THE INTERNAL MARKET ACT:
A CHALLENGE TO DEVOLUTION

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Background

The United Kingdom Internal Market Act 2020 (UKIMA) forms part of Westminster's legislative response to Brexit, following the European Union (Withdrawal) Act 2018 and European Union (Withdrawal Agreement) Act 2020.

Almost four years have now passed since the commencement of UKIMA, an hour before the bells on Hogmanay 2020. Over that time the operation and use of the Act has been central to one relatively high-profile intra-governmental drama - the debate about the scope of deposit return systems for drinks containers. It has also been part of discussions about policy issues as diverse as horticultural peat, glue traps, XL Bully dogs, the phasing out of gas boilers, and minimum unit pricing for alcohol.

This is therefore a suitable point for an initial analysis of how this legislation has worked in practice, whether changes should be made to it, and what those changes might be if so.

In the most simplified sense, UKIMA is what the previous UK Government envisaged as a replacement for the European Single Market - billed as a single internal market for the UK for goods and services, although markedly different in scope and operation to its EU predecessor (notably more centralised and more restrictive for the devolved administrations). It is, however, much more than that.

This report will focus on the implications of UKIMA for devolved policy-making and administration. As might be expected, given Scottish Environment LINK's areas of interest, environmental policy-making will be centre stage, but UKIMA also has implications for public health and other areas of policy devolved to the Scottish, Welsh and Northern Irish institutions, and indeed for devolution itself.

The scope of those institutions' powers were first established by the three devolution Acts passed in 1998 - for Scotland and Wales, as extended later by subsequent legislation at

Westminster, and for Northern Ireland, as the implementation of the Good Friday Agreement.

This framework includes the principle of legislative consent motions, also known as Sewel Motions. Given the effects of the Internal Market Bill on devolved powers, such motions were therefore put to the devolved institutions in this instance, and consent was not given.

While UKIMA is most importantly concerned with market access principles, it can just as accurately be seen as constitutional legislation in this context. Many powers previously devolved cannot now effectively be exercised without consent of UK Ministers. This represents a significant and often ill-understood shift in the balance of power between the UK institutions and the devolved institutions.

This report is based on a wide range of interviews, with academics, elected officials, civil servants, and external stakeholders (specifically NGOs and business representatives). I would like to reiterate my deep gratitude to those who took the time to participate in these interviews. Participants, where they agreed to be identified, are listed in Annex 1. Annex 2 is a bibliography of the relevant papers, reports and other public documents (including Parliamentary debates, as recorded by Hansard and the equivalent for the devolved institutions).

Attitudes to the legislation

The spectrum of responses to the Act's operation so far starts with "no change is needed", the public position of the former Conservative administration at Westminster. It runs through to "repeal outright and rely on the common frameworks" (see below), the position taken by Scottish Ministers (then SNP and Green) in a 2023 debate, backed by Labour and Liberal Democrat MSPs but opposed by the Conservatives.

Strong views are held across that spectrum. During that 2023 debate, the Cabinet Secretary for Constitution, External Affairs and Culture criticised the Act, describing "*its, frankly, malign impact on devolution*". On the other side, former Conservative MSP Donald Cameron observed that "*we stand here today debating one of the Scottish National Party Government's favourite fantasies, namely that the powers of this Parliament are in peril and are being undermined by the UK Government*".

There are aspects of the legislation which are supported by industry, it should be noted, especially larger businesses which operate across more than one of the four nations. As the British Retail Consortium put it:

"*Efficiency of scale is how most retail businesses operate. Things being similar on the greatest spread of market that's possible is what we're interested in, so we have always been supportive of whatever the right mechanism for that is. We were fine when that was Common Frameworks, and we think the Act is a probably useful tool in that sense. It provides a kind of baseline for standards, and means that we can sell the same products in similar ways across the UK*."[1]

However, even from this source, there are concerns about the uncertainty the exclusion process causes for industry: "*Is it happening, is it not, when is it happening, what does that look like? that's really problematic for us for planning. A lot of the measures we're talking about involve making changes to how businesses operate, and those things have lead times*."

The Office for the Internal Market's Annual report on the operation of the UK internal market 2023 to 2024 similarly found that the market access principles, as embodied in the Act, were not how industry tended to prefer to manage divergence:

"*A notable finding from our case studies of Single Use Plastics, Precision Breeding and Deposit Return Systems is a clear view, particularly among the larger businesses in those sectors with significant operations in the devolved nations, that the Market Access Principles are unlikely to be used as the preferred approach to address regulatory differences.*"

Outright repeal without a replacement, even assuming the retention of Part 5 on the Northern Ireland Protocol, was proposed in just one of the interviews undertaken, although the Act was also described as "*tainted and unfixable*"[2]. A case was also made that it would have been better to have begun without legislation of this sort, and for UK Ministers then to have only considered bringing legislation forward once some time had elapsed after Brexit. A "grace period" of this sort could have been used to establish how broad a market regulation regime would be appropriate and required.

At the other end, the argument was never made that the Bill, as it stands, is appropriate or effective in its entirety. Opinions vary, however, on the scale of the consequences it has for

[1] In interview with Ewan MacDonald-Russell, British Retail Consortium
[2] Anonymous public sector interviewee

policy-makers, stakeholders and businesses, and on the scope of changes to it that are required.

This project will therefore look at the space in between, and what options for an alternative framework might look like, whether that be simpler modifications for the short term, or more systematic and longer term changes.

Any proposed changes must recognise that, whether regulated or not, Great Britain[3] does, in practice, operate as a single market, albeit one still shaped in many ways by EU and international rules.

However, from LINK's perspective, that recognition should sit alongside respect for the devolution settlement, an understanding of the benefits of devolution for environmental policy (and other policy, not just public health), including innovation, and a need for clarity, proportionality and fair process.

Specific provisions under consideration

The key element of UKIMA for the purposes of this report will be Part 1, which covers UK market access for goods, and the two principles set out in it: mutual recognition and non-discrimination.

Parts 2 & 3, the former covering services and the latter professional qualifications and regulation, are beyond the scope of this document, as too, in large part, is Part 4 on monitoring, which establishes the Office for the Internal Market (OIM) within the Competition and Markets Authority. The OIM has a limited role, defined in the Act as "*to support, through the application of economic and other technical expertise, the effective operation of the internal market in the United Kingdom*". However, over its short existence, the OIM has developed a reputation as a fair and impartial player on the sidelines of debates around the operation of the Act, and this role could potentially be expanded.

Parts 6 & 7, on economic assistance and subsidy control respectively, will not be considered in depth here. Both do affect the devolution settlements, though, and both have potential environmental impacts.

[3] This also applies to some extent to the whole UK, taking into account the ways in which the Act was amended to embody the Windsor Framework

Part 6 formalises UK Government infrastructure expenditure in devolved areas, in a sense a centralised replacement for the European structural funds for which the devolved governments were previously responsible for as Managing Authorities. In many cases such funding will be relatively uncontroversial, but in other cases reduces devolved powers and inhibits devolved governments' power to say no in devolved areas. Looking at transport, for example, this provision would allow UK Ministers to fund the building of a road project outside England even if it were opposed on environmental grounds by the relevant devolved institutions.

Part 7, conversely, makes additions to the reserved or excluded schedules of the devolution Acts (Schedule 5 to the Scotland Act 1998, Schedule 7A to the Government of Wales Act 2006, and Schedule 2 to the Northern Ireland Act 1998) to prevent the devolved institutions regulating "*the provision of subsidies which are or may be distortive or harmful by a public authority to persons supplying goods or services in the course of a business*". One person's distortive subsidy is of course potentially another person's financial incentive for businesses to adopt higher environmental standards - but this provision has yet to be tested.

In addition, Part 5 of UKIMA, as discussed above, implements the Northern Ireland protocol, establishing Northern Ireland's relationship both with the rest of the UK and with the European Union in market and customs terms. This part is fully beyond the scope of this report, but its presence, if nothing else, makes the case against repeal without replacement.

The market access principles

Part 1 of the Act sets out how the two market access principles, mutual recognition and non-discrimination, should be applied in practice. Many summaries exist of these principles and their operation, but the clearest perhaps is in the October 2024 Westminster Rules? The United Kingdom Internal Market Act And Devolution report from Glasgow University's Centre for Public Policy. It explains that:

Mutual recognition *guarantees, by default, UK-wide market access for goods (except in/for Northern Ireland, see 2.4 below) and services that are produced in, imported into, and regulated in one part of the UK. With respect to the sale and supply of goods, this includes requirements with respect to any characteristics, including ingredients, composition, packaging and labelling, as well as mandatory conditions relating to production covering issues such as site of manufacture, record-keeping, inspection and approval. Mutual recognition also grants access to most regulated professions throughout the UK based on qualifications and/or experience obtained in England, Scotland, Wales or Northern Ireland, respectively.*

Non-discrimination *applies to UK and/or devolved legislation that introduces, directly or indirectly, differences in treatment between goods (again, except in/for Northern Ireland, see 2.4 below), service providers or regulated professional activities based on their connection to another part of the UK. It applies to selling arrangements, including rules around advertising, shop opening restrictions or licensing requirements, as well as mandatory conditions relating to circumstances of sale covering issues like conditions of storage or transportation.*

Within that, the implementation of mutual recognition has had the most relevant impact on devolved policy-making, as it relates to conditionality around the sale of products (including bans). In practice, this means that if a product can be sold in one part of the UK "*without contravening any relevant requirements that would apply to their sale*", as the Act puts it, it must, as the Act stands, also able to be freely sold elsewhere in the UK without such requirements.

This principle, whether you see it as freedom to trade, or a restriction on devolution, or both, is then moderated by exclusions in the form of policy areas set out in Schedule 1 to the Act. As passed, this protected the right of the devolved institutions to regulate without the need for exclusions in limited areas: with regard to threats to human, animal or plant health, chemicals (under REACH), fertilisers and pesticides, and taxation.

Section 10 of the Act then allows the Secretary of State (in practice, any Secretary of State) to amend that Schedule via secondary legislation. The only extension so far made to those exclusions came in July 2022, when UK Ministers added a very specific list of single use plastic items, including single-use straws and single-use plastic balloon sticks. The position of the then Scottish Government on this exclusion, which was more limited than they sought, is here, and in October 2022 the Scottish Parliament's Information Centre (SPICe) used this exclusion as a case study into the operation of the Act.

Case study: deposit return

Mutual recognition, and the requirement for an exclusion from it, was the technical issue at the heart of the latter stages of the debate over the Scottish deposit return system.

Requiring retailers by regulation to charge the public a fully refundable deposit on a glass bottle, say, in Scotland, was accepted as a "*relevant requirement*" under the terms of the Act. If a glass drinks bottle can be sold without requiring a deposit to be charged at the point

of sale in one of the four nations, mutual recognition as defined in the Act would mean it can be sold anywhere in the UK without a deposit.

The Welsh Government's position at the time, concerning their then less progressed system proposals, was that the Act would not simply not apply, and the devolution legislation trumped it. This was never tested in court, and it could be seen as either simply assertive or wishful thinking.

The interaction with Scotland's deposit return system arose during Lords consideration of UKIMA, somewhat presciently. On 26th October 2020. Lord Callanan, then Under-Secretary of State at BEIS, gave the following reassurance:

"*... on the question asked by the noble Lord, Lord Purvis, about the Scottish deposit return scheme, if that legislation comes into force after 30 January 2021, it will indeed be covered by the market access principles. However, we are confident that the deposit return scheme can be brought into effect in full compliance with the market access principles that we have set out in this legislation.*"

Although the primary Scottish legislative basis for deposit return was the Climate Change Act 2009, as Lord Callanan pointed out, the initial secondary legislation was made in May 2020, months before the UKIMA commencement date. The wording of S4 of the Act is clear: deposit return was not yet in force, so was not "grandfathered in" (unlike other regulations already in place which would have been caught by the Act, such as those covering minimum unit pricing for alcohol).

This exclusion power (or more accurately, the power to **not** act) was then eventually used by UK Ministers in May 2023 via a statement that offered Scottish Ministers only a temporary and limited UKIMA exclusion.

The focus of the statement was alignment and taking account of "the strong representations made by relevant businesses", and so the exemption offered was one which did not include permission to require deposits on glass drinks containers. Scottish Ministers took the view that a partial system, just covering aluminium and PET plastic bottles, was not worth progressing given UK Ministers' then preference for an interoperable UK-wide system from October 2025 (now delayed again to October 2027).

Although many businesses argued for limits to the deposit return system, or for it simply not to be introduced, from a retailer perspective, there are also downsides to harmonisation in cases like this.

"One of the big challenges we're going to face is trying to do an entire nation of 60 million people in the same timeframe. That is operationally massively more difficult than doing something which would have been broadly Scottish-based, I say broadly because there are bits of the north of England which in a practical sense you might have included. But actually doing parts of it versus the whole thing - logistically sometimes that can be very very difficult. To do things across a thousand stores rather than sixty stores is a really different sort of upscaling of things. Can we test something in a smaller market, see actually how it works and also how to improve it?"[4]

Common Frameworks

During the passage of the Act, UK Ministers originally opposed putting Common Frameworks onto the face of the Bill. Pressure in the Lords, most notably from Lord Hope, led to their inclusion in S10 (for goods) and S18 (for services).

On 12th Dec 2020, Lord Hope, moving an amendment on this topic, said:
At heart this is an issue about devolution. It was because of devolution that the common frameworks process, and the opportunity for policy divergence, was instituted with the encouragement of the UK Government in the first place. Their support for that process must involve support for policy divergence too.

As a result, the Act references Common Framework agreements, describing them as follows:

A "common framework agreement" is a consensus between a Minister of the Crown and one or more devolved administrations as to how devolved or transferred matters previously governed by EU law are to be regulated after IP completion day.

The Common Frameworks approach is not new. On 16th October 2017, the Joint Ministerial Committee (EU Negotiations) put out a concise communique on the common frameworks process, which committed, amongst other things, to the following as part of the future post-Brexit settlement:

> *Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:*

[4] In interview with Ewan MacDonald-Russell, British Retail Consortium

- *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.*

The experience of devolved governments with regard to Common Frameworks varies according to the UK Departments they liaise with, but overall - unless and until the issue becomes highly politicised - they seem to work well from an administration perspective.

However, the enhanced importance of the Common Frameworks has a concerning consequence: the empowerment of devolved executives at the expense of their legislatures. Where an agreement has been struck between UK Ministers and one or more devolved government, it sets an upper bound on the ambition that can be embodied in that legislation. An exclusion therefore functions as "this far and no further", an issue of particular concern where devolved Ministers work in a minority parliament.

As Professor Horsley puts it: "*The Act's market access principles incentivise the UK and devolved governments to act jointly in devolved policy areas, and that has a quite an impact on the devolved legislatures and their ability to shape and scrutinise what's going on in devolved policy areas. The devolved governments may see upsides to reduced input from the devolved legislatures, but at the same time they also risk having their pockets picked at centre by the UK government which retains ultimate control under the Act.*"[5].

Impact on devolution

There can be no question that the design and operation of the Act limits the powers of the devolved institutions to below the level set in the relevant devolution legislation. When the Scottish Parliament passed its deposit return regulations in 2020, if the launch date set in those regulations had been prior to the commencement of the Act, the system would have come in exactly as designed.

Similarly, prior to the passage of the Act, there would have been nothing to restrict the way the devolved institutions might act to restrict the sale of a product, for example, glue traps -

[5] In interview

or at least, no restriction except the nuclear option, i.e. UK Ministers invoking S35 of the Scotland Act or its equivalents.

These effects flow in the opposite direction too, or could. Under the terms of the Act, if a UK-wide ban on (or condition on the sale of) a product were to be lifted in one of the four nations, that ban or set of conditions would be lifted throughout the UK unless an exclusion were brought in. Should one of the four nations - especially England - start to deregulate in this way, the effect could be a race to the bottom, or at least a ratchet mechanism pushing in that direction.

Significant uncertainty has also flowed from some of the Act's drafting, even with regard to existing policy already in place at commencement. Section 4, which governs this issue, requires any changes not to be substantive. The 2018 regulations on minimum unit pricing set that minimum at 50p per unit. Would it be "substantive" to bring new regulations that uprate that minimum, even by inflation? It remains unclear.

The October 2024 report from Centre for Public Policy, referenced above, sums it up bluntly: "*the design of the UKIMA remains fundamentally antagonistic towards devolution*". Professor Horsley's 2022 paper Constitutional Reform by Legal Transplantation: The United Kingdom Internal Market Act 2020 argues that "*What emerges is a regulatory framework that is incomplete, coercive and, mirroring existing constitutional arrangements, highly asymmetrical*."

That asymmetry is indeed a mirror of the wider constitutional framework, but in the specific context of the Act, Westminster has a conflicting dual role unknown in any other federal or multinational market legislation. It operates both as the regulator for England and essentially the referee for the whole of the UK, which, as that same paper also notes, "*collides with the underlying federal logic of the internal market as a shared regulatory space that cuts across the boundaries that the Devolution Acts set for the exercise of legislative, administrative and executive competences across the four nations of the UK*".

Mick Antoniw, then Counsel General for Wales, told the Senedd on 21st May 2024, in the context of deposit return:

"*The problem with it is that the UK Government have appointed themselves as judge and jury for the Internal Market Act, which is not how you would achieve effective regulation of a single market. As you know, we have common frameworks that have been achieved and arrived at through co-operation between the four nations of the UK, and the problem with*

the Internal Market Act is that it enables UK Government to drive a coach and horses through that."

One perhaps unexpected consequence of the exclusions already granted is that, in the same way that higher emissions requirements in California have shaped the US vehicle market, larger businesses are simply dropping products from their lines where they are banned in one nation via an exclusion.

As the OIM reports, "*the businesses we have examined are taking a UK-wide approach to the supply of Single Use Plastics, rather than treating UK nations with different regimes as separate markets. In many cases this means that retailers have withdrawn in-scope Single Use Plastic items from UK nations where they may still be legally supplied*". This is not an effect specific to the Act: however, it does illustrate the practical ways in which divergence may not be the outcome of devolution, and may represent a possible counter to the "race to the bottom" risks foreseen by some.

Interviewees were widely of the opinion that the Act is ill-understood by external stakeholders, and indeed by some policy-makers, whether civil service or parliamentarians, although many in both categories have become experts in its terms. One curious side-effect of this is that although the Act essentially focuses on the point of sale, other provisions which "feel similar" are treated with undue caution, such as the potential use of the producer responsibility powers devolved through S50 & 51 of the Environment Act 2021.

Options for change

Possible changes to the way the Act operates fall into four broad categories.

Goodwill. At the bottom end, more than one interview participant said, in broad terms, the current legislation would have worked more effectively if there had been reliably higher levels of respect between governments, and better flexibility and clarity about the process of seeking exclusions.

Of course, if other changes are made, either through primary or secondary legislation, then operating a revised internal market regime would undoubtedly be more effective and inclusive if it took place in a context of greater respect, clarity and flexibility. But the experience since 2020 has shown a need for change, and mood music changes will not be enough alone.

Common Frameworks. Beyond that, at the lower end of concrete change to systems around the Act, the Common Frameworks (and Common Framework-like processes used where a policy area is not covered) could be revised to give greater clarity, in particular on timescales and evidential requirements.

There was some concern that these are currently "jointly owned" between the four administrations, and that increased formalisation, especially in primary legislation, would see control over the process effectively centralised at Westminster. Although their informality has downsides for the devolved institutions, there are some saving graces there too, especially when the relevant UK civil servants are sympathetic to particular initiatives.

Secondary legislation. Moving up the scale, some changes could then be made through secondary legislation using the powers contained within the Act itself. Schedule 1 could, by statutory instrument under Section 10(2), be amended to allow broader scope for action by the devolved institutions.

As discussed above, the only use of S10(2) has been around single use plastics, where an exclusion tighter than that sought by Scottish and Welsh Ministers was implemented by regulation in 2022. However, Section 10 does not need to be used in that narrow way: the same powers would allow a Secretary of State to make broader and more systematic changes to Schedule 1.

Primary legislation. At the top end, a new Bill could be brought to replace the Act in full (assuming that, at minimum, the Northern Ireland-specific provisions would be carried over). Below that, a Bill with other relevant purposes could, if in scope, be used by sympathetic UK Ministers to make more significant changes to the Act.

It must also be borne in mind that the principle of parliamentary sovereignty, in a UK context meaning Westminster, means any changes could be overturned essentially at will (in procedural terms, if not political) by a new administration.

As has been widely observed (including by Horsley et al), the Internal Market Act is in one sense only a specific symptom of assymetric devolution, or, less radically, of limits within the devolution settlement. Measures to entrench any such strengthening of devolution (or restoring it, depending on your perspective) are of course beyond the scope of this report,

but one option was mooted in the report from the Commission on the UK's Future, commissioned by Keir Starmer while in opposition[6].

Much as it might seem clearer or more effective to try to address the causes rather than the symptoms, realistically the Act is the most widely cited problem in this category, and there are various ways the specific problems associated with it could be ameliorated or resolved without delving into wider constitutional politics.

Recommendations

The difficulties caused to devolved governance cannot be resolved by wishing for intergovernmental relations to be conducted with more goodwill and respect, desirable as that is in general terms. Practical measures will be needed, ones which can be transparent, relied upon during periods of low goodwill, and which protect devolution as a principle but also provide clarity for business and other stakeholders.

Recommendation 1: the four Governments should consider negotiating possible improvements to the Common Frameworks process.

Improvements here should not be of a statutory nature, just as the Common Frameworks are not established under statute (notwithstanding the definition of them within the Act). In general, Common Frameworks should be - and often are - useful and practical fora for discussions between the four Governments around possible policy divergence within the UK.

Even prior to the passage of the IMA, when the devolved institutions had more freedom of political movement in the areas discussed here, there were of course benefits to Governments working in parallel, or at least understanding what their counterparts may be proposing elsewhere in the UK. On many policy fronts, where the Governments start from positions not too far apart, coordinated and aligned action is likely to be more effective. This remains true, despite the politicisation of recent processes, and would be the case no matter what might replace the Act.

[6] It suggested "there should be a new, statutory, formulation of the Sewel convention, which should be legally binding", alongside a recommendation that "the legislation giving effect to the Sewel convention should be one of the protected constitutional laws which require the consent not just of the House of Commons but of the reformed second chamber also."

Where the Common Frameworks operate in areas which touch on the market access principles, though, greater clarity is needed. The October 2017 Communique discussed above committed to the principle that the Frameworks will "*lead to a significant increase in decision-making powers for the devolved administrations*", an outcome not compatible with even the most generous reading of the post-IMA period.

What those negotiations could lead to is beyond the scope of this paper, but it could potentially include agreement on:

- timescales: first, the point at which Scottish, Welsh or Northern Irish Ministers should first approach UK Ministers to discuss a possible exclusion (i.e. to eliminate the problem that such an approach can always be described as too soon or too late, if goodwill is absent); and second, how long a Common Framework process should be expected to take, to give legislative certainty to those inside and outside government.
- what types of information it is appropriate to require of a Minister seeking an exclusion, and at what point in the process it should be expected; and
- a restatement or amplification of the commitment in the Communique in support of increasing the powers of the devolved institutions - although this might, in a way, be seen as little better than hoping for goodwill.

It's worth noting that the need to make any changes of this sort would be greatly reduced were Recommendation 2 below to be adopted.

Recommendation 2: a broader systemic exclusion to be added to Schedule 1 of the Act by regulation.

On 26th October 2023 Scottish Environment LINK, along with Wildlife and Countryside Link and Wales Environment LINK, APRS, and a number of other supporting organisations, wrote to the then Prime Minister, urging a review of the Act. This letter also argued for a "*qualified automatic exemption for legislation*" in the areas of environmental policy and public health, more akin to the way in which devolved policy-making operated under the EU Single Market.

As discussed above, such a system could be implemented simply though the regulatory powers contained within the Act itself[7], adding by regulation a broader definition of what

[7] There are, for non-discrimination but not for mutual recognition, narrow "legitimate aims" which constitute exclusions outside Schedule 1. S8(6) sets those out as "the protection of the life or health of humans, animals

should be excluded from the application of the market access principles into Schedule 1. This would go beyond not just the "product-by-product" approach taken in the sole amendment to the Schedule so far, but also beyond the "product category" approach sought by both the Scottish and Welsh Governments.

Essentially, the idea is akin to the incorporation into Schedule 1 of the ideas Lord Stevenson of Balmacara proposed in his amendment 5A in December 2020.

"(1) The United Kingdom market access principles do not apply to, and sections 2(3) and 5(3) do not affect the operation of, any requirements which—

(a) make a contribution to the achievement of—

(i) environmental standards and protection, or

(ii) protection of public health,

(b) are a proportionate means of achieving that aim, and

(c) are not a disguised restriction on trade.

(2) For the purposes of subparagraph (1)(b), a requirement is considered disproportionate if the aim being pursued in the destination part of the United Kingdom is already achieved to the same or a higher extent by requirements in the originating part of the United Kingdom."

His inclusion of wording around proportionality is in line with the Centre for Public Policy's recommendations in this area. They say "*a proportionality test would require decisionmakers to balance the effects of regulatory variations on trade across the UK's borders with the protection of recognised public interests*", although their recommendations are to make this change through primary legislation, which would of course also be possible.

This is closely related to the position of LINK and others in the October 2023 letter, which argued for a qualification to any automatic exclusion. However, picking particular policy

or plants" and/or "the protection of public safety or security". These could be extended and also applied to mutual recognition, via primary legislation, but this is unnecessarily cumbersome given the powers to amend Schedule 1 by regulation.

objectives brings with it a risk, and, while markedly broader than the existing exclusions, remains narrower than the equivalent EU Single Market rules[8].

The risk is, as put by a Conservative parliamentarian[9], that you end up with a "*stushie over whether something is an environmental or public policy measure*", and indeed that there may be other legitimate reasons why one or more parts of the UK might wish to diverge from the market access principles.

The same interviewee argued that one could instead provide an exclusion where a measure is proportionate and intended to support a legitimate public policy objective, within the limits set through the devolution Acts. This could then be, optionally, illustrated with a non-exclusive list of examples within the modified Schedule 1 to highlight environmental and public health objectives, or indeed economic objectives, protection of cultural assets, or whatever other elements are deemed worth noting.

After all, the devolution Acts contain their own well-defined limits, through the appropriate Schedules[10], and partially re-empowering the three devolved Governments and legislatures to act within those limits is hardly a radical principle.

This approach, broader than previously recommended by LINK and others, is in line with with the thinking set out in "Sleeping with an elephant: Devolution and the United Kingdom Internal Market Act 2020", a paper published in 2022 by the University of Edinburgh's Law Quarterly Review[11]. It argues that the basic scheme of the Act could be improved through "*a broader system of derogations and justifications could allow an individual administration to refuse mutual recognition or defend trade discrimination where its local regulations are justified for the protection of a much wider range of public interest objectives, as happens in the EU Single Market*."

The Centre for Public Policy's report considers this under a recommendation on subsidiarity, noting that including that principle would mean that "*The presumption would be in favour of maintaining the authority of the devolved legislatures to pass laws as they see fit, removing*

[8] Article 36 of the Treaty on the Functioning of the European Union: see also the Cassis de Dijon ruling and subsequent interpretations of same, discussed in Dougan, M, Hunt, J, McEwen, N & McHarg, A, 2022, 'Sleeping with an elephant: Devolution and the United Kingdom Internal Market Act 2020', Law Quarterly Review and elsewhere

[9] Interviewed for this project

[10] Schedule 5 of the Scotland Act, etc

[11] ibid

the veto power that the UKIMA gives to the UK Government over the exercise of those law-making powers that intersect with the market access principles"[12].

As they also note, both proportionality and subsidiarity are readily justiciable, with a long history in case law: this is not arbitrary licence. In fact, a change of this sort would still constitute less freedom of legislative movement than the Scottish, Welsh and Northern Irish institutions had prior to Brexit and to the passage of the Act[13].

Recommendation 3: consider a package of wider changes to the Act via primary legislation.

In general terms, the urgency or otherwise of the issues set out in this section will depend on the wider shape of a reformed or replaced Act, especially around exclusions. If the scope for the devolved institutions to legislate and regulate comes closer to being restored, changes in these areas would be less vital for UK Ministers to address.

In terms of an immediate route to make these changes, the Product Regulation and Metrology Bill, currently at Committee stage in the House of Lords, could be used. It does not directly touch the Act, nor do its provisions for product regulation and measurement explicitly affect devolution. However, product regulation is at the heart of the Act, so "keyhole surgery" type changes to it via this Bill would seem to be in scope.

One area where certainty could be enhanced via amendments to the Act would be to restrict or eliminate the power of external parties to bring challenges under the Act. As Professor Horsley puts it, "*the direct effect of these provisions – in other words, their use before the courts to challenge Scottish legislation after it's enacted – is likely to be used only rarely; for example, by small traders facing prosecution for not complying with the relevant Scottish regulations*"[14].

This level of uncertainty is a negative both for policy-makers and for other businesses. A regulation being challenged might have taken substantial investment to comply with, and might be intended to deliver significant public policy benefits. All of that could then be put on hold and made subject to the court processes.

[12] see p46

[13] with the caveat that matters understood as not reserved could - and now have, in the case of Scotland's gender recognition reform, always be blocked by other means, in that case through the application of S35 of the Scotland Act, but also including the fallback of direct legislation at Westminster

[14] Interview

The Law Quarterly Review paper cited above touches on this too: "*For example, one might propose that the unique characteristics of the UK are best reflected in avoiding any system of direct legal enforceability at the behest of individual traders, in favour of an effective system of pre-legislative dialogue between the competent authorities from across the UK*". This does indeed seem preferable.

A second relatively minor issue, discussed above, is around what is deemed "substantive" under S4(4), with regard to updates to regulations passed prior to commencement. This also fosters uncertainty and a potential unwillingness to keep the regulatory environment up to date. At some point, if the Act remains unchanged, there will start to be case law clarifying the scope of that section, but, at minimum, revised wording here could set out the sorts of variations that should be deemed non-substantive.

Ministers could also consider more cautious alternatives to the proposals set out above on exclusions. For example, amendments could introduce an automatic exclusion process for any Government seeking to regulate unless two or more of the four nations object (with UK Ministers acting as the regulator for England plus simply the formal actor required to bring that exclusion).

Those sorts of approaches - or ideas about shifting the burden of proof, or expanding the role of the Office for the Internal Market far beyond its existing role to give it oversight over the exclusions process - would be limited and inefficient ways to rebalance the structural asymmetry embodied in the Act in favour of the devolution settlement. They would also be more complicated, and less likely to reduce the uncertainty associated with the Act's operations. But perhaps they are not to be ruled out if a broad but caveated exclusion for public policy objectives is not on the table.

Parts 6 & 7, on direct spend by UK Ministers in devolved areas and on restrictions to subsidies by the devolved institutions, are also worthy of reconsideration. Part 6 could at minimum, very simply, be amended to require consent of the relevant legislature: the example given of authorising roads spending where the devolved institutions are opposed on environmental grounds shows how incompatible this is with the formal devolution of transport policy. Part 7 has yet to be tested, but even enterprise agency support for a local industry might be deemed to distort competition. It looks like a solution without a problem underlying it, and, so, hard to justify at least as it stands.

Finally, and beyond the true scope of this paper, reforms to this Act could also be part of a yet wider set of measures relating to a "reboot of devolution", if UK Ministers felt suitably ambitious.

For example, that could include measures proposed in the A New Britain: Renewing our Democracy and Rebuilding our Economy report, published in December 2022 by the Commisson on the UK's Future. The Commission, chaired by Gordon Brown, was established by Keir Starmer as the then Leader of the Opposition.

It notes that: "*Over the last decade devolved self-government has been undermined and bypassed by a government in London that has been able to ignore its democratic voice, most notably over Brexit and the UK internal market legislation passed despite the view of Holyrood*." This is not a fully consensus view, of course, but at least as an assessment of the problem it is one that appears to be shared by the Holyrood parties with the exception of the Conservatives, and indeed by some within the Conservative Party.

The changes that report proposes are sweeping and constitutional. It recommends that the House of Lords should be replaced with a new second chamber of Parliament: an Assembly of the Nations and Regions, with a constitutional role that, amongst other things, oversees a properly binding Sewel Convention process. A wider set of changes to the devolution settlement is proposed, "*based on the principles that devolved self-government should be permanent, expansive, and each elected body held in equal esteem*".

Conclusion

Whether or not such sweeping changes are on the table, the Internal Market Act 2020 as it stands is a mechanism unfit for the governance of four nations, three of which have devolved institutions established via referendum.

Changes to it can and should be made, changes which focus on clarity of process and fairness of outcome, and which accept that only policies with disproportional impacts on trade and business operations across the UK should be in question. Devolution can again operate as intended, democratically, as sites of innovation and experimentation, and in ways that ideally respond to national needs and voter intention.

Enhanced clarity around the Common Frameworks would be useful, no matter what else is done. Collaboration and preparation are worthwhile, and alignment has its merits. But above all, the exclusion process should be changed so it is limited only by proportionality in pursuit of public policy objectives and by the devolution Acts themselves.

Annex 1
Participants and interviewees

Thanks to all who participated and supported this project, most notably those who agreed to be interviewed. Some interviews were conducted anonymously in order to allow participants to speak freely. The others were as follows.

- Jemma Bere (Keep Wales Tidy)
- Alison Douglas (Alcohol Focus Scotland)
- Dr Thomas Horsley (University of Liverpool)
- Sally Nex (Plantlife)
- Ewan MacDonald-Russell (British Retail Consortium)
- Professor Nicola McEwen
- Professor Aileen McHarg
- Liz Smith (Wales Environment Link)

Thanks also to Lloyd Austin and Dan Paris (Scottish Environment LINK), and Kat Jones (APRS) for discussions around the Act and its implications.

Annex 2
Further reading and bibliography

A. Official documents

1. The Act itself
2. BEIS Memorandum to DPLR (HMG, October 2020)
3. After Brexit: the Internal Market Act and Devolution (SG, March 2021)
4. Letter to George Eustace (SG, Dec 2021)
5. UK paper on exclusions process (Dec 2021)
6. UK Internal Market Inquiry (SP, CEEACC, February 2022)
7. Ministerial response to CEEACC report (SG, February 2022)
8. Senedd research: The UK Internal Market Act 2020: what difference is it making? (March 2022)
9. CEEACC report on the impact of Brexit on devolution (SP, September 2022)
10. CEEACC session on Retained EU Law (SP, November 2022)
11. Timeline for sought deposit return exemption (SG, February 2023)
12. CEEACC papers inc academic written evidence (SP, March 2023)
13. SPICe paper: From single-use plastics to the deposit return scheme: How are Common Frameworks and UK Internal Market Act exclusion processes operating? (SP, March 2023)
14. CEEACC docs associated with Impact of Brexit on Devolution (SP, March 2023 to January 2024
15. CEEACC letter to Michael Gove (SP, May 2023)
16. Devolution since the Brexit referendum (SG, June 2023)
17. Official Report of CEEACC session on Devolution Post-EU (SP, June 2023)
18. Formal process for deposit return (SG, October 2023, published under FOI)
19. Official Report of debate into Scottish Parliament Powers (SP, October 2023)
20. Ministerial response to subsequent CEEACC report (SG, December 2023)
21. Official Report of debate into CEEACC report (SP, January 2024)
22. Guidance on Internal Market Act (SP, date unknown)

B. Academic writing

1. The Internal Market Bill: A New Threat to the Rule of Law (Sahil Thapa: Oxford University Undergraduate Law Journal, October 2020)
2. The United Kingdom Internal Market Act 2020 (Jess Sargeant & Alex Stojanovic: report for the Institute for Government, Feb 2021)

3. Sleeping with an Elephant: Devolution and the United Kingdom Internal Market Act 2020 (Professor Nicola McEwen, Professor Aileen McHarg, Professor Jo Hunt, Professor Michael Dougan: Law Quarterly Review, January 2022)
4. The Deposit Return Scheme and the UK Internal Market (Seán Patrick Griffin: Constitution Society, July 2023)
5. The UK Internal Market: A Global Outlier? (Dr Jan Zglinski: Cambridge University, Sept 2023)
6. UKIMA as red flag symptom of constitutional ill-health: devolved autonomy and legislative consent (Dr Chris McCorkindale: University of Strathclyde, Apr 2024)
7. Westminster Rules? The United Kingdom Internal Market Act and Devolution (Dr Coree Brown Swan, Professor Thomas Horsley, Professor Nicola McEwen, Dr Lisa Claire Whitten: Centre for Public Policy at the University of Glasgow, Oct 2024)