CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE

9th Meeting 2021, Session 6

11 November 2021

The UK Internal Market

1. As part of its inquiry into the UK Internal Market, the Committee launched the call for views The UK Internal Market, which closed on 29 October 2021. All relevant submissions have been published online.

2. At this meeting the Committee will take evidence from two panels of witnesses who will join the meeting remotely—

   Panel 1
   - Alison Douglas, Chief Executive, Alcohol Focus Scotland
   - David Thomson, Chief Executive, Food and Drink Federation Scotland
   - Vhairi Tollan, Advocacy Manager, Scottish Environment Link

   Panel 2
   - Michael Clancy, Director Law Reform, The Law Society Scotland
   - Jess Sargeant, Senior Researcher, Institute for Government

3. Members can find the written submissions from the witnesses mentioned above in **Annexe A**.

4. Guidance on the UK Internal Market is provided in **Annexe B**.

5. SPICe have also provided a brief update on common frameworks which is attached in **Annexe C**.

Committee Clerks
November 2021

Written submission from Alcohol Focus Scotland

Alcohol Focus Scotland (AFS) is the national charity working to prevent and reduce alcohol harm. We want to see fewer people have their health damaged or lives cut short due to alcohol, fewer children and families suffering as a result of other people's drinking, and communities free from alcohol-related crime and violence. AFS welcomes the opportunity to respond to the Constitution, Europe, External Affairs and Culture Committee's call for views on the UK internal market.

ASH Scotland is the national charity working on reducing the use of and harm from tobacco and related products (including recreational nicotine products like e-cigarettes). ASH Scotland endorses and supports AFS's submission to the Committee and the concerns raised here. We have parallel concerns and would be happy to provide additional information.

Obesity Action Scotland is the national advocacy organisation on prevention of overweight and obesity in Scotland. We work to see improvements in the food environment to ensure that we can improve the diet of the Scottish population. OAS endorses and supports AFS's submission to the Committee and the concerns raised here. We have parallel concerns and would be happy to provide additional information.

How devolution is being impacted by the new constitutional arrangements arising from the UK internal market.

It is our view that the UK internal market substantially undermines devolved regulatory autonomy and limits the ability of devolved governments to implement measures to improve public health.

We have serious concerns that the effect of the mutual recognition principle for goods will be to significantly reduce the benefits of introducing new devolved measures to protect public health. Such requirements will be inapplicable to trade from outside Scotland, and as such they will place local Scottish trade at a disadvantage. The net effect is likely to be to stifle policy innovation and to curb the ability to make different public health policy choices at the devolved level. Improvements to pre-existing requirements are also likely to be disincentivised, as any substantive update to such requirements may bring them within the scope of the legislation.

Mutual recognition will allow any English good that meets English regulatory requirements to be sold in Scotland without having to adhere to Scottish regulatory requirements. The Act provides no general public health protection exclusions to the application of this principle; mutual recognition can be denied only to prevent the spread of pests, diseases or unsafe foodstuffs, under strictly controlled conditions.

The non-discrimination principle for goods could also impede the ability of devolved administrations to legislate for public health. The public health grounds for justification for measures deemed discriminatory seem a very challenging bar.

Measures that directly discriminate can only be justified as a response to a public health emergency. Such a definition is far too narrow to enable measures to be taken on public health protection grounds. In order to be justified, measures that indirectly discriminate would have to be 'considered a necessary means of achieving a legitimate aim' and deemed necessary to protect life or health, or public safety or security, with no alternate means of achieving the aims. This risks a situation where the Scottish Government is unable to legislate to protect the health of citizens or faces costly and excessive delays due to legal challenge. The Act's placement of economic interests above those of the public is likely to undermine devolved regulatory autonomy.

Section 8 (7) of the Act gives the Secretary of State powers to make substantial changes to the legislation, including - for example – removing the public health exemption from the non-discrimination principle. Amendments have tempered these powers, requiring the Secretary of State to seek consent from the devolved administrations before making regulations. However, the Secretary of State may make the regulations without consent if it has not been secured within one month. They must publish a statement explaining their decision to do so. We are concerned that this limits the capacity of the Scottish Parliament to protect the public health exemption.

Example: Alcohol Labelling

AFS has long called for statutory regulation on alcohol labelling given the alcohol industry's ongoing failure to provide basic health information on a voluntary basis (1).

The Scottish Government has made clear its preference for mandatory labelling across the UK but has supported the UK Government's attempts to encourage voluntary approaches by the industry. The Scottish Government's Alcohol Framework, however, reserved the right to legislate: "if insufficient progress is made by the time of the UK Government's deadline of September 2019, the Scottish Government will be prepared to consider pursuing a mandatory approach in Scotland" (2).

The Act limits the capacity of the Scottish Parliament to regulate on alcohol labelling without the agreement of UK government. Labelling will be subject to common frameworks, a mechanism through which the UK Government and devolved administrations can work together on policy areas where powers returned from the EU intersect with devolved competence. The Food Compositional Standards and Labelling provisional common framework was presented to parliament in March 2021, however progress on this has stalled due to the pandemic. This has led Food Standards Scotland to comment that "the resultant legislative landscape is therefore messy and challenging to navigate" (3).

Although common frameworks have a dispute resolution process, if agreement isn't reached then the UK Government would not have to pass the regulations necessary to allow for divergence. Alcohol Focus Scotland has concerns that this will both deter the Scottish Government from bringing forward proposals to improve alcohol labelling and constrain the ability of the Scottish Parliament to ensure that people

have access to the information they require to make informed decisions about their drinking.

Example – Minimum Unit Pricing for Alcohol (MUP)

The UK Government amended the bill during its passage to ensure 'manner of sale' requirements - such as MUP - would fall under non-discrimination instead of mutual recognition. This was welcome; however, the question remains whether the 'adverse market effect' condition can be met (section 8 (1) (c) and 8 (3)). The Act's definition of this term is unclear, although it is our interpretation that the requirement would have to disadvantage incoming goods in a way that it does not do for local goods, to cause significant adverse effect on competition in the market. Although we do not see how MUP would have a differentiated impact on Scottish and English alcohol, we are concerned that the uncertainty in the legislation could open the way for a challenge to the policy by the alcohol industry. The risk of such litigation, or the threat of it, may arise if and when the policy is modified.

The Scottish Government had committed to reviewing the minimum unit price after two years of implementation (i.e. from May 2020) (4), but this has been delayed due the pandemic. The Scottish Government's Legislative Consent Memorandum on the Internal Market bill noted that an adjustment to pricing in line with inflation may put MUP within scope of the market access principles (5) (NB. the LCM was drafted at an earlier stage of the bill so states an adjustment may put MUP in scope of mutual recognition, in fact as noted above it would be under non-discrimination).

Minimum unit pricing has been successful in reducing off-sales consumption by 3.5% (6) and there are early signs that it is reducing harm with a reduction in alcohol deaths of 10% in the first full year of implementation (7). However, it is generally accepted that the effects of MUP will have been eroded by inflation since the policy was first approved by the Scottish Parliament in 2012. Alcohol Focus Scotland believes it is essential that the minimum unit price is uprated to ensure that it delivers full benefits and that initial gains from the policy are not lost. We believe the MUP should be increase to at least 65p per unit to take account of inflation over the last nine years since the Parliament approved MUP, as well as increasing the impact of the policy, saving more lives.

However, as public health advocates, we know only too well that the threat of litigation can create regulatory chill among decision-makers. Given the recent experience of the MUP legal challenge launched by the Scotch Whisky Association against the Scottish Government, which took almost five years to conclude, those considering regulation are likely to think long and hard about not only the likelihood of winning a case but the opportunity costs of the process.

If it is deemed that raising MUP would create an adverse market effect, then reliance would be on being able to justify the measure on the basis that it is 'considered a necessary means of achieving a legitimate aim' (Section 8 (1) (d)). This is a high threshold. Given the Internal Market Act prioritises economic considerations, there is concern that the outcome reached on MUP in the European and UK Courts (where the economic impact was put aside in favour of the positive public health

implications), may not be the same when re-assessed, without the underpinning EU Law.

Example – Alcohol Marketing

The Scottish Government will consult shortly on measures to restrict alcohol marketing to protect children and young people from its effects (8). If the Scottish Parliament legislated to impose new advertising restrictions on alcoholic drinks in a way that disadvantaged English imports and adversely affected competition on the relevant UK market, Scotland would need to justify the application of those rules to English goods on public health grounds. This necessity test is strict and difficult to fulfil because it requires that there is no other less restrictive way of achieving the aim.

Human Rights

The Act undermines the ability of devolved administrations to legislate to protect and improve public health. The World Health Organization (WHO), in its Global Strategy to reduce non-communicable diseases, emphasises the importance of creating “health-promoting environments” which reduce consumption of tobacco, alcohol and unhealthy food (9). However, the Act is very likely to limit future regulatory action on unhealthy commodities across the UK and may encourage a default to the lowest common denominator. This would impede implementation of the WHO’s most cost-effective policy recommendations for reducing alcohol harm (10), such as action on marketing, price, availability and labelling.

The Act could also prevent fulfilment of the Scottish Government’s legal obligations to put health before profit. The right to health finds legal expression in a number of key international instruments to which the UK is signatory, including the International Covenant on Economic, Social and Cultural Rights (ICESCR). In ratifying this Covenant, the UK has made a commitment, binding in international law, to abide by the terms of the Covenant. This requires government, Parliament and the courts to make efforts to ensure the fullest possible compliance with the terms of the ICESCR. The Scottish Government has committed to incorporate the ICESCR, alongside three other United Nations treaties, into Scots Law (11).

General Comment 14 of the ICESCR lends specific support to an understanding that the right to health includes an obligation to regulate unhealthy products. It outlines the state’s duty to protect people from an infringement of their right to health by third parties, including corporations. If products are being consumed in a manner hazardous to health, an obligation is placed on the state to intervene to protect the right to health e.g. by developing a policy response to reduce the detrimental effects of alcohol to health by altering the market or consumption patterns.

In addition, General Comment 14 also supports the argument that states have an obligation to regulate unhealthy products in order to fulfil the right to health. Fulfilment of the right to health requires states to take positive measures ‘that enable and assist individuals and communities to enjoy their right to health’ (12). This could

be interpreted as including the obligation to create an enabling environment for healthier lifestyle choices.

(1) Alcohol Health Alliance UK (2020). Drinking in the dark: How alcohol labelling fails consumers. London: AHA UK. https://ahauk.org/wp-content/uploads/2020/09/DRINKING-IN-THE-DARK.pdf

(2) Action 15 - The Scottish Government (2020). Alcohol Framework 2018: Preventing Harm. Next steps on changing our relationship with alcohol. Edinburgh: The Scottish Government https://www.gov.scot/publications/alcohol-framework-2018-preventing-harm-next-steps-changing-relationship-alcohol/

3) Food Standards Scotland Board paper on EU Exit 8 months on for meeting on 21 September 2021, https://www.foodstandards.gov.scot/downloads/06_-_EU_Exit_8_months_on_-_Board_Meeting_-_21_September_15.pdf

(4) Action 3 - The Scottish Government (2020). Alcohol Framework 2018: Preventing Harm. Next steps on changing our relationship with alcohol. Edinburgh: The Scottish Government https://www.gov.scot/publications/alcohol-framework-2018-preventing-harm-next-steps-changing-relationship-alcohol/

(5) https://www.parliament.scot/S5_Finance/General Documents/SPLCM-S05-47.pdf

(6) Giles, L., Richardson, E. & Beeston, C. (2021). Using alcohol retail sales data to estimate population alcohol consumption in Scotland: an update of previously published estimates. Edinburgh: Public Health Scotland. https://publichealthscotland.scot/media/2994/using-alcohol-retail-sales-data-to-estimate-population-alcohol-consumption-in-scotland-an-update-of-previously-published-estimates.pdf

(7) National Records of Scotland (2020). Alcohol-specific deaths: main points. Edinburgh: National Records of Scotland. https://www.nrscotland.gov.uk/files//statistics/alcohol-deaths/2019/alcohol-specific-deaths-19-main-points.pdf

(8) Scottish Government (2021). A fairer, Greener Scotland. Programme for Government 2021-22. Edinburgh: Scottish Government. https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/documents/

(9) World Health Organization (2017). 'Best Buys' and Other Recommended Interventions for the Prevention and Control of Noncommunicable Diseases: Updated (2017) Appendix 3 of the Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013-2020: https://www.who.int/ncds/management/WHO_Appendix_BestBuys_LS.pdf

(10) World Health Organization (2017). 'Best Buys' and Other Recommended Interventions for the Prevention and Control of Noncommunicable Diseases: Updated (2017) Appendix 3 of the Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013-2020: https://www.who.int/ncds/management/WHO_Appendix_BestBuys_LS.pdf

(11) Scottish Government (12 March 2021). New Human Rights Law. Scottish Government. Accessed 28/10/21 from https://www.gov.scot/news/new-human-rights-bill/

(12) CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000

The challenges and opportunities in domestic policy divergence including the risks/rewards of policy divergence between the four parts of the UK and the EU.

The nature and extent of public health problems can vary across UK jurisdictions and devolution enables each to innovate in how it responds. This, in turn, can help to drive UK-wide public health improvements. For example, the rate of alcohol-specific mortality in Scotland remains significantly higher than that in England (13). The existing devolution settlement has allowed the Scottish Government to develop and implement the internationally path-breaking policy of minimum unit pricing for alcohol (MUP), which is estimated to have reduced net off-sales purchases in Scotland, compared to England and Wales, by 3.5% in the first year of implementation (14). Furthermore, Scotland saw a reduction in alcohol-specific deaths of 10% in the first full year of operation of MUP (15).

MUP has now also been implemented by the Welsh Assembly Government, and the Northern Ireland Health Minister has announced his government's intention to consult on the policy by September 2022 (16). Similarly, the Scottish Parliament legislated to ban smoking in public places in 2006, an approach which was subsequently adopted by other administrations, and which has saved and improved tens of thousands of lives across the UK (17).

The opportunity for different administrations across the UK to innovate in public health policy can be of mutual benefit as the evidence obtained from implementing such policies in one country can help inform decision-makers in others. The UK government has previously noted that, while it has no plans to introduce MUP in England, "it will continue to monitor the progress of MUP in Scotland and will consider available evidence of its impact" (18).

(13) In 2019, alcohol-specific death rates were 68% higher for men and 78% higher for women in Scotland compared with England & Wales. Richardson. E. & Giles, L. (2021). Monitoring and Evaluating Scotland's Alcohol Strategy: Monitoring Report 2021. Edinburgh: Public Health Scotland.

(14) Giles, L., Richardson, E. & Beeston, C. (2021). Using alcohol retail sales data to estimate population alcohol consumption in Scotland: an update of previously published estimates. Edinburgh: Public Health Scotland. https://publichealthscotland.scot/media/2994/using-alcohol-retail-sales-data-to-estimate-population-alcohol-consumption-in-scotland-an-update-of-previously-published-estimates.pdf

(15) National Records of Scotland (2020). Alcohol-specific deaths: main points. Edinburgh: National Records of Scotland. https://www.nrscotland.gov.uk/files//statistics/alcohol-deaths/2019/alcohol-specific-deaths-19-main-points.pdf

(16) Northern Ireland Department of Health (September 2021), Preventing Harm, Empowering Recovery A Strategic Framework to Tackle the Harm from Substance Use (2021-31). https://www.health-ni.gov.uk/sites/default/files/publications/health/doh-substanceuse-strategy-2021-31.pdf

(17) For example, Sims, M., Maxwell, R., Bauld, L., & Gilmore, A. (2010). Short term impact of smoke-free legislation in England: retrospective analysis of hospital admissions for myocardial infarction. BMJ, 340, c2161 https://doi.org/10.1136/bmj.c2161; Frazer, K., Callinan, J. E., McHugh, J., van Baarsel, S., Clarke, A., Doherty, K., & Kelleher, C. (2016). Legislative smoking bans for reducing harms from secondhand smoke exposure, smoking prevalence and tobacco consumption. Cochrane Database of Systematic Reviews, (2) https://doi.org/10.1002/14651858.CD005992.pub3.

(18) Lord Bethell, Parliamentary Under-Secretary (Department of Health and Social Care) response to written question HL1749, Alcoholic Drinks: Minimum Prices, on 6 March 2020, https://www.parliament.uk/written-questions-answers-statements/written-question/lords/2020-02-24/HL1749

Written submission from Scottish Environment LINK

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with 42 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society. This response has been drafted by LINK's Governance Group.

This response is supported by the following member organisations:

Environmental Rights Centre for Scotland
National Trust for Scotland
RSPB Scotland
Scottish Wild Land Group

How devolution is being impacted by the new constitutional arrangements arising from the UK internal market.

The world is facing two interlinked, existential crises – climate change and biodiversity loss. The human drivers of these crises – including agriculture, urbanisation, resource extractions and energy use – are closely interconnected with our economic choices and the production, trade, use and disposal of goods on the market. With 80% of UK environmental law prior to 2021 being derived from EU law, the UK's departure from the EU makes many of these challenges more complex.

The UK has a high degree of market integration across each of the four nations. The choices that are made on how to produce and regulate goods in one part of the UK will have consequences for other parts of the UK. The UK Internal Market Act (UKIM Act) seeks to resolve problems of divergence arising across the four nations by introducing principles of mutual recognition and non-discrimination in intra-UK trade of goods. LINK members have previously argued that these principles must be qualified to permit essential regulation in public interest, including to protect and improve the environment.

In response to previous inquiries on the UK Internal Market Bill, LINK has highlighted how the previous arrangements under the EU created conditions that encouraged the raising of environmental standards. With minimum EU environmental standards being required of all member states, UK nations could participate in a 'race to the top' and innovate to set higher standards.

The new constitutional arrangements risk actions to go 'above and beyond' environmental standards in one part of the UK being stymied by legal challenge from another part. For example, given the urgent need to reduce our carbon footprint and protect precious peatlands, eNGOs have suggested a ban on the production and sale of peat in compost for horticulture. The UKIM Act could pose challenges for Scotland's ambition to implement a ban on the sale of peat for horticulture in this parliamentary session.

Scrutiny, transparency and accountability challenges – including how the Parliament can best address these challenges.

In terms of the challenges of scrutiny, transparency and accountability this poses to members of the Scottish Parliament, LINK members believe that country-level decision-making has improved opportunities for scrutiny by devolved parliaments with greater involvement of NGOs in the process of responding to consultations and giving evidence at committee.

LINK encourages the committee to consider the following issues:

- How will the Scottish Government, and subsequently parliament, be informed of any reviews of market access conducted by the Office for the Internal Market (OIM) in Scotland. What are the intergovernmental arrangements for this and what role might the committee have?
- What progress has been made on agreeing Common Frameworks? How can these be best used to ensure steps taken to raise standards in Scotland will not be undercut by goods and services of a lower standard from other parts of the UK?
- What will be the notification process to the Scottish Government, and subsequently parliament, when UK Ministers intend to use the powers under the UKIM Act to provide financial assistance in devolved areas in Scotland? What role would the committee have in such an event?
- In the event of a dispute arising from the UKIM Act or common frameworks, the joint ministerial committee structures are expected to be the primary forums to resolve issues. Can the UK or Scottish Government provide information as to how the dispute resolution process will work?

The challenges and opportunities in domestic policy divergence including the risks/rewards of policy divergence between the four parts of the UK and the EU.

Challenges:

- Allowing for policy innovation – a success of devolution has been the ability of each UK nation to choose to respond in different ways to shared issues. This has allowed countries to be innovative: for example, Scotland introducing the indoor smoking ban in 2006 and Wales introducing the successful 5p plastic bag charge to reduce waste in 2011. The principles of mutual recognition and non-discrimination could limit the opportunity for different parts of the UK to test out different approaches and, in the long term, stifle creativity.

- Effectiveness of policies – if one part of the UK did introduce new measures to tackle a problem, such as placing a ban on particular single-use plastic items, items made in the rest of the UK could continue to enter the country's market and undermine the aims of the policy.

- 'Race to the bottom' – a key risk is that given these limitations on policy innovation and effectiveness, each part of the UK is incentivised to lower its regulatory standards in order to remain competitive within the internal market. This could pose risks to Scotland's environment if, for example, regulations on water quality were relaxed.

Opportunities:

- If strong common frameworks are agreed collaboratively by the four governments of the UK, there is an opportunity to agree new minimum standards for the environment. Setting a new baseline for standards of air, water, soil quality amongst many others, would reduce the risk of deregulation as part of a race to the bottom.

The relationship between the Protocol on Ireland and Northern Ireland and the operation of the UK internal market – including whether this poses challenges for Scotland.

This is not an area LINK members can comment on.

What the establishment of the UK internal market and the increasingly interconnected nature of devolution means for intergovernmental and interparliamentary relations – including what opportunities and challenges they present.

There is a need for good intergovernmental communication and a commitment to take a collaborative approach to the challenges and opportunities of the internal market. LINK believes developing strong common frameworks would contribute to this. Many of our previous briefings from Session 5 remain relevant (https://www.scotlink.org/files/documents/LINK-Parliamentary-Briefing-Common-Frameworks-Debate-September-2019.pdf), as there has been little to no stakeholder engagement on any environmental common frameworks in the months since.

As mentioned above, it would be helpful if government could set out the role, if any, for the Scottish Parliament in the event of a dispute over the operation of the UKIM.

The impact of the EU-UK Trade and Cooperation Agreement and other bilateral trade agreements on the operation of the UKIM and devolution.

The impact of the EU-UK Trade and Cooperation Agreement and other bilateral trade agreements on the operation of the UK internal market and devolution.

LINK has worked with UK-based Greener UK to provide comment on the Trade and Cooperation Agreement – for full details see here:

https://greeneruk.org/sites/default/files/download/2021-10/Greener_UK_response_TCA_DAG_and_CSF_consultation.pdf

The Agreement is broad and complex, providing a framework for the UK's relationship with the EU for years to come. The environment is a key aspect woven through several different parts of the Agreement. The UK Government has recently consulted on how it will engage with civil society and business groups on implementation issues through establishing a Domestic Advisory Group.

Greener UK and LINK have commented that the approach of a single advisory group, meeting 1-2 times per year, will not be effective to work through implementation issues. We have also been clear that the advisory group should not only ensure that a balance of civil society interests are represented, but that representation is balanced across the four nations of the UK. This will help to ensure the devolution aspects of TCA implementation are considered and the potential impacts on the internal market can be worked through jointly.

Written submission from The Food and Drink Federation (FDF) and the Northern Ireland Food and Drink Association (NIFDA)

Joint submission

The FDF and NIFDA are industry representative organisations representing the views of food and drink producers and manufacturers across the UK.

How devolution is being impacted by the new constitutional arrangements arising from the UK internal market.

- To ensure a stable food and drink supply across the UK, it is important that decisions are made that give long term certainty to the food and drink supply chain. Decisions are being made now about multiple years of crop planting, animal husbandry and production investment which will have to operate within the UK internal market.

- It is too early to fully understand how Scottish devolution will be impacted by the Internal Market Act from a food and drink production perspective.

- The FDF continues to advocate for the avoidance of barriers to trading within the UK as this is of critical importance to our members already disrupted supply chains. The food and drink manufacturing industry is a hugely important part of Scotland, England Wales and Northern Ireland's economy, turning over £105bn in 2019.

- Existing supply chains are highly integrated across the four nations, with ingredients and products potentially crossing borders multiple times including in NI with the Republic of Ireland.

- Multiple legal jurisdictions with multiple rules is likely to result in all nations of the UK facing the same challenges NI business is currently experiencing as a result.

Scrutiny, transparency and accountability challenges – including how the Parliament can best address these challenges.

- Any system which is arrived at must have minimal invasion on our member's operations. Mutual recognition on production standards (be it environmental, labour or animal welfare) must be agreed at political level. More cost, audits, bureaucracy will not be welcomed.

- We have previously argued that the role of a scrutiny body should have a relevant relationship and accountability with all four legislatures. It will be interesting to see how the operation of the Office of the Internal Market at the CMA fulfils this brief.

- It is also vital that the dispute resolution function of any body is clearly understood by business, simple and clear to access, and backed by the different legislatures.

- At individual business level it is important that businesses are not subject to conflicting advice by local officials. This will be exacerbated by the nature of the operation of the Act. For example, if one council in one GB nation were to declare a product unfit for purpose, and yet that product (or the offending ingredients of that product) were imported into another council in another GB nation, would the relevant importer or local officials be informed of the breach? And how would this decision-making be challenged by a business? This looks like a bureaucratic mess which it would be very difficult for businesses to challenge effectively and quickly.

- Conversely, it is imperative that local officials and services are given the right resources to allow them to deal with these responsibilities effectively.

- It should also be noted that many food and drink businesses have multiple factories across the UK, where different productions standards may be legally mandated by their respective parliaments either currently or in the future. Any functioning Internal Market Act should be able to smooth out such problems to avoid business duplication, additional costs and critically to ensure that Scottish businesses are not disadvantaged.

The challenges and opportunities in domestic policy divergence including the risks/rewards of policy divergence between the four parts of the UK and the EU.

- Confusion for consumers - Barriers to trade within UK single market will reduce consumer choice and by adding cost to the cost of doing business, will increase costs to the consumer.
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- Where new barriers arise that leave producers at a competitive disadvantage and disrupt supply chain, this could lead to retailers in the UK to move away from sourcing from UK producers

- Additional costs for businesses of running e.g. two sets of labelling

- Being “locked out” of our biggest export market – for Scotland this is England and the EU due to a divergence on food standards.

- Transporting goods through one part of the UK for export to the EU – as we have seen the challenges with Northern Ireland

- The complexity arising from regional divergence in standards creates confusion. Already under the NI protocol, we are seeing businesses in GB

misinterpreting the NI position, refusing to trade as a consequence and refusing to accept the NI business explanations. Legal recourse to resolve, without an Ombudsman type role is likely to be drawn out and expensive.

The relationship between the Protocol on Ireland and Northern Ireland and the operation of the UK internal market – including whether this poses challenges for Scotland.

- The continued lack of certainty around GB-NI trade is destabilising. Our latest survey shows GB sales into NI are already down 15% and this will get worse if there is no long term solution or if that solutions results in an increase in trade barriers.

- The documents below summarise the outstanding issues with moving goods between mainland GB and NI.

- https://www.fdf.org.uk/globalassets/resources/members-only-general/eu-exit/moving-goods-great-britain-to-northern-ireland.pdf

- https://www.fdf.org.uk/globalassets/resources/members-only-general/eu-exit/moving-goods-northern-ireland-to-great-britain.pdf

What the establishment of the UK internal market and the increasingly interconnected nature of devolution means for intergovernmental and interparliamentary relations – including what opportunities and challenges they present.

- We put forward the example of the forthcoming Deposit Return System (DRS) for Scotland due to be implemented 1 July 2022 which would see a 20 pence deposit paid by consumers on each drinks container they purchase. A similar scheme has been proposed for England and Wales. The legislation for a DRS in Scotland is already in place (and so would not be covered by the internal market rules) but by the time DRS legislation in England is brought forward these regulations would have to abide by internal market regulations.

- This means that there would be an impediment to placing bottle from England, Wales or Northern Ireland on the Scottish market (as it would need to be labelled and registered accordingly, or a fee paid) yet a Scottish bottle could be freely placed on the English market without having the same constraints – thereby increasing the potential for fraud.

- A way of decreasing fraud would be an aligned system design and timing across the UK which our industry has long called for.

- If one UK nation increased or lowered product standards in their own jurisdiction there might be areas where enhanced protection might, in principle, be desired.

- On food labelling, we believe there should be no impediments to products being sold in any part of the UK regardless of which UK nation's labelling is on it in future, should differing schemes emerge to ensure safety, authenticity and to minimise consumer confusion.

The impact of the EU-UK Trade and Cooperation Agreement and other bilateral trade agreements on the operation of the UK internal market and devolution.

At the moment it is too early to tell what the long-term impact of the Trade and Co-operation agreement is; indeed we are still in the implementation phase and several elements have been delayed.

Additionally, no genuinely new trade deal has yet been concluded – they are modulations and re-implementations of trade deals the UK had through the EU.

Any future trade deals agreed by the UK will undoubtedly be of interest to food and drink producers and processers in all parts of the UK. In particular, where there are differing standards of production dictated by different laws, then the part of the UK with a 'higher' or markedly different production standard is likely to have more to lose if it is agreed that market access could be gained by products without equivalent levels of standards. If this was the case it would likely be due to the higher costs that tend to come with more stringent standards of production.

The FDF have always argued that trade deals should be developed in proper consultation with industry and amongst the four nations of the UK. This approach is most likely to ensure that relevant production standards are not undermined and that trade deals are better as a result.

Written submission from the Law Society of Scotland

The Law Society of Scotland is the statutory body responsible for the regulation and representation of Scotland's solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Constitutional Law and Human Rights Sub-committee welcomes the opportunity to consider and respond to the parliamentary consultation: Constitution, Europe, External Affairs and Culture Committee Inquiry into the UK Internal Market. The Sub-committee has the following comments to put forward for consideration.

How devolution is being impacted by the new constitutional arrangements arising from the UK internal market.

We commented on aspects of the UK Internal Market bill when it was passing through Parliament that where it impacted on the legislative or executive competences of the Devolved Legislatures or Administrations it would engage the Legislative Consent Convention in relation to the legislative competence of the Scottish Parliament and executive competence of Scottish Ministers. Section 28(8) of the Scotland Act 1998 which recognises 'that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament" will apply. The Scottish Government lodged a legislative consent memorandum relating to the bill in the Scottish Parliament on 28 September 2020. This was debated on 7 October and the Scottish Parliament withheld consent to the bill. None the less the bill was passed without any amendments being made to take account of the position adopted by the Scottish Parliament.

Reforms of the governance of the UK may impact on matters which relate to the legislative competence of the Scottish Parliament and the executive competence of Scottish Ministers and have a similar impact in Wales and Northern Ireland. Accordingly, when considering the governance of the UK and potential changes it is important to respect the devolved institutions and the legislative and legal systems which operate across the UK. This would include consultation and engagement between the UK Government and the devolved administrations. In practice, this should mean that only in the most exceptional circumstances should the UK Parliament legislate on matters within the legislative competence of the Scottish Parliament without its consent and this should be especially so when it comes to making changes in the governance of the UK which impact upon the devolution settlement. Despite the passing of some Brexit legislation without such consent,

there should be no inference drawn that the Sewel Convention has in any way been diluted.

The following paragraphs set out verbatim or in summary form the market access principles in Parts 1 and 2 of the Act but do not explain how devolution is impacted by them. It is suggested that we should do that in order to provide a meaningful response to the question and to explain why the Scottish and Welsh Governments take such exception to those principles. It may be that all we can provide at this stage are hypothetical examples of how devolution might be affected and the uncertainty that they create. For example, to what extent is the SP's power to legislate with respect to devolved matters undermined or rendered ineffective by those principles. Have we seen the arguments put forward in the Welsh case?]

The UK Internal Market Act (UKIMA) has been gradually brought into force by two statutory instruments:

a. The United Kingdom Internal Market Act 2020 (Commencement No. 1) Regulations 2020 (SI 2020/1621) which commenced on IP Completion Day – 31 December 2020 Parts 1 (UK Market Access: goods), 2 (UK Market Access: services) and 3 (UK Market Access: professional qualifications and regulation), sections 30 (10), 32 and 37, 46-48 (Northern Ireland Protocol) and Schedules 1 (Exclusions from the Market Access Principles), 2 (Services Exclusions) and 3 Constitution etc of the Office for the Internal Market panel), and

b. The United Kingdom Internal Market Act 2020 (Commencement No. 2) Regulations 2021 (SI 2021/706) which commenced on 14 June 2021 sections 41-43 (CMA Information Gathering powers). At the moment the entire act has not been commenced.

The following paragraphs set out verbatim or in summary form the market access principles in Parts 1 and 2 of UKIMA.

The provisions of the Act which relate to the Market Access Principles applying to goods namely the mutual recognition principle and the non-discrimination principle are contained in sections 2 and 5

The mutual recognition principle, set out in section 2 of UKIMA, provides:

"The mutual recognition principle for goods

(1) The mutual recognition principle for goods is the principle that goods which—

(a) have been produced in, or imported into, one part of the United Kingdom ("the originating part"), and

(b) can be sold there without contravening any relevant requirements that would apply to their sale, should be able to be sold in any other part of the United Kingdom, free from any relevant requirements that would otherwise apply to the sale.

(2) Where goods are to be sold in a particular way in the other part of the United Kingdom, the condition in subsection (1)(b) has effect as if the reference to "their

sale" were a reference to their sale in that particular way. So, for example, if goods are to be sold by auction, the condition is met if (and only if) they can be sold by auction in the originating part without contravening any applicable relevant requirements there.

(3) Where the principle applies in relation to a sale of goods in a part of the United Kingdom because the conditions in subsection (1)(a) and (b) are met, any relevant requirements there do not apply in relation to the sale."

Section 3 defines "relevant requirements" for the purpose of section 2 and provides:

(1) This section defines "relevant requirement" for the purposes of the mutual recognition principle for goods as it applies in relation to a particular sale of goods in a part of the United Kingdom.

(2) A statutory requirement in the part of the United Kingdom concerned which—

> (a) prohibits the sale of the goods or, in the case of an obligation or condition, results in their sale being prohibited if it is not complied with, and
>
> (b) is within the scope of the mutual recognition principle,
>
> is a relevant requirement in relation to the sale unless excluded from being a relevant requirement by any provision of this Part.

(3) A statutory requirement is within the scope of the mutual recognition principle if it relates to any one or more of the following—

> (a) characteristics of the goods themselves (such as their nature, composition, age, quality or performance);
>
> (b) any matter connected with the presentation of the goods (such as the name or description applied to them or their packaging, labelling, lot- marking or date-stamping);
>
> (c) any matter connected with the production of the goods or anything from which they are made or is involved in their production, including the place at which, or the circumstances in which, production or any step in production took place; …
>
> (g) anything not falling within paragraphs (a) to (f) which must (or must not) be done to, or in relation to, the goods before they are allowed to be sold."

Section 4 of UKIMA excludes pre-existing statutory requirements from the operation of the mutual recognition and non-discrimination principles.

Section 5 states the non-discrimination principle for goods, namely that the sale of goods in one part of the United Kingdom should not be affected by "relevant requirements" which directly or indirectly discriminate against goods that have a relevant connection with another part of the United Kingdom.

Our Comment

Sections 2, 3, 4 and 5 provide cumulatively that goods which sold in one part of the UK (where they originate from or are imported to) are automatically accepted across all other parts of the UK, regardless of the rules there. The Act does not prevent the Scottish Parliament from exercising its legislative powers but provides that the relevant requirements or statutory provisions are of no effect when applied to goods or service providers entering Scotland where these goods or service providers had met statutory regulations in another part of the UK. It is argued by some, including the Scottish Government, that this undermines devolution. We had raised the question in our briefing on the bill as to whether “no effect” is the same as “is not law” in the Scotland Act 1998 section 29.

In the House of Lords Committee Stage, Baroness McIntosh put forward Amendment 26 which probed the meaning of Clause 5(3), regarding the effect of a statutory requirement under Clause 6. Lady McIntosh said: “It appears that Clause 5(3) would render a statutory provision in devolved legislation “of no effect”. This lacks clarity. Am I right in thinking that the statutory requirement is valid? Is it valid but cannot be enforced? Is it voidable? It is also not clear regarding the application, if any, of Clause 5(3) if the statutory provision is in an Act of Parliament that applies to England only. I would be grateful if the Minister would take this opportunity to clarify this.

The amendment applies the statutory language that exists in Section 29 of the Scotland Act 1998 to Clause 5(3) in an effort to bring clarity to the point. Section 29(1) provides:

“An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.”

It is not the intention of this amendment to amend the Scotland Act 1998 but rather to say that that Act provides, in my view, much clearer language than the Bill. These statutory provisions could be challenged by private parties and will presumably also be a basis for challenging devolved legislation. Assuming the inability to modify the Bill under Clause 51, it will in all cases prohibit legislation that is contrary to its principles. Presumably that is the intention, but it is not the clearest way that that outcome could have been achieved, so I am grateful for this opportunity to seek clarification” Official Report 28 October 2020, Column 236

Lord Callanan, the Government Minister responded:
Amendment 26, tabled by my noble friend Lady McIntosh, seeks an explanation of the meaning of Clause 5(3), which I am happy to give. Clause 5(3) will operate so that any future requirements that fall within the scope of the non-discrimination principle will be of no effect to the extent that they are discriminatory. For the benefit of the lawyers, this does not mean that the requirement is to be treated as if it never had any legal effect. Rather, it allows the continued operation of the requirement, except to the extent that it has discriminatory effects. This aims to ensure that businesses can continue in their trade and goods can continue to be sold, despite protectionist measures that might treat goods from one part of the UK more favourably than goods from another. As the Bill deals with trade across the whole of

the United Kingdom, the intention is that this will apply to all legislation: secondary legislation, primary legislation passed by devolved legislatures and legislation passed by the UK Parliament.

We believe that this does not require further elaboration in the Bill and is clear that only changes to existing legislation that affect the outcome are in scope. The amendment in question could cause confusion as there may be amendments that are considered “significant”, but do not change the outcome or effect of legislation. Fundamentally, however, the drafting in this clause will allow businesses to continue following the same regulations as they have been accustomed to, as our desire is not to disrupt their operations. That flexibility is important, because we want this provision to catch legislation only to the extent that it produces discriminatory effects. If something is not law, it cannot have any effect. As I said, we want to create a presumption that future Acts of Parliament are subject to this rule, which the current drafting allows”. Official Report 28 October 2020, Column 252

Professor Nicola MacEwan provides a hypothetical example of the impact on devolution in The Centre on Constitutional Change Blog:
“Let’s assume, for example, that the Scottish Parliament passed a law to introduce a series of measures designed to tackle obesity. Such a law might require producers to reduce the sugar content of food and drink or have bolder labelling on recommended daily intakes and the harmful effects of excessive sugar consumption, or perhaps restrict certain marketing activities of service providers. The Market Access rules would not prevent such a law from being passed. But these rules would not apply to goods or service providers entering the Scottish market where these had already satisfied the (hypothetically less strict) regulations set in other parts of the UK. Given the likelihood that imported products would make up the bulk of the market, the ability of the Scottish policy to have the desired health benefits would be reduced”.

https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/internal-market-bill-implications-devolution

Section 6 defines a “relevant requirement” for the purposes of the non-discrimination principle as follows:

“Relevant requirements for the purposes of the non-discrimination principle

(1) This section defines "relevant requirement" for the purposes of the non-discrimination principle for goods.

(2) A relevant requirement, for the purposes of the principle as it has effect in relation to a part of the United Kingdom, is a statutory provision that— (a) applies in that part of the United Kingdom to, or in relation to, goods sold in that part, and (b) is within the scope of the non-discrimination principle.

(3) A statutory provision is within the scope of the non-discrimination principle if it relates to any one or more of the following— (a) the circumstances or manner in which goods are sold (such as where, when, by whom, to whom, or the price or other terms on which they may be sold); (b) the transportation, storage, handling or display

of goods; (c) the inspection, assessment, registration, certification, approval or authorisation of the goods or any similar dealing with them; (d) the conduct or regulation of businesses that engage in the sale of certain goods or types of goods.

(4) A statutory provision is not a relevant requirement— (a) to the extent that it is a relevant requirement for the purposes of the mutual recognition principle for goods (see section 3), or (b) if section 9 (exclusion of certain existing provisions) so provides.

(5) The Secretary of State may by regulations amend subsection (3) so as to add, vary or remove a paragraph of that subsection.

(6) Regulations under subsection (5) are subject to affirmative resolution procedure.

(7) Before making regulations under subsection (5) the Secretary of State must seek the consent of the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland.

(8) If consent to the making of the regulations is not given by any of those authorities within the period of one month beginning with the day on which it is sought from that authority, the Secretary of State may make the regulations without that consent.

(9) If regulations are made in reliance on subsection (8), the Secretary of State must publish a statement explaining why the Secretary of State decided to make the regulations without the consent of the authority or authorities concerned.

(10) In this section "statutory provision" means provision contained in legislation.”

Section 8 provides: “The non-discrimination principle: indirect discrimination (1) A relevant requirement indirectly discriminates against incoming goods if— (a) it does not directly discriminate against the goods, (b) it applies to, or in relation to, the incoming goods in a way that puts them at a disadvantage, (c) it has an adverse market effect, and (d) it cannot reasonably be considered a necessary means of achieving a legitimate aim. … (6) "Legitimate aim" means one, or a combination, of the following aims— (a) the protection of the life or health of humans, animals or plants; (b) the protection of public safety or security. (7) The Secretary of State may by regulations amend subsection (6) so as to add, vary or remove an aim. (8) Regulations under subsection (7) are subject to affirmative resolution procedure. (9) Before making regulations under subsection (7), the Secretary of State must seek the consent of the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland. (10) If consent to the making of the regulations is not given by any of those authorities within the period of one month beginning with the day on which it is sought from that authority, the Secretary of State may make the regulations without that consent. (11) If regulations are made in reliance on subsection (10), the Secretary of State must publish a statement explaining why the Secretary of State decided to make the regulations without the consent of the authority or authorities concerned.”

UKIMA Part 2 provides for a new market access regime for services in the UK based on the same mutual recognition and non-discrimination principles as for goods.

Our Comment
Part 2 provides that where a service is regulated across the UK, the authorisation for that service in one part of the UK authorisation will be recognised in all other parts. Again, some, including the Scottish Government, maintain that this undermines devolution.

Subsidy Control
One provision which is yet to be commenced is Part 7 (Subsidy control).

Our Comment
In our Second Reading Briefing on the Subsidy Control Bill, we commented on the reservation of subsidy control as follows: “As subsidy control has now been substantially returned to the UK and is a reserved matter, much of the autonomy that the Scottish government had when the UK was under the EU state aid regime has been transferred to the UK government. The UKIMA recognised the importance of consulting with the devolved administrations on its proposals for subsidy control. We hope that the spirit of section 53 will continue throughout the development of the regime, and that that the UK government will take the opportunity to consult fully with the devolved legislatures and administrations and other interests based in each of the UK jurisdictions”: https://www.lawscot.org.uk/media/371606/subsidy-control-bill-second-reading-briefing.pdf.

Accordingly, devolution has already been impacted by the UKIMA with regard to list compliance with the legislative consent convention where the Scottish Parliament's withholding of consent did not result in the UK Parliament amending the UKIMB but rather the bill was passed in spite of consent being withheld. Devolution has also been impacted by the provisions relating to subsidy control in the UKIMA where a devolved matter has been reserved.

Common Frameworks
Another aspect touching on devolved matters is that of the creation and maintenance of Common Frameworks. Section10 of the UKIMA (which was added late during the bill’s passage) makes provisions for further exclusions from market access principles in schedule 1.

Section 10 states: (1) Schedule 1 contains provision excluding the application of the United Kingdom market access principles in certain cases. (2) The Secretary of State may by regulations amend that Schedule. (3) The power under subsection (2) may, for example, be exercised to give effect to an agreement that— (a) forms part of a common framework agreement, and (b) provides that certain cases, matters, requirements or provision should be excluded from the application of the market access principles.

Section 10(4) defines a “common framework agreement” as 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 interaction of devolved matters across the UK and interaction with the Northern Ireland protocol are emphasised in Section 10 (7) which provides: In making regulations under subsection (2), the Secretary of State must have regard to the importance of facilitating the access to the market within Great Britain of qualifying Northern Ireland goods.

Furthermore subsections (9), (10) and (11) confirm the requirement for UK Ministers to seek the consent of devolved administrations before making regulations under section 10 although consent can be dispensed with if a month expires and the devolved administration does not give consent. Similar provisions regarding seeking consent to regulations can be found in sections 6,8,18,21,26.

It is also worthwhile pointing out that the UKIMA contains in Part 4, Section 34 powers for the Competition and Markets Authority (CMA) to "at the request of a relevant national authority give advice, or provide a report, to the authority with respect to a qualifying proposal".

The qualifying condition is that the regulatory provision to which the proposal relates would fall within the scope of this Part and be within relevant competence. In turn, Section 45 defines relevant competence as: in relation to the Scottish Ministers, Scottish devolved competence. In its turn section 45 defines that term as: A regulatory provision, so far as applying to Scotland— (a) is within Scottish devolved competence if it— (i) would be within the legislative competence of the Scottish Parliament if contained in an Act of that Parliament, or (ii) is provision which could be made in subordinate legislation by the Scottish Ministers, the First Minister or the Lord Advocate acting alone; (b) otherwise, is within reserved competence. This adds to the provisions in the Scotland Act 1998 without referencing the competence provisions of that Act.

Welsh Litigation

In Wales, the Welsh Government issued formal proceedings seeking permission for a judicial review to seek declarations as to the scope of provisions of the UKIMA, in January 2021, on the basis that in the opinion of the Welsh Government the Act created uncertainty in terms of the Senedd's ability to legislate (see Written Statement, 19 January 2021: Written Statement: Legal challenge to the UK Internal Market Act 2020 (19 January 2021) | GOV.WALES).

The Welsh Government's application for permission was refused by the Divisional Court, on the ground that it was premature. The Court did not form a view on the substance of the claim. An appeal was subsequently submitted.

The Court of Appeal, by Order dated 23 June, has granted permission to appeal the Divisional Court's decision, noting there are compelling reasons for this appeal to be heard by the Court of Appeal and that the case raises important issues of principle going to the constitutional relationship between the Senedd and the Parliament of the UK.

Our Comment

It is clear however that more impacts on devolution will only follow as businesses or individuals take advantage of the market access principles for the provision of goods or services across the UK. We have no empirical evidence about the extent to which such activity is being undertaken.

Scrutiny, transparency and accountability challenges – including how the Parliament can best address these challenges.

The Parliament does face a number of challenges in scrutiny, transparency and accountability when considering the UK Internal Market and the relevant legislation and related issues such as intergovernmental relations.

Scrutiny – Internal Market issues
The application of the market access principles applies across the whole UK. Therefore, there could be legislation from the UK, Welsh or Northern Irish legislatures which will engage those principles. This situation could be exacerbated by action taken by individuals or businesses who wish to exercise the rights conferred by the mutual recognition or non-discrimination principles.

The Parliament will need to consider the resources which will be necessary to devote to scrutiny of these matters. Many Committees of the Parliament could conceivably engage with Internal Market issues, not only the Constitution, Europe, External Affairs, and Culture Committee but Delegated Powers and Law Reform, Economy and Fair Work, Equalities, Human Rights and Civil Justice, Finance and Public Administration and other Committees could find Internal market issues on their agendas.

We draw attention to the recommendation of the Legacy Expert Panel Report to the Finance and Constitution Committee of 12 February 2021: Legacy_Finaldoc(1).pdf (parliament.scot).

The Panel recommended that Parliament in consultation with the Scottish Government needs to clearly define its scrutiny role in response to Brexit. This should include consideration of –

- an overall approach to the scrutiny of the policy development process in areas previously within EU competence which is proportionate and deliverable;
- the extent to which the Scottish Government can provide the Parliament and its committees with regular updates on developments in EU law within their respective remits;
- the appropriate and proportionate level of scrutiny of the operation of the future relationship with the EU, the keeping pace power, common frameworks and the market access principles and how these interact;
- meaningful scrutiny of inter-governmental working

The Expert Panel also highlighted "scrutiny challenges arising from Brexit which require systematic consideration by the Parliament rather than by individual committees" (page 20). Issues which are likely to arise include regulatory alignment or divergence between the different parts of the UK, future divergence from, and future alignment with, EU rules by the Scottish (through the keeping pace provisions in the UK Withdrawal From the European Union (Continuity) (Scotland) Act 2020) and UK Governments, the impacts of the UKIMA, common frameworks and the Trade and Cooperation Agreement (TCA) and circumstances in which the UK Government may use secondary powers to legislate in devolved areas without seeking the consent of the Scottish Government.

Transparency and accountability - Intergovernmental Relations
The revitalised UK Government central collection webpage on Intergovernmental Relations published in November 2020 is a significant step forward along with the paper on progress made by the UK government and devolved administrations on the joint review of intergovernmental relations which was published in March 2021. However, the nature of intergovernmental relations is that is relates to relations between the Governments.

This is clear from paragraph 7 of the above mentioned paper:

Communication 7. Intergovernmental relations are best facilitated by effective sharing of information and respecting confidentiality of the content of the discussions. The governments have committed to effective and timely communication with each other, particularly where one government's work may potentially have some bearing on the responsibilities of another; and to transparency in the conduct of their relations. The governments believe that sharing information freely between them is likely to be of benefit both to each government and to the people they serve. They will ensure that appropriate formal and informal processes are available for sharing information, both multilaterally between all governments and bilaterally between governments where that is appropriate. The governments commit to respecting the terms under which information is shared.

The question to be asked is where does the Parliament (or any legislature in the UK) stand in relation to such matters? Effective communication coupled with confidentiality means that discussions between the Governments are not subjected to proper scrutiny by the Parliament or the public. Communiques from the Joint Ministerial Committee (JMC) contain no detail of the content of the meetings whereas other groups e.g. the Inter-Ministerial Group for Environment, Food and Rural Affairs (IMG EFRA) and the Inter-ministerial Group for Elections and Registration do contain detail.

What is required however is an agreement between the Governments and Legislatures across the UK which will allow for transparency, scrutiny and openness so that the Legislatures can perform their functions of holding Governments to account.

The challenges and opportunities in domestic policy divergence including the risks/rewards of policy divergence between the four parts of the UK and the EU.

EU law is not static, and it is important to emphasise the scale of its ongoing change. There is significant change on a year-to-year basis. In 2020 there were a total of 1356 legal acts adopted and a further 734 amending acts adopted as follows.

Basic Amending

Legislative acts - Ordinary legislative procedure 31

Other legislative acts 276

Non-legislative acts (Delegated) 34

Non-legislative acts (Implementing) 583

Total 1356

Adopted acts

Legislative acts - Ordinary legislative procedure 32

Other legislative acts 108

Non-legislative acts (Delegated) 98

Non-legislative acts (Implementing) 419

Total 734

Source: Eur-Lex https://eur-lex.europa.eu/statistics/2020/legislative-acts-statistics.html

If the policy intention were to avoid divergence, retained EU law would need to be modified to reflect these changes. It is important to distinguish between UK wide divergence with the EU and divergence within the UK. The latter could occur because a devolved administration has chosen to align with the EU rather than the rest of the UK. It is also worth emphasising that keeping pace with EU law, as the Scottish Government has legislated to do, will require scrutiny from the Scottish Parliament. Even if Scottish Ministers were to adopt only a small fraction of the laws adopted by the EU this could be a significant undertaking.

We do not have a view on the merits or otherwise of divergence in general except to note that it would be beneficial for any such divergence to occur in a constructive and open manner through a formal intergovernmental system (see our answer to question 5).

In relation to domestic policy across the UK, legislative divergence is a necessary effect of devolution. The purpose of devolution was to ensure that decision making

was brought closer to the people and is more democratic. With four legislatures making law within the United Kingdom, it is obvious that there will be policy and legislative divergence. Even prior to the establishment of the Scottish Parliament the UK Parliament made law for Scotland which only applied in Scotland, respecting the provisions of the Union legislation of 1706/7 which acknowledged the distinctive nature of the Scottish Legal System.

Policy divergence allows for policy to framed considering the circumstances of the jurisdiction and enables legislative solutions to be created which will bring the policy into effect through law.

It is not for the Law Society to comment on the risks or rewards of policy divergence amongst the four jurisdictions or between the UK and EU as these are political assessments stretching into matters of economics, fiscal arrangements and social policy

The relationship between the Protocol on Ireland and Northern Ireland and the operation of the UK internal market – including whether this poses challenges for Scotland.

The Northern Ireland Protocol is in some flux at the moment as negotiations between the UK and the EU continue to refine its terms and application. At the time of writing the College of EU Commissioners has approved four non-papers (i.e. non-legislative texts) covering the following areas: Commission proposes bespoke arrangements to benefit NI (europa.eu):

“1. A bespoke solution for Northern Ireland on food, plant and animal health (i.e. “Sanitary and Phytosanitary issues”) – leading to approximately an 80% reduction in checks This solution would result in a Northern Ireland-specific solution in the area of public, plant and animal health (i.e. “SPS”). In practice, this means vastly simplified certification and a significant reduction (approximately 80%) of official checks for a wide range of retail goods moving from Great Britain to be consumed in Northern Ireland. This is in addition to the solutions that the EU put forward on 30 June, which facilitates the movement of live animals from Great Britain to Northern Ireland. In order to protect the integrity of the Single Market, this would be subject to a number of conditions and safeguards, such as the UK delivering on its commitment to complete the construction of permanent Border Control Posts, specific packaging and labelling indicating that the goods are for sale only in the UK, and reinforced monitoring of supply chains. In addition, safeguards would include a rapid reaction mechanism to any identified problem in relation to individual products or traders, and unilateral measures by the EU in case of failure by UK competent authorities or the trader concerned to react to or remedy an identified problem. These specific conditions and safeguards would provide a robust monitoring and enforcement mechanism that would make a significant reduction of checks possible without endangering the integrity of the Single Market.

2. Flexible customs formalities to facilitate the movement of goods from Great Britain to Northern Ireland – 50% reduction in paperwork This solution consists of measures that will simplify and make customs formalities and processes easier. It will cut in half

the documentation currently needed for goods moving from Great Britain to Northern Ireland. This is also subject to safeguards, such as the UK committing to providing full and real-time access to IT systems, a review and termination clause, as well as the UK customs and market surveillance authorities implementing appropriate monitoring and enforcement measures. When taken together, the bespoke solutions for both SPS and customs rules will create a type of “Express Lane” for the movement of goods from Great Britain to Northern Ireland, while at the same providing for a robust monitoring and enforcement mechanism in order to protect the integrity of the Single Market.

3. Enhanced engagement with Northern Ireland Stakeholders and Authorities These proposals aim to improve the exchange of information with stakeholders and authorities in Northern Ireland with regard to the implementation of the Protocol and relevant EU measures. This would make the application of the Protocol more transparent, while at the same time respecting the UK's constitutional order. This solution consists of establishing structured dialogues between Northern Ireland stakeholders (authorities, civic society and businesses) and the Commission. This would involve the creation of structured groups with the participation of experts to discuss relevant EU measures that are important for the implementation of the Protocol. Northern Irish stakeholders would also be invited to attend some meetings of the Specialised Committees. It will also create a stronger link between the Northern Ireland Assembly and the EU-UK Parliamentary Partnership Assembly. A website will also be set up to show in a clear and comprehensive way the EU legislation applicable in Northern Ireland.

4. Uninterrupted security of supply of medicines from Great Britain to Northern Ireland for the long-term the result of this proposal will be that pharmaceutical companies in Great Britain – when supplying the Northern Irish market – can keep all their regulatory functions where they are currently located. This means, for instance, that Great Britain can continue acting as a hub for the supply of generic medicines for Northern Ireland, even though it is now a third country. In this way, the long-term supply of medicines from Great Britain to Northern Ireland can be ensured. The Commission will hold further discussions with the UK and stakeholders before finalising its proposal for amending existing rules. This proposal involves the EU changing its own rules on medicines”.

Obviously, these proposals and those of the UK Government, for example on the role of the European Court of Justice will have implications for trade between Scotland and Northern Ireland and impact on businesses which conduct that trade. However, it is premature to come to any conclusions whilst the negotiations are still being conducted.

What the establishment of the UK internal market and the increasingly interconnected nature of devolution means for intergovernmental and interparliamentary relations – including what opportunities and challenges they present.

Although 1998 was a watershed year for devolution it is trite to acknowledge that the devolution architecture and pillars for each of Scotland, Northern Ireland, and Wales were differentiated by legal, political, social, historical, and economic considerations. It is difficult to conceive of a means to have a more schematic approach to devolution given the different political considerations which apply between the three devolved parts of the UK. Therefore, it would appear that a bespoke approach to the devolved constitutional arrangements is inescapable.

However, that should not mean that there could not be further formalisation between the constituent parts of the UK with constitutional issues firmly on the table. Some may advocate governance ideas which involve federalism. Such a change would raise many important issues such as entrenchment, symmetrical governance, the impact on devolution to Scotland, Wales and Northern Ireland, what institutions are needed for England and how to include the English regions.

The need for a new Governance Agreement
We agreed with the analysis in the SPICe Paper Common UK Frameworks after Brexit ((2 February 2018 SB 18-09) which noted on page 14 that “The 1999 devolution settlements were designed on the principle of a binary division of power between what was reserved and what was devolved. This model had advantages in terms of clear accountability, but it meant the UK did not have to develop a culture of or institutions for ‘shared rule' between central and devolved levels. The UK’s membership of the EU further contributed to the weakness of intergovernmental working, since many policy issues with a cross-border component (including environmental protection, fisheries management, and market- distorting state aid) were addressed on an EU-wide basis”. The SPICe Paper also noted that “when more decisions are taken through intergovernmental forums, as in some federal systems, accountability and parliamentary scrutiny can suffer. The creation of common frameworks signals a move away from a binary division of power towards more extensive joint working between UK and devolved governments. This therefore increases the importance of ensuring that intergovernmental bodies are transparent and accountable”.

In our view the current arrangements lack sufficient transparency and accountability. The Communiques from the JMC meetings are frequently commented upon for their lack of detail. It is essential that all legislatures in the UK have adequate information of the discussions within the JMC structure in order to hold Ministers, in all the administrations, to account. A helpful step towards providing further information is the recent publication of the reports on The European Union (Withdrawal) Act and Common Frameworks, the tenth edition of which is referred to below. The Inter-Governmental Relations written agreement between the Scottish Parliament and Scottish Government dated 10 March 2016 was considered to be a strong development in parliamentary scrutiny of inter-governmental relationships. http://www.parliament.scot/20160309_IGR_Agreement3.pdf It would however enhance parliamentary scrutiny if Ministers in all legislatures could provide an oral report (which goes beyond the relatively uninformative published communiques) soon after any JMC or specialised JMC meeting.

Reforming the intergovernmental system
On 24 March 2021, just before the pre-election period began Lord Dunlop's Review of UK Government Union Capability was published by the UK Government. This report (which was submitted in November 2019), proposed a Cabinet role of Secretary of State for Intergovernmental & Constitutional Affairs, supported by a Cabinet sub-committee. The sub-committee would be "tasked with preparing crossgovernment strategic priorities to enhance the Union and ensure their effective delivery" with resourcing from a new fund for UK-wide projects.

Such proposals are matters of political controversy on which the Law Society has no view although we note that there is currently a designated Minister of State for Constitution and Devolution, Chloe Smith MP and advancement to Cabinet level is a matter which is in the gift of the Prime Minister which could be exercised or withdrawn at any time.

We have suggested in the past that new inter-governmental structures could include "new JMC-type committees in areas where common frameworks are created" with accompanying sub-committee structures. We have also suggested that the JMC (and consequently any replacement) is put on a statutory footing, that it is given a defined structure and that its Sub-Committees are reformed in such a way as to be clearer and better understood by those who have contact with them and that the dispute resolution arrangements are more structured.

Lord Dunlop proposed replacement of the Joint Ministerial Committee (JMC) with a new UK Intergovernmental Council (UKIC). No matter what formal structures are put in place or what they are called, their effectiveness depends on matters of substance such as mutual trust, transparency and respect being in place too. Those aspects are beyond legislation. If the JMC is replaced, we agree with the creation of relevant sub-committees.

The development of a new body will require revision of the Memorandum of Understanding between the UK Government and the devolved administrations which in turn will require revision of the Devolution Guidance Notes. We have already stated that such a revision is necessary in the light of withdrawal from the EU. Lord Dunlop has suggested that the UKIC should look to take on a decision-making role via co-decision by consensus. We agree that if a new body is established this would be an innovative approach to decision making which could build on the precedent of Common Frameworks.

The impact of the EU-UK Trade and Cooperation Agreement and other bilateral trade agreements on the operation of the UK internal market and devolution.

We continue to have concerns about the broader institutional framework contained in the TCA and the impact on devolution.

Title III: Institutional framework
We note Article 7 and Annex 1 (Rules of Procedure of the Council and the Committees) provide for the establishment of the Partnership Council, which will comprise representatives of the EU and of the UK and will be co-chaired by a

member of the European Commission and a UK Government minister. The remit of the Council is the attainment of the objectives of the TCA and any supplementing agreement. The Council will also supervise and facilitate the implementation and application of the TCA and any supplementing agreement and along with Committees can make decisions binding on the UK and the EU and all bodies set up under the TCA. We particularly welcome Annex 1 rules 10 and 13 which make provision for the transparency of Council and Committee meetings. The impact of this provision can be seen in the publication of the Minutes of the Meeting of 9 June 2021 see https://ec.europa.eu/info/sites/default/files/first-meetin-partnership-counci-09062021_en.pdf and UK Government statement on the meeting of the Partnership Council: 9 June 2021 - GOV.UK (www.gov.uk).

The Council is only one of a number of structural arrangements (e.g. the Trade Partnership Committee and various specialised committees and working Groups) mentioned in Title III, which create a dialogue between the UK and the EU.

We welcome provision Article 11 for the UK and EU Parliaments to be able to establish a Parliamentary Partnership Assembly consisting of members of both Parliaments “as a forum to exchange views on the partnership”. However, there appears to be no mechanism for the devolved legislatures to be able to express views to either United Kingdom Parliament or the European Parliament. The Government should explain how the devolved legislatures and administrations will have a role in this process. It is important that the devolved legislatures are involved because under the various devolution statutes international relations including those with the European Union are reserved to the United Kingdom whereas the implementation of agreements in areas of devolved competence lie with the devolved legislatures and administrations. Clear lines of communication and the ability to input into the process of decision-making would be of advantage to both the UK and devolved legislatures and administrations and help to ensure smooth implementation of any decisions.

We welcome Article 12: Participation of civil society; Article 13: Domestic Advisory Groups, and in particular Article 14: the Civil Society Forum which reflects a suggestion we made in connection with the structural architecture of the Withdrawal Agreement in 2018.

Article 12 states that the parties “shall consult civil society” on the implementation of the TCA and supplementing agreements, in particular through interaction with domestic advisory groups and the Civil Society Forum as set out in the next two articles.

Domestic Advisory Groups
Article 13 states that each party shall consult “its newly created or existing domestic advisory group or groups comprising a representation of independent civil society organisations” on issues covered by the TCA and supplementing agreements.

The organisations to be consulted include “nongovernmental organisations, business and employers' organisations, as well as trade unions, active in economic, sustainable development, social, human rights, environmental and other matters”.

Each Party may convene its domestic advisory group or groups in different configurations to discuss the implementation of different provisions of the TCA or supplementing agreement. The Article also provides that each party shall consider views or recommendations submitted by its domestic advisory group or groups and should aim to consult with them at least once a year. We propose that the Government take note of the role which the legal professions throughout the UK play in the administration of justice and the maintenance of the rule of law – two principles which are key to the implementation and functioning of the TCA. In that context we consider that the DAGs should comprise members of the legal professions from each of the UK jurisdictions. The DAGs should also include membership of the bodies referred to in Article 13 so that they produce a balanced representation from around the UK. The UK and EU should try to ensure that meetings of the DAGs take place more than once a year.

To promote public awareness of the domestic advisory groups, each party shall endeavour to publish a list of participating organisations as well as a contact point for the groups. The parties will also promote interaction between their respective domestic advisory groups.

Civil Society Forum
Article 14 provides that the parties shall facilitate the organisation of a Civil Society Forum to conduct a dialogue on the implementation of Part Two of the TCA (relating to trade, transport, fisheries and other arrangements). The Partnership Council will adopt operational guidelines for the conduct of the Forum. The Forum will meet at least once a year, unless otherwise agreed by the parties. It will be open to the participation of independent civil society organisations established in the territories of the parties, including members of the domestic advisory groups referred to in Article 13 (see 14.3). This provision with its reference to the “territories of the parties” would suggest that the Civic Society Bodies should be drawn from the jurisdictions within the UK and EU. This should not however mean that because this phrasing is used in Article 14 its spirit should not be applied to Article 13,

Each Party shall promote a balanced representation “including non-governmental organisations, business and employers´ organisations and trade unions”. We encourage the Government to apply the proposals which we have made regarding the DAGs to the Civil Society Forum particularly regarding meeting more than once a year. Annual meetings will not suffice to create cohesion in the group nor to give pace to the forum’s work.

The UK Government should follow the spirit of the Principles of Public Appointments contained in the Governance Code on Public Appointments (2016) when making appointments to the DAGs and the CSF:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/578498/governance_code_on_public_appointments_16_12_2016.pdf

The Government should also establish principles of engagement which relate to the work of TCA implementation. These should include transparency and accountability, equality and inclusiveness. Expressions of interest should be sought but also the

Government should actively seek involvement from organisations and individuals who may be able to contribute to the work of the DAGS due to skill, knowledge or expertise. We consider that the DAGs should include members of the legal professions from each of the UK jurisdictions. The DAGs should also comprise membership of the bodies referred to in Article 13 so that they produce a balanced representation from around the UK. The UK and EU should try to ensure that meetings of the DAGs take place more than once a year.

We agree that the DAGs should meet more than once a year. Meeting on fewer occasions will reduce the cohesiveness of the DAGs and the amount of work they can undertake. The remit for the DAGs is set out as “to discuss the implementation of different provisions of the TCA or supplementing agreement”. Clearly due to the extensive nature of the TCA there will need to be a number of DAGs which correspond to those parts of the TCA which are being considered. Due to the continued presence of Covid-19 meetings should be held on a hybrid basis. Agendas should be issued well in advance of the meetings to enable representative groups to gather membership views. The scope should focus on the parts of the TCA under discussion and where appropriate any broader consultation papers and results should be available to members. Explanatory notes and impact assessments should be the norm.

The suggested additional criteria all have merit and we would add representation from not only the network of business and civil society groups which Government usually consults such as the professions, academia but also a broad range of bodies based in the devolved areas and groups representing minorities, vulnerable and marginalised groups. As Lord Frost alluded to in the House of Lords, Trades Unions and Charities should be included. The UK Government should enable and facilitate contact between the UK and EU stakeholders by hosting introductory meetings, providing (where necessary) translating facilities and arranging for exchange of contact details.

Written submission from Institute for Government

The Institute for Government is an independent, non-partisan think tank whose mission is to improve the effectiveness of government across the UK. The Institute has a standing work programme on devolution and has conducted research into intergovernmental relations, common frameworks, the UK internal market and the Northern Ireland protocol.

How devolution is being impacted by the new constitutional arrangements arising from the UK internal market.

The definition of an 'internal market' is itself disputed. For the purpose of this submission, we understand the UK's internal market to be the arrangements governing the movement of goods and services between the four nations of the UK – that is, those within the UK as opposed to trade with the rest of the world.

There are now three key elements to the arrangements managing the UK's internal market: the common frameworks programmes, the UK Internal Market (UKIM) Act 2020 and the Ireland/Northern Ireland Protocol. There are also external factors such as international trade agreements that have implications for the internal arrangements governing the UK internal market.

These arrangements do not change the terms of the devolution settlements – under the terms of the European Union (Withdrawal) Act 2018, devolved powers previously exercised at EU level returned to the devolved legislatures. But they have significant implications for how these devolved powers may be exercised, and therefore for devolution itself.

Common frameworks place some voluntary constraints on their exercise of devolved powers. According to the UK government's latest analysis, there are 33 common framework areas. These are areas that are devolved, but where it has been agreed cooperation between different governments is required, effectively creating a category of 'shared competencies'. The Scottish Government will need to inform relevant parties of regulatory proposals within the scope of these frameworks, enter into intergovernmental discussions, and where necessary reach agreement as to how to manage potential divergence.

The UKIM Act places legal constraints on the exercise of devolved powers within the scope of the Act. The Act enshrines two market access principles in law:

- Mutual recognition: If a good is compliant with the statutory rules relating to its sale in the part of the UK in which it was produced or imported into, then it will automatically be acceptable for sale in the other parts of the UK. A service provider who is authorised to provide a service in one part of the UK is automatically authorised to provide that service in the other parts of the UK.

- Non-discrimination: Statutory rules about how a good must be sold or how a service must be provided that discriminate against goods or services from another part of the UK – directly or indirectly – do not apply.

Under the UKIM Act, each government of the UK will retain the ability to regulate goods and services in their part of the UK, but not all of that regulation will be enforceable against goods and service providers from other parts of the UK. This could undermine the ability of each administration to successfully implement certain policies.

For example, if the Welsh government decided to introduce a law banning certain types of single-use plastics to reduce plastic waste, that would apply only to goods produced in Wales. Single-use plastic from elsewhere in the UK would continue to be permitted on the Welsh market, which would undermine the policy objective. Although a similar mutual recognition principle existed in EU law, it had broad exemptions for public policy purposes – allowing the principles to not apply where there was, for example, an important public health or environmental aim. The UKIM Act, by contrast, has fewer and much more narrowly defined exemptions, and therefore places new constraints on the governments of the UK.

The arrangements governing the UK internal market will require each of the four governments of the UK to take into account rules and regulations in force in other parts of the UK when exercising their powers to an extent that was not required before. However, given the market dominance of England – accounting for 86% of the UK's GDP – the constraining effect of the UK internal market arrangements will be greater for the devolved administrations.

The challenges and opportunities in domestic policy divergence including the risks/rewards of policy divergence between the four parts of the UK and the EU.

Devolution allows ministers in each administration to tailor policy interventions to the needs of their local population, rather than the UK as a whole, as well as to pursue their political priorities based on their specific democratic mandate. For example, in 2012 the Scottish government introduced its minimum-unit alcohol pricing to address Scotland's higher rate of alcohol-related deaths relative to other parts of the UK.

Divergence can also act as a 'policy laboratory', allowing different parts of the UK to introduce different policies, evaluate their successes and learn from each other. For example, Scotland was the first nation to introduce an indoor smoking ban, in 2006, and Wales was the first to introduce a 5p charge for plastic bags, in 2011. The success of both policies led to them being adopted across the rest of the UK.

However, when devising regulatory policies, the benefits of divergence must also be weighed against potential challenges divergence may create – particularly relevant to the UK internal market are the costs to businesses they create, or barriers to trade across the UK.

For policies that fall within scope of the mutual recognition principles of the UKIM Act certain types of policy divergence may put Scottish businesses at a competitive disadvantage compared to businesses in other parts of the UK. For example, if the Scottish Government decided to introduce new rules that raised costs for producers,

those rules would only apply to Scottish producers. Goods produced in England, Wales or Northern Ireland that were not made in accordance with rules could still be sold in Scotland. This creates a risk that Scottish producers could be undercut on the Scottish market.

Some policies may also be less effective or ineffective if implemented in only one part of the UK rather than on a UK-wide basis. In these cases, divergence risks creating additional costs for Scottish businesses without a significant policy return. For example, the four governments have recently agreed to mandatory fortification of flour – requiring the addition of folic acid to prevent birth defects on a UK-wide basis. This policy was initially considered on a Scotland-only basis in 2017 but Food Standards Scotland advised against it due to the fully integrated nature of the bread and flour sector in the UK. It said that "that fortification on a Scotland only basis would not be straightforward and would incur significant complications and additional cost burden".

In policy areas where divergence may create problems, common frameworks provide an opportunity for the four governments to work together, to set minimum standards, achieve common goals, and counter some of the potentially deregulatory effects of the UKIM Act. Such aims may also be achieved through other forms of intergovernmental working.

The relationship between the Protocol on Ireland and Northern Ireland and the operation of the UK internal market – including whether this poses challenges for Scotland.

There is significant overlap between common frameworks, the Northern Ireland protocol and the regulatory areas in scope of the UKIM Act. Of the 33 common framework areas set out in the most recently published analysis, 24 are areas where Northern Ireland is bound by EU law under the protocol, and 21 are areas that would be within scope of the market access principles (MAPs) in the UKIM Act – mostly mutual recognition of goods.

In areas where Northern Ireland is required to apply EU law under the terms of the protocol — such as customs and product requirements, including medicines, animal and plant health, food safety and farming standards – any goods entering Northern Ireland must comply with EU standards in these areas and so the MAPs cannot apply to all goods from Great Britain.

Goods from England, Scotland or Wales will not automatically be acceptable for sale on the Northern Ireland market; compliance checks and paperwork will therefore be necessary in some areas. However, 'qualifying' Northern Ireland goods (currently defined as any good in free circulation in Northern Ireland) will be able to benefit from mutual recognition and non-discrimination in Scotland, Wales and England. The UKIM Act prevents the UK government or devolved administrations from introducing any new checks or controls on 'qualifying' goods moving from Northern Ireland to Great Britain, except in a very narrow set of circumstances.

Goods produced in Scotland will need to comply with EU law in areas covered by the protocol in order to be sold on the Northern Ireland market and be subject to checks and processes on entry. The exact nature of these checks remains under discussion in the UK-EU Joint Committee, which oversees the implementation of the withdrawal agreement, and the recently extended grace periods have delayed the full implementation of EU law on medicines and parcels and the introduction of agri-food checks for supermarket and their suppliers. Nonetheless, the protocol has introduced additional administration costs for Scottish producers who will need to provide new paperwork; the UK government has committed to meet some of these costs through the Trader Support Service for customs declarations, and the Movement Assistance scheme for agri-food certification.

It also creates the potential for Scottish producers selling across the UK to have to comply with two regulatory regimes – the EU and the Scottish Government regimes – in areas covered by the protocol. This could increase production costs, and may disincentivise Scottish businesses from selling into the Northern Ireland market. However, the Scottish Government has said that it intends to ‘keep pace’ with EU law in these areas, and has introduced legislation — UK Withdrawal from the European Union (Continuity) (Scotland) Act 2020 — to enable it to do so. Therefore, in practice, the impact of dual compliance is likely to be limited.

What the establishment of the UK internal market and the increasingly interconnected nature of devolution means for intergovernmental and interparliamentary relations – including what opportunities and challenges they present.

The need to manage the UK internal market post-Brexit has created a need for greater intergovernmental working. This poses challenges for legislatures aiming to hold their governments to account, as the lack of transparency over the content of the discussions and negotiations between the government means fewer opportunities for influence.

With the UK internal market, the legislatures of the UK have a shared aim: to understand the implications of the UKIM Act and how common frameworks are being applied in practice, and to hold their respective ministers to account for the decisions that are made in those forums. Better interparliamentary relations would allow relevant select committees in the different legislatures to share information that will help in the scrutiny of these frameworks and allow greater focus on specific issues relating to each nation – rather than committees calling the same witnesses to answer the same questions. Interparliamentary working can allow the legislatures to pool resources and divide the scrutiny task, leading to more efficient working and high-quality scrutiny.

The best chance to influence intergovernmental agreements is also through interparliamentary working. As intergovernmental agreements require negotiation between the four governments, it can be harder for each legislature to influence the respective government. Opportunities to scrutinise documents or policies – for

example, common frameworks – are only available once an agreement has been reached, and at this stage, governments may be reluctant to reopen discussions. Policy changes could be best brought about by coordinated scrutiny and recommendations from multiple legislatures, who can put pressure on their respective governments to revisit an agreement.

In our report, The UK Internal Market, we outline a range of options to improve interparliamentary working, ranging from informal to formal:

• Information sharing at official level

• Policy-specific chairs' forums to mirror inter-ministerial groups (including those proposed in the progress update on the review of intergovernmental relations in March 2021)

• Interparliamentary forum(s) on the internal market, building on the model established by the interparliamentary forum on Brexit.

• Joint evidence sessions and reports

• Interparliamentary body for the UK with a standing membership, a small joint secretariat and similar powers to the select committees.

The benefit of informal working is that it is more flexible and requires less administrative work but still helps build up relationships and share information between different committees. The drawbacks are that it often relies on individual personalities and will not always be a priority. Other, more formal options, may require changes to the standing orders of different legislatures, and therefore may be harder to implement.

The impact of the EU-UK Trade and Cooperation Agreement and other bilateral trade agreements on the operation of the UK internal market and devolution.

International trade is a reserved matter, which means the UK government has exclusive responsibility for negotiating and signing new trade deals. There are several mechanisms under the devolution statutes to ensure that the DAs comply with any international agreements. However, changes to regulatory standards are often a result of 'side bargains' in the margins of trade negotiations – where negotiators put pressure on their partners to change particularly troublesome regulations – rather than being included in the text of a free trade agreement, so it is not clear the UK government will be able to use these constitutional mechanisms in all cases. Where these changes are in devolved areas, the DAs have responsibility for implementing them – and may choose not to.

However, the terms of the UKIM Act will allow the UK's trading partners across the whole of the UK (or GB where the Northern Ireland protocol applies) even if the constituent parts do not change their regulations. Under the Act, mutual recognition will apply to any goods imported into the UK provided it complies with the relevant rules in the part of the UK in which it first arrives. For example, if the UK government

agreed to permit the sale of chlorine-washed chicken in the UK market as part of a trade deal with the US, it could allow the product to be imported into England, following which it would automatically be allowed to be sold in any other part of the UK. Any ban on the product in Scotland or Wales would be of little effect, although products sold in Northern Ireland would still need to comply with EU law regardless of where they originate.

Guidance on UK Internal Market

Introduction

1. The aim of this paper is to provide subject committees with guidance on scrutiny of the impact of the UK internal market on devolved policy areas.

2. In Session 5 the focus of the Parliament and its committees has been on withdrawing from the EU and the legislation needed to ensure legal continuity after Brexit. In Session 6 the focus will shift to policy-making and secondary and primary legislation within the new constitutional arrangements.

3. These new arrangements are substantially more complex than existed while the UK was a member state of the EU. This is essentially for two reasons. First, the four governments within the UK are no longer constrained by a statutory requirement to comply with EU law. Second, there is substantial disagreement between the devolved governments and the UK Government regarding the governance of the UK internal market which replaces membership of the EU single market and which in practice will limit regulatory divergence[2].

4. The core of this continuing disagreement is the process for limiting regulatory divergence in order to ensure that businesses can continue to trade freely across the UK while respecting the devolution settlement. While the UK Government and the devolved governments agree that there is a need for a common UK or GB approach to the governance of the UK internal market there are fundamental differences as to how this can be achieved.

What is an Internal Market?

5. The Finance and Constitution Committee's internal market adviser, Professor Kenneth Armstrong, defines an internal market as –

> "an economic space consciously created to facilitate economic activity between the territorial jurisdictions that comprise the internal market. It entails governance arrangements that aim to integrate distinct territorial markets – market integration – while allocating and policing decision-making in the public interest between different jurisdictions – market regulation."[3]

6. He also states that from the experience of the EU internal market we can learn four general lessons:

    - An internal market is not an uncontested concept ;
    - Trade-offs and balances are involved in making an internal market;
    - The operation of an internal market depends upon its governance architecture and its relationship with constitutional settlements;

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[2] The extent of this disagreement is evident in the response of the Scottish and Welsh Governments to the UKIMA and the votes in both the Senedd and the Scottish Parliament to withhold consent. See, for example, the Scottish Government's LCM on the UKIMA: SPLCM-S05-47.pdf (parliament.scot)
[3] Briefing(1).pdf (parliament.scot)

- There is more than one way to design an internal market.

7. The Scottish Government's view is that the term "internal market" does not have a fixed or widely accepted single meaning.[4] Trading activities intersect with a large range of other policy considerations that make up the governance arrangements of a state, such as:

- the civil law to underpin contracts and resolve disputes;
- product standards for safety and consumer protection;
- safety in the workplace;
- employment laws;
- competition policy;
- formation of companies, to limit risk and liability;
- intellectual property;
- rules for transport and safety of vehicles;
- environmental standards;
- promotion of human health;
- protection of animal and plant health;
- provision of public services, such as health and education;
- government procurement rules; and
- taxation of trading activities.

8. The Scottish Government states that an internal market can "therefore be seen to encompass many, if not almost all, areas of government and parliamentary activity, and public policy considerations."[5]

9. The UK Government's view is that -

> "the UK will continue to operate as a coherent Internal Market. A Market Access Commitment will guarantee UK companies can trade unhindered in every part of the United Kingdom – ensuring the continued prosperity and wellbeing of people and businesses across all four nations. At the same time, we will maintain our high standards for consumers and workers."[6]

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[4] After Brexit: The UK Internal Market Act and devolution - gov.scot (www.gov.scot)
[5] After Brexit: The UK Internal Market Act and devolution - gov.scot (www.gov.scot)
[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901225/uk-internal-market-white-paper.pdf

UK Internal Market Act (UKIMA)

10. The UKIMA creates two key market access principles which will operate in the post-Brexit environment: the *mutual recognition principle* and the *non-discrimination principle*. All devolved policy areas are potentially impacted by the market access principles although some exemptions are provided in the Act. For example, neither of the market access principles currently applies to healthcare services, social services or transport services.

11. Both principles can be applied to relevant requirements in respect of the sale of goods or the provision of services. These principles serve to disapply relevant requirements in one part of the UK when goods or services are lawfully provided in another part of the UK.

12. The principles will permit access to the Scottish market of goods and services which originate elsewhere in the UK under different regulatory conditions. This is likely to have a substantial impact on the effectiveness of devolved regulatory regimes.

13. The Act does not introduce any new statutory limitations on the competence of the Scottish Parliament or Scottish Ministers. But in practice, regulatory competition may constrain the ability of the devolved authorities to exercise their executive and legislative competences. Specifically, UKIMA may not affect the Scottish Parliament's ability to pass a law, but may have an impact on whether that law is effective in relation to goods and services which come from another part of the UK.

14. This means that the Scottish Government and Scottish Parliament will need to be cognisant of the regulatory environment in each of Wales, Northern Ireland and England when considering the impact of legislative change in Scotland on market access across the UK. This will include the impact of the Ireland/Northern Ireland protocol.

15. In particular, given the size of the English population and economy relative to the three other nations within the UK, the Scottish Government will need to take account of market forces when considering regulatory divergence. The devolved governments will not want to put their own economies at a competitive disadvantage with the much larger English economy by introducing higher regulatory standards which imports from other parts of the UK do not need to comply with.

16. The Scottish Government's view is that the UKIMA is fundamentally incompatible with the principles and practice of devolution in the UK's constitutional arrangements since 1997.[7] In its view the Market Access Principles cut across the clear reserved powers model to introduce wide ranging constraints on devolved competence, and in ways that are unpredictable and will lead to increased legal disputes. The mutual recognition principle, in particular, will reduce the ability of the Parliament to use its powers to pursue devolved social and economic objectives in Scotland for which it is accountable.

[7] After Brexit: The UK Internal Market Act and devolution - gov.scot (www.gov.scot)

17. The UK Government's view is that the market access principles will allow people and businesses to trade, without additional barriers based on which nation they are in. In its view the end of the need to comply with EU law means that vast numbers of powers currently exercised by the EU will flow back to the UK, including new powers for the Scottish Government in over a hundred policy areas.

18. The Act was passed notwithstanding that legislative consent was withheld by the Scottish Parliament and the Welsh Senedd. The Welsh Government is seeking a judicial review[8] with a view to obtaining a declaration that the powers conferred by the Act cannot be exercised incompatibly with the constitutional status of the devolution statutes. The Scottish Government has indicated that it is supportive of this approach.

Common Frameworks

19. Both the Welsh and Scottish Governments argue that the legislation is unnecessary as common frameworks approach can fulfil the same objectives in guaranteeing market access across the UK. A set of principles[9] were agreed in October 2017 to guide the negotiation of these frameworks including where they are necessary to:

    - 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.

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

21. The Scottish Government's view is that the common frameworks approach provides all of the claimed objectives of the Bill in guaranteeing market access across the UK, while respecting devolved competence, and, crucially, effectively providing agreed minimum standards which all producers must meet, avoiding the risk of competitive deregulation while giving producers and consumers clarity and certainty.[10]

22. But the UK Government does not believe that common frameworks would provide the certainty for businesses and citizens because they –

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[8] Written Statement: Legal challenge to the UK Internal Market Act 2020 – Update (29 June 2021) | GOV.WALES
[9] Minister for Parliamentary Business.dot
[10] SPLCM-S05-47.pdf (parliament.scot)

- are not able to assess the wider economic impacts or knock-on effects of regulatory divergence;
- do not address how the overall UK Internal Market will operate;
- will not account for the full UK economy across goods and services.

23. The Scottish Government's view is that the UK Internal Market Bill as introduced undermines the agreed process of negotiating and agreeing common UK frameworks where these are required to replace existing EU structures. In its view the Bill cut across agreed common frameworks in a deeply damaging manner, undermining processes to manage policy divergence by agreement and instead requiring that standards set in one part of the UK are automatically recognised elsewhere, including in policy areas covered by common frameworks, regardless of whether these standards are compatible.

24. The UK Internal Market Bill was amended to provide a mechanism for UK Ministers to disapply the market access principles in respect of legislative measures that fall within common frameworks policy areas. But there is no requirement to do so; the discretion lies with UK Ministers.

25. Despite the disagreement on the Impact of the UKIMA, the most recent quarterly report on common frameworks, published by the Cabinet Office in May 2021, states that they "are being developed through constructive discussions between the UK Government and devolved administrations" and that this "has continued during the latest reporting period."[11]

26. Until now there has been limited parliamentary scrutiny of the frameworks. While all 26 common frameworks have been minimally operable since 1st January 2021, only 3 provisional frameworks have completed Scottish parliamentary scrutiny. A further 5 provisional frameworks have been published and laid in the UK Parliament to aid transparency but are not yet ready for parliamentary scrutiny. The timescale for publication and scrutiny of the remaining 16 frameworks remains unclear.

27. The Scottish Government has previously stated that it is committed to operating as if the full frameworks were in place until they are finalised.[12]

Scrutiny Issues

28. The CEEAC Committee will have the lead role in scrutinising the overall impact of the UK internal market on the devolved settlement. But subject committees will have responsibility for how the UK internal market impacts on the Scottish Government's policy commitments and legislation within their respective remits.

29. Key questions which the subject committees may wish to consider early in Session 6 are as follows –

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[11] 2021-03-19 - OFF SEN - Eleventh EUWA and Common Frameworks Report.docx (publishing.service.gov.uk)

[12] SPLCM-S05-47.pdf (parliament.scot)

- **To what extent are the market access principles impacting on the implementation of the Scottish Government's policy commitments. For example, in areas such a single use plastics, regulation of fireworks, the deposit return scheme and regulatory policy more generally;**
- **To what extent is the policy-making and legislative process constrained by the lack of final agreement on common frameworks;**
- **What are the outstanding issues which need to be resolved in finalising each common framework;**
- **Is there an expectation that the market access principles will be disapplied from legislative measures that fall within common frameworks policy areas once the frameworks are finalised and if not how will minimum standards in Scotland be maintained.**

Trade and Co-operation Agreement (TCA)

30. The regulatory environment within the UK internal market will to some extent be dependent on international agreements including the TCA. The TCA between the EU and the UK does not provide for common regulatory standards for goods - manufacturers who wish to place goods on both the UK and EU markets will need to comply with the regulatory rules for those goods in the UK and EU even where they are different.

31. Non-regression has been agreed on some overall legal standards in the areas of labour and social standards, environment, and climate: under the TCA the overall levels of protection in these areas cannot be lowered in a way which affects trade and investment between the UK and the EU. This went some way to addressing both the UK and EU position on the level playing field question.

32. Previously, the constraints imposed by EU law on the policy-making process within the UK including at a devolved level were legally explicit. By contrast, what exactly the TCA requires is not spelt out to the same extent. It relies instead to a much greater extent on ongoing negotiation and agreement between the UK Government and EU. The TCA also contains many commitments to cooperate which do not detail exactly what that cooperation requires.

33. The TCA also stablishes a complex governance structure, headed by a 'Partnership Council', co-chaired by the European Commission and the UK Government, to oversee the implementation of the agreement. The Partnership Council will be supported in its work by nineteen Specialised Committees and four working groups. The Specialised Committees will consider issues which are within devolved competences such as fisheries, law enforcement and judicial co-operation.

34. The UK Government has stated that where "items of devolved competence are on the agenda for the Partnership Council or Specialised Committee, we expect to facilitate attendance by Devolved Administrations at the appropriate level."[13]

35. The TCA governance structure also establishes a 'Parliamentary Partnership Assembly' and a 'Civil Society Forum'. The Parliamentary Partnership Assembly

[13] Letter_from_Lord_Frost_on_engagement_regarding_EU_matters.pdf (publishing.service.gov.uk)

(PPA) is proposed to consist of Members from the European Parliament and UK Parliament. The Culture, Tourism, Europe and External Affairs Committee recommended in Session 5 that representation from the Scottish Parliament be included on the PPA.

Scrutiny Issues

36. **The CEEAC Committee will have the lead role in scrutinising the impact of the TCA on the devolution settlement including addressing the issue of Scottish Parliament representation on the PPA. Subject committees are likely to have an interest in how the operation of the TCA is impacting on policy areas within respective remits. In particular, how the operation of the TCA impacts on the level of alignment with EU law. Subject committees may also have an interest in the make up of any Scottish Parliament representation on the PPA. It is also likely that a number of subject committees will have an interest in scrutinising the economic impact of the TCA on Scotland.**

37. **Key questions which the subject committees may wish to consider early in Session 6 are as follows –**

    - **To what extent does the TCA allow for policy divergence between the UK and EU and how might this impact on Scottish Government policy commitments;**
    - **The scrutiny role in relation to the work of the Specialised Committees in areas within devolved competence;**
    - **The scrutiny role in relation to the work of the PPA.**

Legislation

38. Existing mechanisms and procedures in the UK and Scottish Parliaments for the scrutiny of EU measures of political and legal significance to the UK and Scotland were predicated on the obligations to align with EU law while a member. Post-membership, the scrutiny challenge lies in understanding the reasons behind both future divergence from, and future alignment with, EU rules (or indeed other international legal norms).

39. When scrutinising Scottish bills or subordinate legislation, the limits on regulatory autonomy will not always be clear, given the impacts of the UKIMA, common frameworks and the TCA. Analysing such legislation presents a different challenge to the more familiar one of determining what the limits of legislative or executive competence are. Both exercises will be necessary to fully understand the policy approach being taken.

40. It is also expected that the UK Government will increasingly make use of other statutory powers to make instruments arising from UK withdrawal from the EU that would include provisions within the legislative competence of the Scottish Parliament. The Scottish Parliament has no formal scrutiny role in relation to subordinate legislation in devolved areas made by UK Ministers. Its role is instead to hold the Scottish Ministers to account for their decisions on whether or not to consent to UK Ministers making such legislation. Scrutiny of those

decisions generally takes place prior to the legislation itself being available for consideration

41. Whilst the Scottish Parliament cannot scrutinise secondary legislation laid at the UK Parliament, even where the proposed changes to the law are in devolved areas, it can scrutinise decisions by Scottish Ministers to consent to such legislation. Protocol 2 was agreed between the Scottish Parliament and the Scottish Government and is applicable for all proposals to make UK statutory instruments which include devolved matters and which are in former EU law areas. It sets out the agreed process for the Scottish Parliament's role in scrutinising the Scottish Government's decisions to consent to devolved matters being included in Statutory Instruments being made by UK Ministers rather than by Scottish Ministers.

42. Protocol 2 covers secondary legislation to be made by UK Ministers that include provisions that are within devolved competence and were previously within the competence of the EU. It applies regardless of whether there is a statutory requirement on UK Ministers to obtain the consent of the Scottish Ministers before making an instrument that contains provisions within devolved competence.

43. Scrutiny will be required of notifications of proposals by the Scottish Government to consent (or refuse consent) to new UK regulations under the UKIMA. Changes under the UKIMA are potentially of great significance since they could constrain Scottish Ministers' powers to regulate the goods and services that come into Scotland from other parts of the UK. New regulations under the UKIMA can be made by UK Ministers to change its scope.

44. The changes for which the devolved Governments' consent must be sought under the UKIMA are those which:

- amend the Schedules to the Act and so change the scope of application of the Act to the sale of goods or provision of services;
- change what constitutes a "legitimate aim" for measures indirectly discriminating against incoming goods or incoming service providers;
- change the Schedules to the Act by amendment to reflect the outcome of a common framework process.

45. Protocol 2 will apply to the scrutiny of these requests for consent (among others).

Scrutiny Issues

46. Subject committees when scrutinising primary and secondary legislation and LCMs and consent decisions under Protocol 2, will wish to consider whether the legislative purpose is wholly or in part–

- **to align with EU law;**

- **a requirement of an international treaty/trade agreement;**
- **consistent with the TCA;**
- **consistent with a UK-wide common framework;**
- **consistent with the market access principles in the UKIMA?**

47. **An example of how legislative scrutiny needs to evolve within the new constitutional arrangements is provided at Annexe B.**

“Keeping Pace”

48. While the UK was a member state of the EU, the Scottish Government was required to comply with EU law in devolved areas. Powers were available to Scottish Ministers through Section 2(2) of the European Communities Act (ECA) to implement EU legislation in domestic law. These powers are no longer available to Scottish Ministers.

49. Scottish Ministers have indicated that, where appropriate, they would like to see Scots Law continue to align with EU law. To support this policy aim Part 1 (section 1(1)) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 confers a power on Scottish Ministers to allow them to make regulations (secondary legislation) with the effect of continuing to keep Scots law aligned with EU law in some areas of devolved policy (the “keeping pace” power).

50. Scottish Ministers could also use other legislative powers to “keep pace”. Primary legislation has been passed at Westminster (and to a lesser extent at Holyrood) in a number of policy areas previously governed by EU law. This legislation has given many new powers to UK and Scottish Ministers to make secondary legislation in those policy areas. Scottish Ministers may also seek to “keep pace” using secondary legislative powers provided by non-Brexit related primary legislation.

51. The Scottish Government’s view is that while in some cases it may be possible to align with EU law using other legislative powers these are not sufficient. The Scottish Government considers it necessary therefore to give Scottish Ministers the power to make secondary legislation (“the keeping pace power”) to ensure that Scotland’s laws may keep pace with changes to EU law, where appropriate and practicable.

52. In summary, this means that there are a number of legislative options through which the Scottish Government may seek to “keep pace” with EU law –

    - Already existing legislative powers which cover the subject matter of a particular EU law;
    - New primary legislation;
    - The provision of consent to the UK Government to legislate in devolved areas using secondary powers in policy areas previously governed by EU law;
    - The “keeping pace” power.

53. The Scottish Government is statutorily required to report to the Parliament (first in draft form for consultation and then a final version) on the intended and actual use of the keeping pace power. However, there is no statutory requirement to report on the use of other legislative powers to keep pace.

54. There are two forms of reporting to Parliament on the use of the keeping pace power:

- a Policy Statement setting out policy on, and how decisions will be made about the use of the keeping pace power;

- and an Annual Report explaining how the power has been used during the reporting period, and how Scottish Ministers intend to use it in future.

Scrutiny issues

55. **It is anticipated that the CEEAC Committee will take the lead in co-ordinating the scrutiny of the draft policy statement and annual report. It is likely that it will wish to seek the views of subject committees on both the draft policy statement and the annual report.**

56. **Given these documents may only cover the use of the keeping pace power, subject committees may also wish to scrutinise Ministers more comprehensively on the extent to which the Scottish Government intends to use other legislative powers to align with EU law and areas where, for whatever reason, they have decided not to align. Some awareness of the EU policy-making and legislative programme (as discussed below) will be necessary in doing so.**

57. **Subject committees may also wish to routinely include questions in relation to keeping pace as part of their legislative scrutiny. For example, whether legislative proposals are intended to keep pace with EU law and whether this is part of a UK-wide approach or whether there is any divergence with other parts of the UK.**

Monitoring the EU Policy-Making and Legislative Programme

58. In order to scrutinise levels of future alignment with EU law, subject committees will need to have an understanding and awareness of EU policy developments. The Finance and Constitution Committee legacy expert panel stated that it will be necessary to be aware of developments in EU law in all devolved areas in order to scrutinise the Scottish Government's decisions on which areas it chooses to keep pace with, and where it chooses not to do so.

59. The Scottish Government's Brussels Office's identified priorities show a continued attempt to try to influence EU policy development, and aim to create opportunities for Scottish cooperation with partners across Europe in areas such as knowledge exchange and EU funding opportunities.

60. In January 2020, the Scottish Government published The European Union's Strategic Agenda 2020-2024: Scotland's Perspective. This set out why the Scottish Government thinks the EU's priorities are of importance to Scotland and how Scotland can contribute to their delivery.

61. The Scottish Government suggests there are opportunities for Scotland in engaging with the EU's work in the following priority areas:

- promoting progressive, democratic values on the world stage
- addressing the challenges presented by the global climate emergency
- promoting the wellbeing of all of society
- creating smart economies which thrive by the intelligent and humane use of new technologies.

62. The Scottish Government set out the ways in which it would seek to work with the EU:

- proactive and constructive engagement with the EU institutions and other multilateral organisations
- active bilateral collaboration with member states.
- robust and constructive engagement with the UK Government and the other devolved governments to protect Scotland's interests and shape the UK Government's approach to influencing the EU and future international activity.

63. The Scottish Government have stated that relevant policy leads, staff in the Scottish Government Brussels office and legislative monitoring staff contributed to the development of, monitoring and, where necessary, implementation of EU law. While this cannot be entirely replicated outside the EU they have said that this approach, of a collaborative process involving EU-facing staff, could be continued and developed to monitor changes to EU law and, in collaboration with policy teams, develop policy proposals for keeping pace with EU law as appropriate.

64. The Scottish Parliament currently has a contract with *Scotland Europa* which is based in Brussels and which provides regular updates on policy developments at an EU level. This includes a guide to the European Commission annual work programme. These updates will be provided to the subject committees.

Scrutiny issues

65. Subject committees will therefore need to consider the extent to which they will wish to monitor EU policy developments and the Scottish Government’s related policy priorities within their respective remits. While this is likely to be high level there is a need to be aware of EU policy developments especially in relation to scrutiny of the Scottish Government’s “keeping pace” commitment.

66. **Subject committees should also consider whether to appoint a EU reporter. Rule 12.6.2 of the Standing Orders requires each subject committee to appoint a committee member as a European Reporter to bring to the attention of the committee any EU issue including legislative proposals. While the Parliament will need to consider whether this requirement remains appropriate following Brexit there is nevertheless an ongoing business need to monitor EU policy developments which merits consideration of appointing an EU reporter.**

Annexe B

Legislation that could affect the sale of goods/services	**Example**: scrutinising legislation for a new measure requiring a food product to conform to a new standard in Scotland. **Previous position**: Can SP legislate for this? Answer: consider (a) Scotland Act 1998 and (b) EU law. **New position**: In the new devolution landscape, in order for its scrutiny to be effective, the Parliament may now need to be informed about and to consider the following additional matters: - Does this relate to a common framework(s)? Is the proposal consistent with the common framework? - Is it consistent with the market access principles in the UKIMA? Could it be disapplied by the operation of the UKIMA in relation to goods imported from other parts of the UK? - Does it rely on one of the exclusions in the UKIMA (e.g. if the measure indirectly discriminates against goods from another part of the UK but for the legitimate aim of health protection)? If so, what is the evidence justifying this? - What are the equivalent rules in each of the other parts of the UK, and are any changes to them in prospect? (In order to assess the measure against the UKIMA.) - Has the measure (or a similar measure in this or another part of the UK) been considered by the new Office of the Internal Market (“OIM”)? - Has the OIM produced a report or advice on the measure (or similar measures)? - Can evidence be taken from the following new bodies: OIM; Trade Remedies Authority, Trade and Agriculture Commission (if relevant)? - What is the equivalent EU law position? - Is the measure consistent with the requirements of the TCA? - Are there any relevant decisions/subsequent agreements by the Partnership Council that change or expand on the position in the TCA as initially agreed? - Are any related matters currently under consideration by the Partnership Council and the relevant committees that sit under it? - How does the TCA work (for example, could the EU take retaliatory action under the TCA if this measure breaches the TCA)?

SPICe The Information Centre
An t-Ionad Fiosrachaidh

Constitution, Europe, External Affairs and Culture Committee

9th Meeting, Year (Session 6), Thursday, 11th November 2021

Internal Market Inquiry– common frameworks

Common frameworks and the UK Internal Market Act 2020

A common framework is an agreed approach to a particular policy, including the implementation and governance of it.

UK Government Ministers have the power to disapply the market access principles set out in the UK Internal Market Act 2020 (UKIMA) where the UK Government has agreed with one or more of the devolved governments that divergence is acceptable through the common frameworks process. Although UK Ministers can disapply the market access principles in such circumstances, they are not obliged to do so.

Scottish Government position

On 2 September 2021, the Cabinet Secretary for the Constitution, External Affairs and Culture told the Committee that the Scottish Government *"remain[s] committed to working with the UK Government and other devolved Governments in an equal partnership on common frameworks"*. The Cabinet Secretary did, however, indicate that UKIMA is a point of tension between the UK Government and the Scottish Government. Donald Cameron of the Scottish Government explained the position stating:

"We have now reached the crunch point in three separate areas where we need to see progress and which really sit at the heart of the effect of the United Kingdom Internal Market Act 2020 in terms of an exclusions process for frameworks. Our sense in the Scottish Government is that there needs to be a degree of automaticity to that process if we are to see the frameworks do the job that they were originally

conceived to do, otherwise we will be in a situation in which, irrespective of what is agreed in a framework's area, the United Kingdom Internal Market Act 2020 provisions can cut across that agreement, and the only thing that can be done to address that is a decision made by the UK Government secretary of state. That cuts across the principles that were agreed that govern the frameworks at the outset."

Frameworks in operation

The last frameworks report published by the UK Government in May 2021 stated that:

- 21 frameworks were operating on an interim basis across the UK whilst waiting for provisional confirmation.

- Eight frameworks were 'provisionally confirmed' meaning that they had been agreed by the Joint Ministerial Committee (EU Negotiations) (JMC(EN)) with each of the eight awaiting final Ministerial confirmation by each administration.

Two frameworks are relevant to the food industry in particular.

1. The Nutrition Labelling, Composition and Standards framework which is provisional. The framework was considered by session 5 Health and Sport. The framework covers:

    - nutrition and health claims made on foods
    - the addition of vitamins, minerals, and certain other substances to foods
    - the composition and labelling of food supplements
    - the composition and labelling of food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control ("Foods for Specific Groups") and
    - the mandatory nutrition declaration (food labelling), including additional forms of expression and presentation.

The framework does not require legislation. A concordat between the UK Government and devolved administrations *"provides the basis for managing and maintaining commonality in approach and minimum standards as well as surveillance and sharing of information."* The concordat sets out agreements including governance arrangements and dispute resolution. Food Standards Scotland is the party representing Scotland in the framework.

Paragraph 8.4 of the Framework states that *"The framework arrangements within this framework will also link into any future arrangements for the UK Internal Market."* A footnote indicates that *"Scottish Government and Cabinet Office officials continue to discuss this section."*

The session 5 Health and Sport Committee noted after its initial scrutiny of the framework that:

"Stakeholders referred to frameworks as having been "invisible" and "under the radar". Those stakeholders who had been consulted on the provisional framework suggested this had been at an introductory stage and wasn't extensive."

2. The Food and Feed Safety and Hygiene provisional framework is also relevant. The following areas are in-scope of the Framework:

- General Food and Feed Law and Hygiene
- Food and Feed Safety Standards
- Official Controls for Food and Feed; and
- Public Health Controls on Imported Food and Feed.

The framework was discussed in session 5 by the Health and Sport Committee. Following its initial scrutiny, the Committee again raised the issue of stakeholder consultation, saying:

"Our scrutiny of the FFSH Framework has again shown concerns from stakeholders about who has been consulted on the framework and the extent of the scrutiny conducted."

The session 5 Health and Sport Committee also received a copy of a letter issued to the Minister for Health and Social Services from David Rees MS, Chair of the External Affairs and Additional Legislation Committee, Senedd Cymru which scrutinised the framework. That letter stated that:

"The provisional Framework does not take account of significant material developments, such as the enactment of the UK Internal Market Act 2020, the UK-EU Trade and Cooperation Agreement, the European Union (Future Relationship) Act 2020, and ongoing negotiation around reference to UK international obligations in framework documents."

The letter cautioned against final agreement of the framework until such matters had been resolved. The letter also raised the issue of transparency for stakeholders, noting that:

"The framework recognises that it should operate transparently. However, it does not clearly explain how stakeholders and citizens will be able to provide input into the decision-making processes that it sets out…We believe that the framework should set out how stakeholders and citizens will be able to feed into the decision-making processes that it establishes."

A FFSH Frameworks Management Group will provide oversight of the Framework. The group will be senior representatives between Grade 6 and Deputy Director level from food safety bodies from all four nations.

The Committee may wish to discuss with witnesses:

- Whether they have had any interaction with Government on frameworks.
- If they have observed any operational issues with the provisional frameworks in place at present.
- Their views on the transparency of frameworks.

Sarah McKay, Senior Researcher, SPICe Research
8th November 2011

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.

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