the UK Government to do so.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

The BEIS UK Internal Market Project

28. Common Frameworks has been a joint project overseen by officials from the three devolved governments and the Cabinet Office. The Department for Business, Energy and Industrial Strategy (BEIS) has also been leading work on the UK internal market.

29. It became increasingly evident over the course of 2018 that BEIS-led work on the internal market was going significantly further than work under way on Common Frameworks. The proposals for overarching market measures lying outside, or cutting across individual frameworks, along with the suggestion of appointed oversight structures caused increasing concern, as did the lack of substantive progress in how these concerns were being addressed by the UK Government.

30. The Scottish Government withdrew from the BEIS-led internal market project in March 2019. It did so because it was obvious at that point that the UK Government was not prepared to take into account the arguments the Scottish Government had presented, based on legal, economic and academic evidence, that the mechanisms agreed in individual framework areas – as well as existing provision in the devolution statutes – are sufficient to address any internal market issues that might emerge on EU exit. It became clear that the UK Government approach to work on the UK internal market presented a clear risk to the devolution settlement.

Development and Scrutiny of the Bill

31. A White Paper on the UK Government's internal market proposals was published on 16 July 2020¹⁰, with a four week consultation period set, despite the devolved legislatures being in recess. The proposals were not shared with the devolved governments until hours before publication. Although Scottish Government officials had withdrawn from the project in March 2019, Welsh Government and Northern Ireland Executive officials remained involved. However, as subsequent comments have made clear, the proposals did not reflect their views, contributions and priorities, and there had been no prior consultation on the contents of the paper.

32. Despite the very brief period afforded for scrutiny of the proposals, a wide range of concerns were raised across a range of sectors, including farming, business, the environment, and public health¹¹. These centred on the impact of the

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901225/uk-internal-market-white-paper.pdf

¹¹ See, for example, NFUS Scotland, <https://www.nfus.org.uk/news/news/white-paper-proposal-presents-risks-to-vital-internal-uk-markets> the Scottish Council for Development and Industry, <https://www.scdi.org.uk/policy/consultation-response-uk-internal-market/> Scottish Environment Link, <https://www.scotlink.org/publication/link-response-to-uk-internal-market-bill-white-paper/> and the STUC, <https://www.stuc.org.uk/media-centre/news/1506/stuc-prime-minister-on-a-crash-course-to-undermine-devolution-and-with-it-the-union#:~:text=STUC%3A%20Prime%20Minister%20on%20a%20crash%20course%20to,picking%20and%20choosing%20investments%20in%20Scottish%20public%20services.>

proposals on devolution, their impact on jobs and businesses, and Scotland's ability to make different policy choices to reflect its specific needs and circumstances.

33. These concerns were mirrored by ministers in the other devolved governments and by the majority Conservative Public Administration and Constitution Committee at Westminster¹². The UK Government has so far failed to publish the responses given to it during the consultation process. It is extremely disappointing that the UK Government's response to the consultation in the main ignores or significantly downplays these widespread and detailed concerns. Indeed, the Bill as introduced also contained further far-reaching measures concerning expenditure including on devolved areas in Part 6 of the Bill, on which the Devolved Governments were not consulted.

34. The Bill was introduced in the House of Commons on 9 September on an accelerated timetable that affords inadequate time for the scrutiny of such far reaching changes to the UK's constitutional arrangements. The Scottish Government understands UK Ministers intend for the Bill to have completed its Commons stages by the end of September. The European Union (EU), for its part, has made clear that it will consider using the range of mechanisms and legal remedies in the Withdrawal Agreement to address those provisions in the Bill that are in breach of international law¹³.

Content of the Bill

35. The Explanatory Notes¹⁴ accompanying the Bill set out the UK Government's view of its purpose and main functions. The UK Government describes the principal purpose of the Bill as "to preserve the UK internal market, providing continued certainty for people and businesses to work and trade freely across the whole of the UK".

36. Detail of the structure and provisions of the Bill is the Annex. However, the main provisions of the Bill are as follows:

Part 1 and Schedule 1 – UK Market Access: Goods

This Part provides for a new market access regime for goods in the UK at the end of the Transition Period when EU Single Market Rules no longer apply in the UK. The regime is based on the principles of (1) mutual recognition – any good that meets regulatory requirements in one part of the UK can be sold in any other part, without having to adhere the relevant regulatory requirement in that other part; and (2) a prohibition on direct or indirect discrimination based on differential treatment of local and incoming goods. It also provides for limited exclusions from these rules, based on policy area.

Part 2 and Schedule 2 – UK Market Access: Services

This Part provides for a new market access regime for services in the UK based on the same mutual recognition and non-discrimination principles. Again, it provides for limited exemptions from these provisions.

¹² <https://committees.parliament.uk/publications/2419/documents/24006/default/>

¹³ https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1607

¹⁴ <https://publications.parliament.uk/pa/bills/cbill/58-01/0177/en/20177en.pdf>

Part 3 – Professional Qualifications and Regulation

This Part provides for a system for the mutual recognition of professional qualifications that are regulated in law across the UK. It introduces an “automatic recognition” principle for a professional qualified in one part of the UK to be treated automatically as qualified in respect of that profession in another part of the UK, as well as setting out the situations where the automatic recognition principle does not apply.

Part 4 – Independent Advice and Monitoring of UK Internal Market

This Part provides the creation of a new reporting, advising and monitoring function for the Competition and Markets Authority (CMA). In addition to these functions, the CMA will have powers to require information from an individual, business or public authority, and powers to issue penalty fines for non-compliance.

Part 5 – Northern Ireland Protocol

This Part requires “appropriate authorities”, including the Scottish Ministers, to have special regard for Northern Ireland’s integral place in the UK internal market and customs territory. Contrary to the requirements of the Withdrawal Agreement and Northern Ireland Protocol, it prohibits the introduction of any new check, control or administrative process on the movement of goods from Northern Ireland to Great Britain, and confers powers on UK Ministers to disapply or modify export declarations and other exit procedures in respect of goods, or a description of goods, moving from Northern Ireland to Great Britain. It provides for UK Ministers regulation making powers to disapply or modify the effect of Article 10 of the Northern Ireland Protocol (State Aid) as it applies under the Withdrawal Agreement, and provides a statutory requirement that no one apart from the Secretary of State may notify or inform the European Commission of State Aid, or proposed State Aid, where required under Article 10. It also sets out which of the Bill’s provisions “would have effect notwithstanding inconsistency or incompatibility with international or other domestic law” and ceases the direct effect of parts of the Withdrawal Agreement and Northern Ireland Protocol.

Part 6 – Financial Assistance Powers

This Part confers on UK Ministers a general power to provide financial assistance in the following devolved matters: economic development, infrastructure, culture, sporting activities, domestic educational and training activities and exchanges, and international education and training activities and exchanges.

Part 7 – Final Provisions

This Part amends Schedule 5 of the Scotland Act 1998 to reserve legislative competence relating to subsidy control regimes once the UK ceases to follow EU State aid rules. It also adds the Bill to the list of protected enactments in Schedule 4 of the Scotland Act 1998. This means that the Scottish Parliament cannot pass legislation that amends the Bill, or modifies its application. This Part also contains further provision relating to the Northern Ireland Protocol.

Requirement for Legislative Consent

37. The Bill is a relevant Bill within Rule 9B.1.1 of Standing Orders as it makes provision applying to Scotland for purposes within the legislative competence of the Parliament and alters that legislative competence and the executive competence of the Scottish Ministers. The Scottish Government considers that legislative consent is required for all of the clauses of the Bill, in line with the position set out by the UK Government in the Explanatory Notes on the Bill.

38. The Bill alters the legislative competence of the Parliament and the executive competence of the Scottish Ministers, in a variety of ways, and in a manner that is incompatible with established understandings of how the devolution settlement in Scotland should operate. It is also incompatible with the model of devolution that was extensively debated and consulted on in the 1990s, and endorsed by a majority in Scotland in 1997 (see paragraphs 8-11).

Part 1 – UK Market Access: Goods

39. The Scottish Government considers legislative consent is required for all the clauses in Part 1: the Explanatory Notes make clear (paragraph 74) that “Parts 1 to 3 of the Bill operate so that any requirements created after its entry in force that would impede the operation of the UK internal market will have no effect”. In effect, a new, blanket constraint or test would be placed on the powers of the Scottish Parliament and Scottish Ministers.

40. Part 1 and Schedule 1 of the Bill establish the United Kingdom Market Access principles of mutual recognition and non-discrimination. They set out:

- how the mutual recognition and non-discrimination principles would be applied to goods in the UK;
- the application of both direct and non-direct discrimination principles for the purposes of the Bill
- the relevant requirements for being in scope of the principle; and
- the exclusion of some of these requirement from the principles.

41. It confers powers on UK Ministers (and only UK Ministers) to amend provision at Schedule 1 relating to exclusions from the application of the United Kingdom market access principles and how the principles apply to qualifying Northern Ireland goods moving from Northern Ireland to Great Britain.

42. These provisions amend the competence of the Scottish Parliament not by reserving matters in Schedule 5 of the Scotland Act in a manner coherent with the general scheme of that Act, but by providing that provisions of Acts of the Scottish Parliament, or Scottish Statutory Instruments, must conform to the principles of the Bill or else they “do not apply” or have “no effect”. This is in effect a new, wide-ranging constraint on devolved competence that potentially goes further than existing constraints on legislative or executive competence at Sections 29 and 54 of the Scotland Act 1998, and is unpredictable in effects.

43. The **mutual recognition principle** at clause 2(3) will apply to all devolved legislation and to UK secondary legislation.

44. The types of devolved provisions which could be affected by this principle are very broad. The mutual recognition principle applies to statutory requirements, defined in clause 3(10) as

“an obligation, a condition or a prohibition (however described) imposed by legislation (including legislation imposing mandatory terms into contracts for the sale of goods).”

45. Clause 3(3) confirms that a statutory requirement which does not prohibit sale but has an equivalent effect is caught, as is any statutory specification about the characteristics of goods, including their nature, composition, age, quality or performance. The full list is provided in clause 3(4).

46. The effect of these provisions can be illustrated simply with an example on food standards¹⁵: if the Scottish Parliament chose to pass a law to limit the sugar content of goods produced in Scotland to tackle the problem of obesity, a choice currently within competence, it could not impose those standards on goods coming into Scotland from other parts of the UK, nor could it prevent those goods from entering the Scottish market, provided these satisfy regulations set anywhere in the UK. The Scottish Parliament could technically still legislate in this way, but it would only bind producers based in Scotland, undermining the intended effect of the policy, as well as potentially disadvantaging Scottish producers. The Bill would therefore, in effect, prevent the Scottish Parliament from exercising its devolved competence in this area, for which is it democratically elected, and accountable.

47. Clause 4 provides that the mutual recognition principle will not be backdated to catch restrictions which were in place before the commencement of the Act. That would protect existing requirements in Scots law, for example minimum unit pricing (MUP). This protection applies to restatements of the existing law. However, this protection only applies provided there is no substantive change. It is highly likely that MUP regulations will in future be brought before the Parliament, for example to adjust unit pricing in light of inflation. At that point, they may be caught by the mutual recognition principle.

48. As one legal commentator notes:

“... the basic effect of the [Bill] 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.*”¹⁶

¹⁵ Nicola McEwen, ‘Proposals for a UK internal market law: a sledgehammer to crack a nut?’, July 2020, <https://ukandeu.ac.uk/proposals-for-a-uk-internal-market-law-a-sledgehammer-to-crack-a-nut/>

¹⁶ Michael Dougan, ‘United Kingdom Internal Market Bill: Implications for Devolution’, September 2020 https://www.liverpool.ac.uk/media/livacuk/law/2-research/eull/UKIM_Briefing_Paper_-_Prof_Michael_Dougan_15_September_2020.pdf

49. It is not accurate therefore that there is a general protection for devolved measures implemented before enactment that would otherwise be in scope. It is more accurate to say that the provisions would be frozen, with any subsequent change rendered potentially ineffective nor is it correct to claim that devolved competence is not affected: in practical terms the scope for autonomous action which the Scottish Parliament can currently take to address a range of social and economic policy objectives is significantly reduced by this Bill.

50. As set out above, these provisions do not provide certainty and clarity for producers and consumers but introduce complexity and the potential for confusion given four regulatory systems could be valid in each part of the UK. The provisions also encourage deregulation and lowering of standards, and are asymmetric in the way they bind the devolved legislatures and the UK Parliament.

51. The **non-discrimination principle** applies to direct and indirect forms of discrimination against goods which are produced in, or imported into, one part of the UK and sold in another. Like mutual recognition, all devolved legislation (concerning goods and services) will be subject to the principle (see clause 6(2)).

52. There is a very broad list of the factors which bring a statutory provision within the scope of the principle set out in clause 6(3). These include restrictions in handling, transportation and storage, as well as inspections and certifications. Again, UK Ministers, and only UK Ministers, have a broad power to amend that list.

53. As with mutual recognition, the non-discrimination principle does not ostensibly affect pre-commencement provisions, but in effect freezes current devolved measures, or makes substantive change more challenging.

54. The interaction between the mutual recognition principle and the non-discrimination principle could be complex and it is possible that a provision in Scottish legislation could breach both at the same time or be acceptable under one principle, but not under the other.

55. There is a limited list of exceptions to the Market Access Principles at Schedule 1 of the Bill, essentially covering some animal and food safety matters, chemicals and taxation. UK Ministers are given the power to amend this Schedule, and could therefore add exceptions which the UK Government wished to regulate in England without being obliged to recognise devolved regulations of the same type. They could also remove matters from the Schedule if they wished to stop devolved regulations binding English producers in these excepted areas. There is no reciprocal power for devolved Ministers; the only obligation on UK Ministers is to consult devolved Ministers before using this power.

56. The market access principles do not apply symmetrically across the administrations of the UK as UK Parliament primary legislation could amend the Bill's scope and application at any time. As noted, UK Ministers can unilaterally alter the list of exclusions to the market access principles.

57. As the Bill is protected from change by Act of the Scottish Parliament, the market access principles therefore modify the legislative competence of the Scottish

Parliament and the executive competence of the Scottish Ministers. Provisions which would be within the *vires* of the Scottish Parliament (if contained in primary legislation) or the Scottish Ministers (if contained in secondary legislation) before the commencement of the Part 1 of the Bill would have their effect thrown in to doubt if enacted after the commencement of the Bill. The principles add a whole new complex set of legal restrictions, limiting the scope of devolved action in areas affecting a wide variety of policy objectives.

Part 2 – UK Market Access: Services

58. This Part places limits on the application of authorisation requirements and regulatory requirements on service providers by (i) establishing a principle of mutual recognition of authorisations to provide services; and (ii) prohibiting direct and indirect discrimination by a service regulator against a service provider.

59. The Scottish Government considers legislative consent is required for all the clauses in Part 2: the Explanatory Notes make clear (paragraph 74) that “Parts 1 to 3 of the Bill operate so that any requirements created after its entry in force that would impede the operation of the UK internal market will have no effect”. In effect, a new, blanket constraint or test would be placed on the powers of the Scottish Parliament and Scottish Ministers.

60. The same principles of mutual recognition and non-discrimination (direct and indirect) are applied to services in a manner analogous to goods in Part 1. A service provider that meets the necessary requirements to operate in one part of the UK should be able to operate in any other. A service provider cannot be discriminated against directly or indirectly. Indirect discrimination includes placing a service provider from another part of the UK at a substantial disadvantage, or “has a market adverse effect” in a way that is neither necessary or proportionate.

61. Schedule 2 contains a list of services that exempt from the mutual recognition and non-discrimination principles. UK Ministers, and only UK Ministers, can alter the scope of exemptions at Schedule 2 by statutory instrument.

62. As with Part 1 (goods), these provisions constrain devolution, not by amending the reserved matters in Schedule 5 of the Scotland Act 1998, but in a more subtle and far-reaching way.

63. The UK Government White Paper indicated (paragraph 133) that the UK Ministers’ intention is largely to seek to replicate those parts of the Provision of Services Regulations (2009)¹⁷ (“the 2009 Regulations”) that the UK Ministers would like to retain – although provisions have already been brought into UK law through Statutory Instruments.

64. In 2009, the Department for Business, Innovation and Skills stated that, under the 2009 Regulations, “UK businesses operating in another EEA state can expect to be subjected to that country’s rules and regulations, although any discriminatory,

¹⁷ <https://www.legislation.gov.uk/ukdsi/2009/9780111486276/contents>

unnecessary or disproportionate barriers to providing services in that country should have been removed”¹⁸.

65. The Bill, as it stands, contains the same sectoral exclusions as the 2009 Regulations – adding legal services and ‘Services provided by a person exercising functions of a public nature or by a person acting on behalf of such a person in connection with the exercise of functions of a public nature’. However, it makes this list subject to review by UK Ministers , who can amend it through regulations.

66. There are concerns with the Bill where it deviates from the 2009 Regulations:

- The Bill “makes provision that limits the application of authorisation requirements and regulatory requirements”
- Authorisation in one jurisdiction applies to all jurisdictions: the 2009 Regulations made it a requirement that a service provider from one member state had to be able to offer services in another member state without a requirement for establishment, but they would have to comply with local regulations, and some ‘reservations’ on the provision of services operate within the EU itself
- Under the 2009 Regulations, authorisation schemes in member states have to be complied with in a defined set of circumstances: an authorisation scheme can only be imposed if, broadly speaking: the scheme is non-discriminatory; it can be justified by an overriding reason relating to the public interest, such as public policy, public security or public health; and the objective of the authorisation cannot be attained by less restrictive means.

67. In the Bill, the only exclusion to mutual recognition is “to the extent it can reasonably be justified as a response to a public health emergency” (clause 17(4)).

68. At clause 16, UK Ministers have the power to make regulations to add or remove sectors (for example, healthcare services) from the list of exclusions. So any decision to bring devolved Scottish health or housing services into the scope of the Bill lies with UK Ministers and UK Parliament alone – the Scottish Parliament and Ministers would have no say in the matter.

69. The 2009 Regulations say that authorisation schemes must be non-discriminatory. The Bill includes the twin concepts of direct and indirect discrimination. Under clause 19 (indirect discrimination), restrictions must be a “necessary means to achieving a legitimate aim”. These aims are:

- (a) the protection of the life or health of humans, animals or plants;
- (b) the protection of public safety or security;
- (c) the efficient administration of justice.

70. This transfers authority to decide on these matters from the Scottish Government, the Scottish Parliament and devolved regulators. Furthermore, the Bill

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<https://webarchive.nationalarchives.gov.uk/20140321190242/http://www.bis.gov.uk/files/file53100.pdf>

gives UK Ministers the power to add or remove aims from this list by way of regulations.

71. In summary, the Bill removes the power of regulators to require authorisation where a service provider is authorised elsewhere in the UK, by introducing comprehensive mutual recognition. It gives the UK Government the power to decide what service sectors are in and out of the scope of the Bill (without consultation), expands the definition of discrimination. It also transfers power to the UK Government to decide on ‘legitimate aims’ and introduces a role for the Competition and Markets Authority (CMA).

Part 3 –Professional Qualifications and Regulation

72. This Part requires that (i) a professional qualified in one part of the UK to be automatically treated as qualified in respect of that profession in another part of the UK (the automatic recognition principle); (ii) exceptions to these principles; and (iii) equal treatment measures requiring that a UK resident practising a profession in a part of the UK with qualifications or experience obtained in another part of the UK, is treated on the same basis, in respect of ongoing professional requirements, as a locally qualified professional.

73. The Scottish Government considers legislative consent is required for all the clauses in Part 3: as noted the Explanatory Notes also make clear (paragraph 74) that “Parts 1 to 3 of the Bill operate so that any requirements created after its entry in force that would impede the operation of the UK internal market will have no effect”. In effect, a new, blanket constraint or test would be placed on the powers of the Scottish Parliament and Scottish Ministers.

74. The underlying principle in Part 3 is that professional qualifications and experience gained in one nation of the UK should automatically be considered as equivalent to that gained in another where there is a direct equivalent, or the ‘closest equivalent’ where not.

75. However, automatic recognition does not apply where a regulator offers a route to apply for a recognition decision: this has been described as the “manual”, as opposed to “automatic”, route to recognition. For example, the General Teaching Council for Scotland (GTCS) offers a clear route to recognition already¹⁹. However, by creating a new legislative framework for recognition, the process becomes subject to control from UK Parliament, undermining the Scottish Government and Parliament’s role, and the autonomy of devolved regulators in setting standards. There are no guarantees that the UK Parliament or Ministers could not remove or substantially amend the “manual route”, or define professions to which the automatic route would apply.

76. Under the Bill, where there is a difference between levels of qualification or experience required, and therefore a deficiency in respect of the applicant, the regulator must offer a route for the assessment of qualifications and experience through a test to assess equivalence – unless “the test or assessment would (having

¹⁹ <https://www.gtcs.org.uk/registration/qualified-outside-scotland.aspx>

regard to the knowledge and skills demonstrated by the applicant in accordance with the principles set out in subsection (4)(a) and (b)) be similarly demanding to obtaining so much of the usual qualifications or experience as the applicant lacks.”

77. The Explanatory Notes for clause 47 state “If the qualifications or experience do not meet the required standard, an assessment should be offered to allow the professional the opportunity to demonstrate the required knowledge and skills. If the knowledge and skills required can be demonstrated either by; qualifications or experience or the assessment, the individual must be recognised and permitted to practise profession in the relevant party”. It is currently not clear the extent to which existing intra-UK recognition routes across Scotland, England, Wales and Northern Ireland would comply with this approach.

78. On top of the additional ‘test’ route, some provisions on professional qualifications are subject to the authority of the CMA – and this would appear to undermine the Scottish Government and Parliament’s role, and the autonomy of regulators in setting standards.

79. Furthermore, in creating a legislative ‘framework’ for recognition, this process becomes subject to control from UK Parliament, risking that amendments to the Bill on its passage through Parliament could remove the ‘manual route’ or define professions to which the automatic route would apply. This risk would continue once the legislation comes into force.

80. In summary, the Bill adds extra processes and undermines devolution by risking the autonomy of the Scottish Government, Parliament and regulators in setting standards, processes and determining eligibility for ‘automatic’ recognition.

Part 4 – Independent Monitoring and Advice on the UK Internal Market

81. These clauses would confer functions on the CMA relating to UK internal market reporting, advice, and monitoring.

82. This Part of the Bill also confers powers on the CMA relating to (i) information gathering, either in issuing an information notice or requiring the production of a document by an individual, business or public authority; (ii) enforcement in the event of non-compliance with an information request; and (iii) financial penalties in cases of non-compliance with an information notice.

83. These provisions would introduce new compliance obligations on Scottish Ministers and devolved agencies in respect of the overall internal market regime introduced by the Bill, which are protected from modification by Act of the Scottish Parliament. As such they have the potential to constrain devolved competence. They would also confer new powers on Scottish Ministers in respect of advice or reports from the CMA. They would apply in devolved areas.

84. The Scottish Government therefore considers legislative consent is required for Part 4.

Part 5 – Northern Ireland Protocol

85. Part 5 of the Act contains a range of provisions relating to the Northern Ireland Protocol (NIP).

86. Clause 40 provides that authorities, including Scottish Ministers, must have “special regard” to Northern Ireland’s place in the UK when exercising functions for certain purposes. These functions would include making SSIs for the purposes of implementing the NIP and regulating the movement of goods.

87. Clauses 41 and 42 (i) prohibit an appropriate authority from applying new checks, controls or administrative processes on qualifying goods as they move from Northern Ireland to Great Britain; and (ii) confer a power on UK Ministers to make provision regarding application of exit procedures (applicable by virtue of the Northern Ireland Protocol or otherwise) to goods, or a description of goods, when moving from Northern Ireland to Great Britain, including provision disapplying, or modifying the application of, exit procedures, stating or restating the application of exit procedures. The devolved functions that would fall under the prohibitions include making SSIs for the purposes of implementing the NIP and regulating the movement of goods.

88. Clauses 43 and 44 (i) confer powers on UK Ministers to make regulations in connection with Article 10 of the Northern Ireland Protocol (State Aid), and to make provision about how this Article is to be interpreted for the purposes of UK domestic law; and (ii) provide for a statutory requirement that no one apart from UK Ministers may notify or inform the European Commission of State aid, or proposed State Aid, where required under Article 10.

89. Clause 44 provides that:

“No public authority apart from the Secretary of State may comply with a requirement of a provision of EU law applied to the United Kingdom by Article 10 of the Northern Ireland Protocol (State aid) to give the European Commission a notification or information relating to aid.”

90. To the extent that any such notification would otherwise fall within the executive competence of the Scottish Ministers, this provision would cut across the exercise of that function.

91. Clause 45 makes express provision in relation to clauses 42 and 43 (regulations regarding Article 10 of the Northern Ireland Protocol). Regulations made under those sections and any other provision relating to those provisions have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent.

92. In particular, clause 45 of the Bill

- expressly provides that certain provisions of the Bill are to have effect despite “any incompatibility or inconsistency with relevant international or

domestic law”. Relevant international law includes the Withdrawal Agreement and the Northern Ireland Protocol

- modifies sections 7A and 7C of the European Union (Withdrawal) Act 2018 (which give direct effect to the Withdrawal Agreement) to provide that the Withdrawal Agreement and Northern Ireland Protocol cease to have direct effect where it is incompatible with certain provisions in the Bill. This is at odds with Article 4 of the Withdrawal Agreement.

93. The Bill places a number of obligations on the Scottish Ministers which may conflict with the obligations that the Scottish Ministers would expect to be obliged to follow in the Withdrawal Agreement. The Scottish Government cannot recommend that the Parliament consent to a Bill that contains provisions that directly contradict the fundamental principle, reflected in the Ministerial Code, that Ministers do not knowingly break the law, including international law.

94. The Bill’s provisions do not provide “clarification” in relation to aspects of the Northern Ireland Protocol, they give UK Ministers powers to change the fundamental meaning and intent of the agreement, particularly on State Aid. Specifically:

- On State Aid, Ministers would have powers to make changes to all aspects of the State Aid provisions in the Protocol;
- On customs arrangements, the proposals are limited to powers to eliminate any new documentation on “NI Goods” moving to GB, and explicitly the power to remove the need for export certificates, which are required under the Common Customs Code, which, under the Protocol applies fully to Northern Ireland.

95. The Scottish Government considers legislative consent is required for the clauses contained in Part 5.

Part 6 – Financial Assistance Powers

96. Extensive new financial assistance powers are conferred on UK Ministers at Part 6 of the Bill. While the UK Government retained residual powers following the Scotland Act 1998, this provision gives UK Government explicit powers to spend on matters within the responsibilities of the Scottish Ministers and the Scottish Parliament, without their consent or any requirement to coordinate or consult on existing spending in these areas. The source of funding to be used under these powers is not specified in the Bill, and the powers are not limited to replacing previous EU funding streams.

97. Clause 46 contains provisions which provide the UK Government with wide powers to provide financial assistance directly for the purposes of economic development, culture, sporting activities, infrastructure, domestic educational and training activities and exchanges, and international educational and training activities and exchanges.

98. The Explanatory Notes clarify this (paragraphs 65 and 66):

The general power to provide financial assistance within this Bill would provide the UK Government with the ability to provide financial assistance for the purposes of economic development, culture, sporting activities, infrastructure, domestic educational and training activities and exchanges, and international educational and training activities and exchanges.

The power to provide financial assistance in this Bill is intended to enable the UK Government to provide funding to local authorities, sectoral organisations, community groups, educational institutions and other bodies and persons in order to support and promote these policy areas across the UK.

99. While the impact assessment associated with the Bill refers specifically to direct replacements to EU programmes²⁰, the powers conferred on UK Ministers are not restricted to such replacements. They are broad and would allow the UK Government to spend money including in devolved areas without the consent or input of the Scottish Ministers, or the approval of the Scottish Parliament.

100. The Scottish Government believes that these provisions are a further source of uncertainty and confusion in the Bill, as well as potentially removing from the Scottish Government its current role in EU funding.

101. Spending on devolved areas is currently the responsibility of the Scottish Government, as approved by the Scottish Parliament, funded by the Scottish block grant calculated according to the Statement of Funding Policy²¹ using the Barnett formula, as adjusted by the agreed fiscal framework²². In addition EU funding is provided for various devolved purposes.

102. The Statement of Funding Policy notes that (paragraph 1.17 (4)):

“changes in UK government funding for the devolved administrations in relation to devolved public service responsibilities will generally be linked to changes in planned spending on comparable areas by departments of the UK government. This linkage will generally be achieved by means of the Barnett Formula.”

103. That is, where the UK Government undertakes expenditure in England on matters devolved to Scotland, the Scottish Government receives a population share of the increase in such expenditure.

104. However, the UK Government has made clear its position that it retains overall responsibility for cross-UK funding, and can depart from this approach should

²⁰<https://publications.parliament.uk/pa/bills/cbill/58-01/0177/UK%20Internal%20Market%20Bill%20Impact%20Assessment%2008092020.pdf> Annex B

²¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/479717/statement_of_funding_2015_print.pdf

²²<https://www.gov.scot/publications/agreement-between-scottish-government-united-kingdom-government-scottish-governments-fiscal/>

it wish to do so. The UK Government, for example, provided funding for devolved matters directly to the Northern Ireland Executive as part of the Confidence and Supply arrangement agreed between the Conservative Party and DUP after the 2017 General Election. No funding flowed to the Scottish or Welsh Governments as a consequence of this.

105. Any decision by the UK Government to undertake expenditure on devolved areas in Scotland, Wales or Northern Ireland, is therefore very unlikely to result in any additional funding for the Devolved Administrations.

106. In addition to the risks to the devolved Scottish budget from these spending powers, the Scottish Government believes that there is an risk of an uncoordinated and potentially incoherent approach to spending in devolved areas if the UK Government and the Scottish Government have separate spending programmes on, for example, education, culture and infrastructure. Moreover, for the Scottish Government to have to coordinate with the UK Government plans to spend in devolved areas would constrain current devolved decision making. The Scottish Government believes that the current position provides clarity for responsibility and accountability for spending in devolved areas within Scotland, and that this clause should be removed from the Bill.

107. On replacing EU funding, the Scottish Government believes the following principles should be observed:

- Scotland should not lose out financially compared with the current level of funding that it receives from the EU;
- the devolution settlement must be respected and the UK Government must make no attempt to take back powers that the Scottish Parliament and Scottish Government has rightfully executed to date; any replacement schemes should be operational in time to be implemented in early 2021, so that stakeholders do not suffer difficulties as a result of a funding cliff edge.

108. The Scottish Government considers legislative consent is required for the clauses contained in Part 6.

Part 7 – Final Provisions

109. Clause 48 adds a new reservation C16 to Schedule 5 of the Scotland Act 1998 relating to the “Regulation of the provision of subsidies which are or may be distortive or harmful by a public authority to persons supplying goods or services on the course of a business”. It covers subsidies which distort competition, whether or not those persons are established in the United Kingdom.

110. This is a new reservation of a previously devolved matter. The European Commission acted as regulator of State Aid while the UK was a Member State of the EU and each public authority in the UK was able to make its own funding decisions within the EU’s rules.

111. The Bill reserves that regulatory function to the UK Government, raising concerns that Scottish Ministers will not be appropriately consulted in the design and establishment of any future regime. Any UK-led subsidy framework may not therefore reflect Scotland's specific needs in terms of the level and types of financial interventions our public sector can make to successfully grow the economy.

112. Clause 49(1) includes the whole Bill in Schedule 4 of the Scotland Act 1998, meaning an Act of the Scottish Parliament cannot in any meaningful way modify the Bill or its application. Clause 49(4) also provides that "No power to make subordinate legislation contained in primary legislation passed or made before [clause 49] comes into force may be exercised so as to amend, repeal or otherwise modify the operation of this Act."

113. This is the same approach as was taken by the UK Government for provisions within the European Union (Withdrawal) Act 2018 and European Union (Withdrawal Agreement) Act 2020. The justification for including those Acts in Schedule 4, which is a very unusual approach, was that they effectively replaced the European Communities Act 1972, certain provisions of which were already included in Schedule 4. No similar argument is advanced by the UK Government for making the whole of the Bill a protected enactment under the Scotland Act. The sole intention appears to be to achieve another level of permanent constraint on devolved competence on matters that are already severely affected by the Bill's provisions. The UK Government's Explanatory Notes say (at paragraph 83):

The Bill will be a protected enactment under the Scotland Act 1998 and the Government of Wales Act 2006. It will be an entrenched enactment under the Northern Ireland Act 1998. This means that it cannot be modified by the Devolved Legislatures, and so it will not be open to those legislatures to disapply the provisions of the Bill, or modify their effect.

114. The Scottish Government is deeply concerned at the increasing use of Schedule 4 by the UK Government to constrain devolved legislative competence, especially as it is willing to do so without legislative consent, bypassing both the Sewel Convention and section 30 of the Scotland Act, which explicitly requires consent from the Scottish Parliament to amend Schedule 4 by Order in Council (the statutorily prescribed route). Adding enactments to Schedule 4 has a similar effect to adding reservation to Schedule 5 in that the legislative competence of the Parliament is permanently reduced and there are no measures the Scottish Parliament can take to recover its powers; only further primary legislation in the UK Parliament can achieve that. In addition, the operation of Schedule 4 to prevent "modification" of the relevant provisions is less clear than the well understood operation of reservations under Schedule 5, introducing, in the Scottish Government's view, significant levels of uncertainty in discerning the limits of devolved competence in considering future legislation in the Scottish Parliament.

Draft Legislative Consent Motion

115. Under Rule 9B.3.3 (d) of the Parliament's Standing Orders, if a member of the Scottish Government does not propose to include a draft motion in the Memorandum, the Memorandum must explain why not. Paragraphs 20 – 114 above

set out the Scottish Government's reasons for not including a draft motion in this Memorandum for the purposes of that rule.

Conclusion

116. This Legislative Consent Memorandum is highly unusual, indeed unprecedented, in that it does not set out only the provisions in a UK Bill that require the consent of the Scottish Parliament under the Sewel Convention: instead it has to describe a set of legislative provisions that would fundamentally overwrite, and undermine, a material part of the system of devolution that has operated in the UK for more than two decades and has been endorsed by the people of Scotland. The legislative powers of the Scottish Parliament and the executive competence of Scottish Ministers as they have been understood since 1998 would in many respects cease to exist. Many of the most important measures taken by the Scottish Parliament since 1999 would not be possible, or at least would be subject to intense challenge and significant delay. These proposals are being rushed through both consultation and Westminster with minimal debate, with inadequate time for their consequences to be properly set out and debated.

117. The Scottish Government could never, in these circumstances, recommend that the Parliament consent to the Bill. Moreover, the fundamental principle, reflected in the Ministerial Code, that Ministers do not knowingly break the law requires that the Scottish Government recommend that consent is withheld to a bill that, by UK Ministers' own admission, is in breach of international law.

118. Given the implications of the UK Internal Market Bill for the future of the Scottish Parliament and the devolution settlement, the Scottish Government urges all members to reject its proposals, and calls on the UK Government to undertake to respect and implement the views of the Scottish Parliament on legislative consent in line with the rules of the UK's constitutional system.

SCOTTISH GOVERNMENT
September 2020

UNITED KINGDOM INTERNAL MARKET BILL – STRUCTURE AND PROVISIONS

PART 1

UK Market Access: Goods

Purpose

Clause 1 Purpose of Part 1

This clause would establish the United Kingdom Market Access principles of mutual recognition and non-discrimination.

Mutual Recognition: goods

Clause 2 The mutual recognition principle for goods

Clause 3 Relevant requirements for the purposes of section 2

Clause 4 Exclusion of certain requirements existing on the relevant day

These clauses would provide for (i) how the mutual recognition principle would be applied to goods in the UK; (ii) the relevant requirements for being in scope of the mutual recognition principle (any statutory requirements that prohibit the sale of the goods or result in their sale being prohibited if not complied with); and (iii) the exclusion of some of these requirement from the mutual recognition principle.

Non-discrimination: goods

Clause 5 The non-discrimination principle for goods

Clause 6 Relevant requirements for the purposes of the non-discrimination principle

Clause 7 The non-discrimination principle: direct discrimination

Clause 8 The non-discrimination principle: indirect discrimination

Clause 9 Exclusion of certain provision existing at the passing of this Act

These clauses would provide for (i) how the non-discrimination principle would be applied to goods in the UK; (ii) the relevant requirements for being in scope of the non-discrimination principle (any statutory requirements that prohibit the sale of the goods or result in their sale being prohibited if not complied with); (iii) the application of both direct and non-direct discrimination principles for the purposes of the Bill; and (iv) the exclusion of some of these requirement from the non-discrimination principle.

Exclusions from market access principles

Clause 10 Further exclusions from market access principles

This clause would confer powers on UK Ministers to amend Provision at schedule 1 relating to exclusions from the application of the United Kingdom market access principles.

Supplementary

Clause 11 Modifications in connection with the Northern Ireland Protocol

Clause 12 Sale of goods complying with local law

Clause 13 Interpretation of references to “sale” in Part 1

Clause 14 Interpretation of other expressions used in Part 1

These clauses would provide for the application of the UK market access principles to qualifying Northern Ireland goods moving from Northern Ireland to Great Britain.

PART 2

UK Market Access: Services

Clause 15 Services: overview

Clause 16 Services: exclusions

Clause 17 Services: mutual recognition of authorisation requirements

Clause 18 Direct discrimination in the regulation of services

Clause 19 Indirect discrimination in the regulation of services

Clause 20 Definition of regulator

Clause 21 Interpretation of Part 2

These clauses would provide for limits on the application of authorisation requirements and regulatory requirements on service providers by (i) establishing a principle of mutual recognition of authorisations to provide services; (ii) prohibiting direct discrimination by a service regulator against a service provider; (iii) prohibiting indirect discrimination by a service regulator against a service provider.

PART 3

Professional qualifications and regulation

- Clause 22 Access to professions on grounds of qualifications or experience
- Clause 23 Meaning of “qualified” UK resident
- Clause 24 Exception from section 22 where individual assessment offered
- Clause 25 Other exceptions from section 22
- Clause 26 Professional regulation not within section 22: equal treatment
- Clause 27 Interpretation of Part 3

These clauses would provide for (i) a professional qualified in one part of the UK to be automatically treated as qualified in respect of that profession in another part of the UK (the automatic recognition principle); (ii) exceptions to these principles; and (iii) equal treatment measures requiring that a UK resident practising a profession in a part of the UK with qualifications or experience obtained in another part of the UK, is treated on the same basis, in respect ongoing professional requirements, as a locally qualified professional.

PART 4

Independent Advice on and Monitoring of UK Internal Market

Reporting, advisory and monitoring functions

- Clause 28 Functions of the CMA under this Part: general provisions
- Clause 29 Monitoring and reporting on the operation of the UK internal market
- Clause 30 Advising etc on proposed regulatory provisions on request
- Clause 31 Provision of report on request after regulatory provision is passed or made
- Clause 32 Report on request on provision considered to have detrimental effects
- Clause 33 Statements on reports under section 32
- Clause 34 Reports under this Part
- Clause 35 General advice and information with regard to exercise of functions

These clauses would confer functions on the Competition and Markets Authority (CMA) relating to UK internal market reporting, advice, and monitoring.

Information-gathering powers

Clause 36 Information-gathering powers

Clause 37 Information-gathering powers: enforcement

Clause 38 Information-gathering powers: penalties

These clauses would confer powers on the CMA relating to (i) information gathering, either in issuing an information notice or requiring the production of a document by an individual, business or public authority; (ii) enforcement in the event of non-compliance with an information request; and (iii) financial penalties in cases of non-compliance with an information notice.

Interpretation

Clause 39 Interpretation of Part 4

This clause would provide for (i) a definition of the CMA itself and clarity about how broadly the “operation of the internal market in the United Kingdom” should be understood; and (ii) definitions of “regulatory provision”, “relevant legislative competence” and “relevant national authority”. The latter includes the UK Government and the devolved governments.

PART 5

Northern Ireland Protocol

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

Clause 40 Northern Ireland's place in the UK internal market and customs territory

This clause would require an appropriate authority, including the Scottish, Welsh and Northern Irish Ministers, to have special regard to a number of matters when exercising functions related to the implementation of the Northern Ireland Protocol or relating to the movement of goods within the UK. These matters are:

- a) the need to maintain Northern Ireland's integral place in the UK's internal market;
- b) the need to respect Northern Ireland's place as a part of the UK's customs territory; and,
- c) the need to facilitate the flow of goods between Great Britain and Northern Ireland.

Unfettered access

Clause 41 Unfettered access to UK internal market for Northern Ireland goods

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

These clauses would (i) prohibit an appropriate authority from applying new checks, controls or administrative processes on qualifying goods as they move from NI to GB; and (ii) confer a power on UK Ministers to make provision regarding application of exit procedures (applicable by virtue of the Northern Ireland Protocol or otherwise) to goods, or a description of goods, when moving from Northern Ireland to Great Britain, including provision disapplying, or modifying the application of, exit procedures, stating or restating the application of exit procedures.

Notifications under Article 10 of the Northern Ireland Protocol

Clause 43 Regulations about Article 10 of the Northern Ireland Protocol

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

These clauses would (i) confer powers on UK Ministers to make regulations in connection with Article 10 of the Northern Ireland Protocol (State Aid), to make provision about how this Article is to be interpreted for the purposes of UK domestic law; and (ii) provide for a statutory requirement that no one apart from UK Ministers may notify or inform the European Commission of State aid, or proposed State aid, where required under Article 10.

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

45 Further provision related to sections 42 and 43 etc

This clause would provide that a range of provisions in the Bill would have effect notwithstanding any incompatibilities or inconsistencies with relevant international or domestic law:

- a) clause 42 which provides a power to disapply or modify export declarations and other exit procedures;
- b) any regulations made under subsection 42(1);
- c) clause 43 regarding regulations about Article 10 of the Northern Ireland Protocol;
- d) any regulations made under subsection 43(1);
- e) this clause; and,
- f) any other provision of this Act so far as relating to the provisions above.

PART 6

Financial Assistance Powers

Clause 46 Power to provide financial assistance for economic development etc

This clause would confer a general power to provide financial assistance for a number of specified purposes. Those purposes are economic development, infrastructure, culture, sporting activities, domestic educational and training activities and exchanges, and international education and training activities and exchanges.

Clause 47 Financial assistance: supplementary

This clause sets out the forms this financial assistance may take.

PART 7

Final Provisions

Clause 48 Regulation of distortive or harmful subsidies

This clause would reserve to the UK Parliament the exclusive ability to legislate for a subsidy control regime once the UK ceases to follow EU State aid rules, whether that is in relation to international trade or markets within Scotland or the UK.

Clause 49 Protection of Act against modification

This clause would insert references to the United Kingdom Internal Market Bill into the Scotland Act 1998, the Government of Wales Act 2006 and the Northern Ireland Act 1998, so that the Bill is treated as a protected or entrenched enactment under each. This means that the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly may not pass legislation that amends the Bill, or modifies its application.

Clause 50 Further provision in connection with the NI Protocol

This clause would confirm that when Articles 5 to 10 of the Northern Ireland Protocol cease to apply, clauses 11, Part 5 and section 8C(5A) of the European Union (Withdrawal) Act 2018 will cease to have effect.

Clause 51 Regulations: general

This clause would make provision in relation to powers conferred by the Bill on UK ministers to make regulations. It provides that regulations made under the powers are to be made by statutory instrument. The powers may be used to amend, repeal or modify the effect of legislation, including Acts of Parliament. When exercised for their stated purpose, the powers may also be used to make supplementary, incidental, consequential, transitional, transitory or saving provision.

Clause 52 Regulations: references to parliamentary procedures

Clause 53 Interpretation: general

Clause 54 Extent, commencement and short title

Schedule 1 – Exclusions from market access principles

This schedule would set out what legislation is excluded from the market access provisions and the requirements needed for this exclusion to apply.

Schedule 2 – Services exclusions

- Part 1 - Services to which clause 17 (mutual recognition) does not apply
- Part 2 - Services to which clauses 18 and 19 (non-discrimination) do not apply
- Part 3 - Authorisation requirements to which clause 17 (mutual recognition) does not apply
- Part 4 - Regulatory requirements to which clauses 18 and 19 (non-discrimination) do not apply

This schedule would set out which services are excluded from the market access provisions and the requirements needed for this exclusion to apply.

This Legislative Consent Memorandum relates to the United Kingdom Internal Market Bill (UK legislation) and was lodged with the Scottish Parliament on 28 September 2020

UNITED KINGDOM INTERNAL MARKET BILL – LEGISLATIVE CONSENT MEMORANDUM

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