CEEAC/S6/25/8/1

Constitution, Europe, External Affairs and Culture Committee
Thursday 6 March 2025
8th Meeting, 2025 (Session 6)

UK Internal Market Act 2020: Consultation and Review

1. The UK Government has announced a review of parts of the UK Internal Market Act 2020 and, as part of that review, is consulting stakeholders on the operation of the Act to date. The review consultation was launched on Friday 23 January 2025 and closes on 3 April 2025.

2. The Committee has agreed to carry out a short inquiry with a view to submitting a response to the consultation.

3. This week we will be hearing from two panels—

   Panel 1

   - Professor Thomas Horsley, Professor of Law, University of Liverpool
   - Professor Aileen McHarg, Professor of Public Law and Human Rights, Durham University
   - Professor Jo Hunt, Professor in Law, Cardiff University;
   - Dr Coree Brown Swan, Lecturer in British Politics, University of Stirling

   Panel 2

   - Jonnie Hall, Director of Policy, NFU Scotland
   - Lloyd Austin, Convener of the LINK Governance Group, Scottish Environment LINK

4. Written submissions from the witnesses can be found at **Annexe A**.

Clerks to the Committee
March 2025

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

Professor Thomas Horsley
University of Liverpool

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.

Thomas Horsley
27 February 2025

[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.'

CEEAC/S6/25/8/1
Annexe A

Scottish Parliament Constitution, Europe, External Affairs and Culture Committee

Review of the United Kingdom Internal Market Act

Problems with the United Kingdom Internal Market Act (UKIMA)

The operation of the United Kingdom Internal Market Act 2020 (UKIMA) poses four major, inter-related, and mutually compounding, problems in its intersection with the UK's devolution arrangements:

1. *An unsatisfactory intersection with devolved competence*. In contrast with the EU internal market rules which they replaced, UKIMA's market access principles technically have no effect on devolved competence. The *validity* of devolved legislation (primary or secondary) is not affected by the market access principles. However, these may (depending on a range of contextual factors) have very serious implications for the *effective operation* of devolved legislation, such as to significantly constrain the scope of devolved law-making competence in practice.

   This is not merely a conceptual point. Because the market access principles do not affect the validity of devolved legislation, they are not subject to the same pre-enactment scrutiny and testing that applies to formal constraints on devolved competence under the Scotland Act 1998. This means that there may be significant uncertainty at the point that legislation is being debated and enacted as to whether and how, precisely, it is affected by the market access principles. Governments *may* seek advice from the Office of the Internal Market (OIM) (UKIMA, s.34) regarding the effect of proposed regulations on intra-UK trade, but so far this provision has only been used once (in relation to a proposed ban on the sale of horticultural peat in England).

2. *Asymmetry*. Although formally applicable to legislation passed by all four of the UK's governments and legislatures, the devolved governments and legislatures are significantly more constrained by the market access principles than the UK Government and Parliament when legislating for England. This is partly because of the inherent asymmetry of market size in the different parts of the UK. It is also partly because of the operation of parliamentary sovereignty, which means that the UK Parliament can override the market access principles in order to protect regulatory choices for England, in a way that the devolved legislatures cannot (because UKIMA is a protected/entrenched statute under the devolution statutes). And it is partly because UKIMA itself places the UK Government in a privileged position compared with the devolved governments, for instance in the exercise of secondary legislative powers to amend the list of exclusions in Schs 1 and 2 from the scope of the market access principles in relation to goods and services respectively. In the exclusions process, while the consent of the devolved governments has to be *sought* before the Schedules can be amended, only the UK Government is in the position of a veto player – i.e., amendments cannot be made unless the UK Government wishes to do so, whereas it may proceed in the absence of consent from any or all of the devolved administrations.

3. *An unsatisfactory balance between market access and regulatory divergence*. UKIMA as enacted gave significant priority to the principle of market access over protecting the ability to regulate local markets in accordance with local democratic choices. Exclusions from the market access principles for goods in particular are notoriously narrow, although

these can be extended by amending Schedule 1. Only in the case of the indirect discrimination principle is there any explicit ability to balance market access against competing aims, but again legitimate aims are defined extremely narrowly (ss. 8 and 21). At times the priority given to market access has approached the absurd, as with the last UK Government's refusal to grant an exclusion for the ban on the *supply* of rodent glue traps in Scotland,[1] notwithstanding a lawful ban on their *use*.

The heavy reliance on the exclusions process to regulate the balance between market access and regulatory divergence has a number of adverse consequences:

a. It means that the balance between market access and regulatory divergence is dealt with on an all or nothing basis – i.e., market sectors are either subject to the market access principles or they are not – rather than on a more nuanced, case-by-case basis. This may in itself encourage the narrow approach to granting exclusions that we have seen so far in practice.

b. Because of the position of the UK Government as a veto player in the exclusions process, it exposes devolved law makers to political control by UK ministers in areas of devolved policy competence. It may be unpredictable as to how the exclusions process will be used, and there is scope for abuse of power with very little opportunity for legal challenge. This has been, and is likely to continue to be, a source of considerable political tension between the UK and devolved governments.

c. It encourages decisions to be made on a UK-wide (or GB-wide) basis, so as to avoid the operation of the market access principles. While collaborative approaches to policy making may be desirable where they are voluntary, compelled collaboration is incompatible with devolved legislative autonomy. Collaborative law-making also undermine the ability of the devolved legislatures to effectively scrutinise decisions taken in inter-governmental forums and implemented by UK-wide or parallel legislation and reduces the ability of devolution to act as a policy laboratory.

4. *Uncertainty*. UKIMA has added significant uncertainty to the devolved law-making process. This comprises *legal* uncertainty, regarding the meaning of the market access principles, which have not yet been tested in court; *factual* uncertainty, regarding the practical impact of the market access principles in any particular regulatory context; and *political* uncertainty, regarding the operation of the exclusions process, particularly as it intersects with agreements on policy divergence reached via the Common Frameworks process.

Uncertainty has adverse consequences not only for law makers, but also for policy stakeholders, who may find it difficult to predict and therefore assess the consequences of regulatory proposals, and for businesses themselves. Indeed, while OIM evidence suggests that businesses are reluctant to rely on the market access principles,[2] the

[1] Wildlife Management and Muirburn (Scotland) Act 2024, s.2.
[2] Annual report on the operation of the UK internal market 2023 to 2024 - GOV.UK.

litigation that Biffa Waste Management is pursuing against the Scottish Government arising out of the postponement of the Deposit Return Scheme demonstrates that they may be significantly adversely affected by political uncertainty in relation to the exclusions process.

Potential Reforms

Given that the UKIMA Review has ruled out repeal of UKIMA or any part of it, not all of these problems can be addressed. This applies in particular to problem 1 and elements of problem 2. However, other problems can be addressed, or at least mitigated. Approaches to reform could involve non-statutory mechanisms to improve the operation of decision-making around the Act; use of delegated legislative powers under the Act; or primary legislation to amend aspects of UKIMA. It is not clear what types or scale of reform the UK Government may be willing to contemplate. In my view, however, **the most important objective of reform should be to reduce the role of political discretion in the operation of the Act**, thereby reducing asymmetry as between the UK and devolved governments, providing a more satisfactory approach to the balance between market access and regulatory divergence, and reducing uncertainty around the effect of UKIMA on devolved law-making.

The following reform options might be considered:

1. *Improve the process for seeking UKIMA exclusions.* A procedure for seeking UKIMA exclusions was agreed under the Common Frameworks process.[3] However, there remains considerable uncertainty around the operation of that process, particularly around the timing of when exclusion requests should be made. A relatively minimal reform would be for the four governments to agree a new, more detailed exclusions process. More ambitious reforms in this space might include a role for stakeholder consultation and scrutiny by the UK and devolved legislatures before exclusions are agreed. Nevertheless, non-statutory reform would not address the underlying legal asymmetry in the exemptions process. Nor is there any guarantee that the process would be followed in practice, and it seems unlikely that it would give rise to grounds for judicial review if not.[4]

   Statutory reform of the exclusions process would be more difficult to achieve, but could be more satisfactory. For instance, UKIMA could be amended to create a formal process for requesting exclusions, subject to the agreement of all four governments, with a duty on UK ministers to lay amending regulations if agreement is reached, and duties to give reasons for failure to agree. A super-affirmative approach might be adopted for amending regulations, including consultation obligations and laying of regulations before all four legislatures in draft before approval. A more formal exclusions process would, however, be more cumbersome and time consuming to operate, opening up the potential for exclusion decisions to be challenged via judicial review. Given the general preference for non-statutory intergovernmental processes, there may be resistance to formalisation of the exclusions process.

2. *Expand UKIMA exclusions.* Regulation making powers under ss. 10 and 18 of UKIMA could be used to expand the range of exemptions from the market access principles in

[3] Process for considering UK Internal Market Act exclusions in Common Framework areas - GOV.UK.
[4] See *Scottish Ministers v Advocate General for Scotland* [2023] CSOH 89.

Schedules 1 and 2, thus reducing the need for *ad hoc* exemptions. This would significantly tilt the balance of the Act away from market access and in favour of regulatory divergence, thus reducing the constraints on devolved law makers and reducing their exposure to political control by UK ministers.

However, there are significant objections to this approach. First, a blanket approach to exclusions would arguably still fail to strike a satisfactory balance between market access and regulatory divergence. Secondly, unless accompanied by other reforms to the exclusions process, there would be nothing to stop the list of exclusions being narrowed again in future.[5]

3. *Subject the market access principles to tests of proportionality and subsidiarity*. A more fundamental reform of UKIMA, requiring primary legislation, would be to subject the application of the market access principles in any particular case to principles of proportionality and subsidiarity, thus returning to something more like the position under the EU internal market rules where the preservation of free trade is balanced against competing regulatory objectives on a case-by-case basis.[6] A proportionality principle would mean that benefits of any particular regulation would have to outweigh any adverse impacts on internal trade, while a subsidiarity principle would place the burden of proof on those seeking to challenge the application of divergent devolved regulations.[7]

   As under EU law, the courts rather than the UK Government would become the final arbiters of where the balance is to be struck between market access and regulatory divergence. This would have the benefits both of depoliticising disputes and – over time – fostering greater clarity over the meaning and application of the market access rules. A potential objection would be that this approach might increase costs to businesses, as the market access rules would no longer apply by default. However, as noted, this would be a return to the position under EU membership rather than an entirely new approach.

4. *Improve processes for considering the effects of UKIMA on proposed legislation*. A final reform option that the Committee may want to consider irrespective of the outcome of the UKIMA Review is to seek improvements in the Scottish Parliament's own processes for considering the potential effect of the market access principles when considering proposals for primary or secondary legislation. One possibility would be to require explanatory notes or impact assessments to expressly address the potential impact of the market access principles and what steps are being taken (where necessary) to secure UKIMA exclusions. Standing Orders might also place a "UKIMA reserve" on the approval of Bills or secondary legislation where significant concerns remain. In addition, the Committee may wish to encourage ministers to make greater use of the possibility of seeking advice from the OIM on the market impact of regulatory proposals.

Aileen McHarg
Professor of Public *Law and Human Rights, Durham University*
27 February 2025

---

[5] See, e.g., The United Kingdom Internal Market Act 2020 (Services Exclusions) Regulations 2023, SI 2023/1263.
[6] See, e.g., *Scotch Whisky Association v Lord Advocate* [2017] UKSC 79.
[7] See C Brown Swan *et al*, *Westminster Rules? The United Kingdom Internal Market Act and Devolution* (2024), pp 45-7 REPORT: Westminster Rules? The United Kingdom Internal Market Act and Devolution.

Summary of report: The Internal Market Act – a challenge to devolution

February 2025

Key points:

- The Internal Market Act restricts the ability of devolved governments to act in areas of their responsibility, including in the environment.
- The UK Government review of the Act is an opportunity to establish a system which better allows for policy innovation and a race-to-the-top in environmental standards.
- A report commissioned by Scottish Environment LINK recommends:
  - **The four governments should consider how to improve the Common Frameworks process.**
  - **Regulations should be implemented to allow devolved governments to pursue legitimate policy aims within their powers.**
  - **Wider reform to the Act should be considered.**

Background: The Internal Market Act

The United Kingdom Internal Market Act (UKIMA) was introduced as part of the Brexit process, establishing new rules around the sale of goods and services in the four nations of the UK. The then UK Government envisaged this as a replacement for the European single market rules, though the scope and operation of was markedly different from its EU predecessor.

The Act effectively meant that powers previously held by devolved governments cannot be exercised without the consent of UK ministers. **This represents a significant shift in the balance of power between the UK institutions and the devolved institutions.**

Since introduction 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.

In January 2025 the new UK Government launched a review of the Act.

Approach to LINK report

The Internal Market Act: A Challenge to Devolution was commissioned by Scottish Environment LINK and produced by James Mackenzie. The report is based on a wide range of interviews, with academics, elected officials, civil servants, and external stakeholders (specifically NGOs and business representatives).

Recommendations for reform

Recommendation 1: the four governments should consider how to improve the Common Frameworks process.

The Common Frameworks should be - and often are - useful and practical fora for discussions between the four Governments around possible policy divergence within 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.

Where the Common Frameworks operate in areas which touch on the market access principles, though, greater clarity is needed. This could 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; 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.

● a restatement of the commitment of increasing the powers of the devolved institutions.

Recommendation 2: devolved governments should be able to pursue legitimate policy aims within their powers.

Devolution was established on the principle that the four nations of the UK could pursue different approaches in areas within their responsibilities, such as the environment or public health, but that specific, well-defined issues would be reserved to the UK Government.

Under the EU single market, member states can implement trade-related policies where local regulations can be justified by wider public policy objectives. This principle has been lost to devolution since the introduction of the UKIMA but could easily be reestablished, although under this proposal the devolved administrations would still have less freedom of legislative movement than they had before Brexit.

The devolved administrations should be allowed to pursue measures which are proportionate and intended to support a legitimate public policy objective, within the limits of their powers. This could be achieved by introducing a broader systemic exclusion to Schedule 1 of the Internal Market Act by regulation. This power would be limited by the principles of proportionality and subsidiarity, which are well established principles with a long history in case law, and would not give the devolved administrations an arbitrary licence to act.

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

Wider reform to the Act could be introduced through amendments when a suitable legislative opportunity arises. The urgency and necessity of wider reform would be lessened by the implementation of Recommendation 2. This could include:

- Restricting or eliminating the power of external parties to bring challenges under the Act
- Clarifying what level of changes to existing regulations count as “substantive” and are therefore subject to the Act
- Reconsidering the role of direct spend by UK Ministers in devolved areas

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 40 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

For more information contact:

Dan Paris
Director of Policy and Engagement

NFUScotland

Briefing

THE UK INTERNAL MARKET AND THE INTERNAL MARKET ACT (IMA) 2020

Summary

1. The UK Internal Market is critical to the interests of Scottish agriculture and the vitally important food and drinks sector it underpins.
2. NFU Scotland stresses the need for agricultural support policies to diverge where necessary to reflect different needs and objectives. However, the free movement of goods and services and the regulations governing agricultural production, animal welfare, the environment, etc. must be aligned so there is no competitive (cost) advantage or disadvantage from farming in one part of the UK over another.
3. It is the clear view of NFU Scotland that the principles embedded in the UK Internal Market Act (IMA) 2020 pose a significant threat to the development of Common Frameworks and to devolved policy.
4. Common Frameworks would ensure that the UK Internal Market effectively continues to operate as it does now – providing a level playing field of minimum regulatory standards to enable the free movement of goods and services without unfair distortion. Common Frameworks would manage policy differences on the basis of agreement and is founded on respect for devolution.
5. However, the UK IMA 2020 appears to limit the devolved administrations' ability to act if any standards were lowered and give the UK Government a final say in areas of devolved policy.
6. The UK IMA 2020 potentially undermines the Common Frameworks process both in principle, as they move from agreement to imposition, and in practice by removing the incentive for the UK Government and devolved administrations to agree ways to align and manage differences when mutual recognition and non-discrimination rules require acceptance of standards from other parts of the UK.

Background

7. The regulatory fields of agriculture, environment and food have a hugely important role in agricultural practice and trade within the UK. They also require close co-operation between the UK Government and devolved administrations.

8. NFU Scotland supports the principle of Common Frameworks as an important component of safeguarding the integrity of the UK Internal Market. This support has always been predicated on the frameworks being 'commonly agreed' through mutual agreement between the UK Government and the devolved administrations and not by imposition from the centre.
9. Common Frameworks are integral to the functioning of the UK Internal Market. They must operate effectively to preserve the UK Internal Market and to ensure that the UK does not breach its international obligations and should respect the devolution settlements and democratic accountability of the devolved legislatures.
10. NFU Scotland believes that Common Frameworks should:
    - enable the functioning of the UK Internal Market, while acknowledging policy divergence
    - ensure compliance with international obligations
    - ensure the UK can negotiate, enter into and implement new trade agreements and international treaties
    - enable the management of common resources
    - administer and provide access to justice in cases with a cross-border element
    - safeguard the security of the UK
11. NFU Scotland remains concerned that the UK IMA 2020 could potentially override all Common Frameworks relating to agricultural support, environmental and animal welfare standards, and food. In addition, it does not include any proposals for how UK Internal Market disputes may be resolved or how Common Frameworks might operate and be governed. This is a major omission.

February 2025