UK Internal Market Act 2020:
Review and Consultation Relating to Parts 1, 2, 3 and 4

Written Evidence to the Constitution, Europe, External Affairs and Culture Committee of the Scottish Parliament

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The United Kingdom Internal Market Act 2020 (the UKIMA) continues to pose significant challenges to devolved policymaking in Scotland. Introduced by the previous UK Government (UKG) without devolved consent, the Act establishes a legal framework to manage intra-UK trade in goods and services (and the recognition of qualifications) in devolved areas that prioritises deregulation by default and positions the devolved governments as junior partners in UK market-management.

This submission addresses four key issues that the UKG's consultation on the UKIMA scopes for discussion: 1) the operation of the market access principles to date; 2) potential improvements to the intergovernmental exclusions process; 3) the role of the Office for the Internal Market; and 4) the relationship with the Common Frameworks. It is intended to assist the Committee with the preparation of its response to the UKG's consultation.

1. The MAPs: Operation and Impact on Devolved Policymaking in Scotland

The UKIMA market access principles (MAPs) – mutual recognition and non-discrimination – are familiar trade law principles that are used to manage regulatory divergence in systems of multilevel governance (incl. the EU internal market).

Two overarching features frame discussion of the MAPs under the UKIMA.

- *First*, the MAPs are highly deregulatory: by default, they prioritise intra-UK trade over the protection of non-market policy objectives (eg environmental protection; animal welfare etc.). The UKIMA recognises only a very limited set of grounds justifying regulations that fall within the scope of the MAPs. This contrasts, for example, with EU internal market law, which recognises space to defend an open-ended list of proportionate non-market policy objectives.

- *Secondly*, the UKIMA introduced a hierarchy between the UK and devolved governments with respect to market-management. Under the UKIMA, the UKG occupies a dual role as 1) regulator for England (i.e. parallel to the Scottish Government's position in relation to Scotland) and 2) UK-wide regulator (i.e. exercising ultimate responsibility to determine the application of the MAPs across the four nations and territories of the UK).[1]

[1] This fusion of responsibilities contrasts with the position under the EU internal market, where there is a clear division between 1) the institutional role of member states acting *unilaterally* as national regulators and 2) EU institutions acting *collectively* to regulate intra-EU trade across the 27 national markets through eg the adoption of common standards.

These two macro-level design features remain inherently problematic and explain, in part, why the Scottish Government withheld legislative consent to the UKIM Bill. Reform is possible. The deregulatory pull of the UKIMA can be adjusted (eg by expanding the scope to defend non-market policy objectives against the MAPs). The UKG could also (re)balance its institutional position vis-à-vis the devolved governments; for example, by committing politically to anchor the exercise of its existing UKIMA powers to the outcome of intergovernmental processes (eg the Common Frameworks). These issues are discussed further below.

How do the MAPs shape devolved policymaking in Scotland?

The MAPs have a transformative impact on devolved policymaking. To the extent that it intersects with the MAPs, devolved policymaking now takes place in a shared regulatory space – the UK internal market – with the UKG positioned as ultimate gatekeeper. The MAPs do not affect the existence of devolved competences under the Scotland Act 1998, and the validity of Scottish legislation is not conditional on compliance with the MAPs. What the MAPs do is restrict the ability of the Scottish Government to apply its regulatory preferences to goods and services entering Scotland from other parts of the UK (including those entering from outside the UK through another part of the UK). This is a *practical* limitation on devolved competence. It has two distinct effects on devolved policymaking in Scotland.

First, and most obviously, the MAPs reduce the effectiveness of *unilateral* policymaking in devolved areas. Scottish legislation cannot be applied to incoming (in-scope) goods and services that comply with regulations applicable in another part of the UK (eg incoming glass containers under the Scottish DRS). *Secondly*, the MAPs restrict the ability of the Scottish Government to *respond* to regulatory changes in *other* parts of the UK (eg UKG changes to precision breeding licensing in England under the Genetic Technology (Precision Breeding) Act 2023). The MAPs are protected enactments (Scotland Act 1998, Schedule 4), meaning that the Scottish Parliament is unable to legislate to 'undo' the effects of regulatory changes in areas of devolved competence should it wish to defend different (incl. higher) standards for Scotland.

How are the devolved governments responding to the MAPs?

On the one hand, initial experience indicates that the MAPs have had *a chilling effect* on devolved policymaking thus far. The Scottish Government's decision to pause its introduction of a deposit return scheme in Scotland and the Welsh Government's approach to implementing its ban on single-use plastics (SUPs) evidence this clearly. In both instances, the UKG's refusal to grant exclusions from the MAPs resulted in the devolved governments – explicitly in the case of Scotland and the DRS; implicitly in the case of Wales and SUPs – reshaping (and lowering) their policy ambitions in areas of devolved competence.

On the other hand, there is growing evidence of *increased engagement with intergovernmental processes* as a means to navigate the practical effects of the MAPs on devolved policymaking. Rather than acting unilaterally and seeking exclusions for devolved policies, the devolved governments appear increasingly open to engaging with the UKG bilaterally (or with the UK and other devolved governments multilaterally) with a view to adopting joint UK-wide approaches in devolved policy areas. This started under the previous UKG already (eg on tobacco and vapes and wet wipes). It is likely to strengthen under the new UKG in line with its commitment to 'reset' relations with the devolved governments.

For the Scottish Government, engaging with intergovernmental processes has the advantage of circumventing possible conflicts with the MAPs (the MAPs cannot be used to challenge any jointly

agreed UK-wide regulations). But it is associated with significant costs and legitimacy concerns. In terms of costs, intergovernmental decision making inevitably dilutes devolved policy ambitions: the Scottish Government will be pushed to compromise on policy depth and timing, with the UKG retaining the final say as ultimate gatekeeper. Shifting policymaking to the intergovernmental level also disempowers the Scottish Parliament – intergovernmental processes prioritise executive politics over deliberation through devolved legislative processes.

2. The Exclusions Process; Further Reforms to the UKIMA

The UKIMA provides only limited space for the Scottish Government to defend its policy preferences in devolved areas against the MAPs. This remains a key weakness of legislative design and a significant source of the Act's deregulatory bias.

With a view to potential reform, the UKG's consultation focusses discussion on the existing exclusions process agreed by the UK and devolved governments in December 2021, inviting proposals for pragmatic improvement. This section foregrounds a series of possible reforms for the Committee's consideration. These reforms may be implemented through primary legislative change (eg amending the UKIMA), or through revisions to intergovernmental agreements (or a combination of both).

- Reverse the Burden of Proof for Exclusions

  Under the current UKIMA framework, it falls to the Scottish Government to initiate the exclusions process to shield devolved legislation from the MAPs. The Committee should consider pressing for the reversal of this burden of proof. The Scottish Parliament has primary responsibility for legislative policymaking in devolved areas, and the UKIMA exclusions process ought to reflect (and protect) this core manifestation of devolved autonomy.

  Accordingly, it should fall to the UKG – in its role as UK-wide regulator – to adduce evidence that Scottish legislation interferes (or is liable to interfere) with intra-UK trade. Only where this is established (with qualitative and quantitative data) should the Scottish Government be required to commence bilateral discussions with the UKG through the Common Frameworks with a view to securing an exclusion from the MAPs.

  Requiring the UKG (acting as UK-wide regulator) to discharge the burden of demonstrating that a particular Scottish regulation has an actual or potential impact on intra-UK trade would remove the effective veto that the UKG presently exercises by default over Scottish policymaking in devolved areas (see eg SUP, DRS and Glue Traps). Moreover, reversing the burden of proof would align the UKIMA exclusions process with the subsidiarity principle. That principle operates explicitly (but also implicitly) in other systems of multi-level government (incl. the EU) to protect the autonomy of lower tiers of government from encroachment by the centre where legislative powers are held concurrently.

- Procedural Reforms to the Exclusions Process

  The current exclusions process would also benefit from further procedural improvement – whether or not the burden of proof is reversed as outlined above.

  Presently, there remains a degree of confusion around the timing for seeking exclusions (and for decision making) as well as on the format for submitting responses and the supporting evidence required. The Committee should consider pressing for greater clarity

on these key issues. It is suggested that a new 'exclusions request form' could be co-designed by the UK and devolved governments as part of discussions on future reforms. This form should set out an agreed workflow to manage the exclusions process. This is currently lacking. There are, for example, presently no safeguards for the devolved governments in relation to the timing of UKG decision making on exclusions. It is further suggested that the Office for the Internal Market could be given a role in a revised exclusions process (see below). The exclusions process could also be put on a statutory footing (eg incorporated into the UKIMA) to bolster transparency.

- Further Potential Reforms to the UKIMA

  The UKG's consultation focusses attention on the operation of the current intergovernmental exclusions process. However, other aspects of the UKIMA are ripe for reform to rebalance the relationship between the MAPs and devolved policymaking. The Committee should consider picking up on these broader points in its consultation response.

  For example, the UKG could be pressed to use its existing UKIMA powers (eg s.10 and s.18) to exclude devolved policy areas in whole or in part from the scope of the MAPs. These powers are not limited to giving effect to exclusions agreed through the existing exclusions process and could therefore be used to neutralise the effects of the MAPs by removing wide areas of devolved policymaking *ex ante*. It should be noted, however, that the UKG could reverse such action in the future without devolved consent.

  Further legislative reform is also possible. For example, the UKIMA could be amended radically to expand the list of public interest requirements justifying restrictions on intra-UK trade. Presently, the UKIMA provides only very limited space for the UKG to add to the list of recognised 'legitimate aims' in relation to indirect discrimination (eg s.8(7) and s.21(8)). Expanding the list of available legitimate aims under the UKIMA is crucial and should not be overlooked. It is essential to bolster the protection of devolved policymaking where the MAPs are engaged outside intergovernmental processes (eg as directly effective provisions to challenge Scottish legislation before the courts).

  Alongside this, the proportionality principle could be introduced to support the balancing of devolved autonomy with the protection of intra-UK trade under the MAPs. Like subsidiarity, proportionality is familiar in other systems of multi-level governance. In that context, the principle functions to scrutinise the *intensity* of regulatory interventions, ensuring that policymaking at both the centre *and* lower tiers of government furthers a recognised public interest, is suitable to achieve its aims and, crucially, cannot be achieved using measures that are less restrictive of (here) intra-UK trade.

3. An Increased Role for the Office for the Internal Market?

The UKG's consultation invites comment on the OIM's role, including potential changes to its functions. This submission draws the Committee's attention to two proposals.

- *First*, the OIM's existing powers could be expanded to support more data-driven decision making under the exclusions process. Presently, the OIM is empowered, at the request of the UK and devolved governments (acting individually or jointly), to report on the economic impact of devolved (and for England: UK) regulations (proposed or passed) falling within the scope of the UKIMA (eg ss. 34 and 35). These powers could be modified

to integrate the OIM's technical reporting powers into the exclusions process. The OIM is arguably well-placed institutionally to support the UK and devolved governments by providing data on the actual and/or potential impact of new regulatory proposals on intra-UK trade as part of that process. It is already expressly mandated to act even-handedly in the exercise of its existing statutory functions.

- *Secondly*, the OIM could be given new responsibilities to improve legislative tracking. Advanced notice of future regulatory divergence is essential to the proper functioning of any internal market. The UK internal market currently relies on political commitments to share information set out in intergovernmental agreements rather than on any formal framework. This approach has proved weak in practice (eg Genetic Technology (Precision Breeding) Bill). It also creates uncertainty for the devolved governments, business and other stakeholders. The UKIMA could be modified to establish the OIM as a repository for legislative tracking (the OIM already tracks developments *de facto* when preparing its Annual Reports). Legislative tracking through a centralised body such as the OIM could provide a stronger platform for increased intergovernmental cooperation in areas of shared concern at an earlier stage of policy development.

  A notification system, requiring the UK and devolved governments to notify the OIM (or an alternative body) of potential regulatory divergence could be introduced alongside efforts to strengthen legislative tracking. Presently, there is no such system comparable eg to that established under Directive 2015/1535 with respect to the EU internal market. Prior notification of proposed regulations with potential impacts on intra-UK trade would improve transparency and further support early intergovernmental cooperation, incl. through the Common Frameworks.

4. Looking Ahead: (Re)prioritising the Common Frameworks?

The UKG's UKIMA consultation gestures towards a fundamental reordering of the relationship between the UKIMA and the Common Frameworks that predate that Act. Going forward, the UKG would appear now to be explicitly prioritising the Common Frameworks as 'the main fora for the 4 governments to discuss and collaborate on new ideas and policies in the areas they cover, and to consider the impact these may have on the internal market.' The UKIMA is being relegated – it is now the 'background' instrument, so the UKG.

The Scottish Government will welcome the UKG's recommitment to the Common Frameworks to manage future regulatory divergence in devolved areas – and for good reasons. The Common Frameworks have distinct advantages over the application of the MAPs – most obviously perhaps, unlike the UKIMA, the Common Frameworks rest on the consent of the four UK governments (and, once formally approved, their respective parliaments). Consent and co-design are essential prerequisites to deliver certainty and stability in any system of market governance, and the Common Frameworks deliver on both counts. That said, to achieve their potential as market governance tools, the Common Frameworks require further refinement, and the Committee should be alerted to three limitations with the Frameworks in their current form.

- *First*, to function effectively, the Common Frameworks require further work. The UKG's commitment to finalise the outstanding frameworks by Easter should be welcomed but likely underestimates the scale of the task. The Frameworks remain inconsistent across policy areas, and concerns remain around their transparency, notably regarding stakeholder input. Contrary to initial expectations, in their present form, the Common

Frameworks remain principally concerned with procedural matters, i.e. setting out agreed ways of working between governments. If they are to displace the MAPs, what principles apply to determine the scope for policy divergence? Individual Frameworks currently provide little detail on the substantive parameters for policy coordination beyond that agreed in the JMC Communique.[2] Further, finalising the Frameworks also requires the UK and devolved governments to clarify their relationship with the exclusions process (assuming the UKIMA is not amended/repealed) – the Frameworks do not currently address this.

- *Secondly*, the Committee should be aware that (re)prioritising the Common Frameworks risks aggravating further existing concerns around executive empowerment. Recourse to the Common Frameworks to manage future policy divergence prioritises executive over legislative politics and risks weakening devolved legislative processes. The Frameworks shift decisions over the scope, depth and timing of legislation in devolved areas into an intergovernmental space where the focus is on securing consensus between the UK and devolved governments. Where agreement is reached through intergovernmental negotiations, the Scottish Parliament may find its scope to shape policy outcomes significantly narrowed. Reprioritising the Common Framework therefore requires renewed consideration of the Scottish Parliament's procedures for authorising and scrutinising the Scottish Government's decision making. It is imperative that robust processes exist to ensure the Scottish Government remains fully accountable to the Scottish Parliament when acting within the Frameworks.

- *Thirdly* and critically, without legislative change, the Common Frameworks remain formally subordinate to the UKIMA. The UKG's announcement that it wishes to prioritise the Common Frameworks over the UKIMA ultimately rests on little more than a political commitment. As a matter of principle, it remains open to the UKG (or a future UKG) to reassert its gatekeeping functions under the UKIMA at any time to veto devolved legislation where its substance runs counter to its own preferences (eg regulating for England). The continued existence of the UKG's UKIMA powers (which are not conditional on devolved consent) leaves the devolved governments vulnerable to interference from the centre. For that reason, the Committee should keep the UKIMA (and proposals for its reform) in clear focus when considering changes to the management of the UK internal market. Even when shifted to the background, in its unreformed state, the UKIMA remains a latent – and extremely potent – challenge to devolution going forward.

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[2] The JMC Communique (EU Negotiations) (2017), establishing the Common Frameworks, references a commitment to 'maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules.'