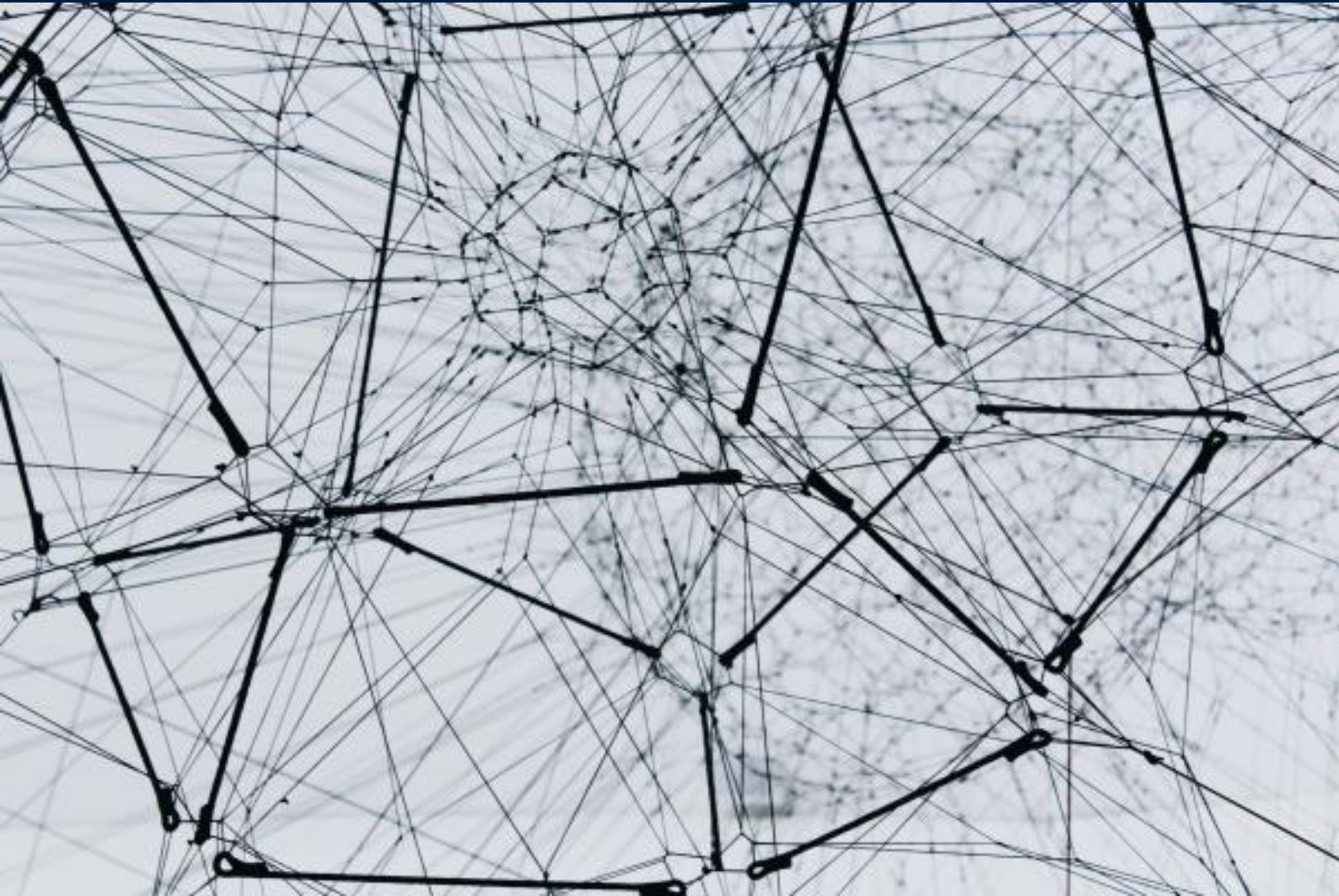


# UK INTERNAL MARKET BILL DEVOLUTION AND THE UNION

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# UK INTERNAL MARKET BILL, DEVOLUTION AND THE UNION

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**Michael Dougan, Katy Hayward, Jo Hunt, Nicola McEwen,  
Aileen McHarg and Daniel Wincott**

This briefing paper explores the impact of the UK Internal Market Bill for the future of devolution and the relations between the governments and territories of the United Kingdom. It focuses in particular on the market access principles established by the Bill, with consideration also given to the powers the Bill confers upon the UK Government to spend on devolved matters.<sup>1</sup>

We answer ten key questions raised by the Internal Market Bill:

1. What are market access principles?
2. How will Internal Market principles be enforced?
3. Does the Bill simply replicate EU law?
4. Do the market access principles weaken devolution?
5. How do the Principles in the Bill relate to Common Frameworks?
6. Will the Bill ensure high regulatory standards?
7. Are the financial assistance powers necessary to uphold the UK Internal Market?
8. Will the Bill promote cooperation and trust between governments?
9. Is the Bill necessary to enable businesses to trade freely across the UK?
10. Can the Bill be improved?

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<sup>1</sup> Analysis of the provisions in the Bill relating to the Protocol on Ireland/Northern Ireland can be found in this [UK in a Changing Europe Explainer](#).

## **EXECUTIVE SUMMARY**

The UK Government anticipates a power surge for devolution after the end of the transition period, while the devolved governments in Scotland and Wales regard its Internal Market Bill as a power grab. This briefing addresses 10 questions to explain the arrangements proposed in the Internal Market Bill and their effect on devolution.

### **1. What are the market access principles?**

The Briefing elaborates the Bill's two key 'market access principles' – mutual recognition and non-discrimination. While they leave some aspects of devolved regulation of economic production unchanged, these principles restrict the devolved authorities' practical capacity to regulate. Northern Ireland's distinct position means that it is not accurate to say that these market access principles will lead to trade between Northern Ireland and Great Britain being unhindered.

### **2. How will the internal market principles be enforced?**

Enforcement mechanisms are not clearly set out in the Bill. Rules that might exclude products or services from being sold in any part of the UK that were produced in one of its other parts will be disapplied under the UK Internal Market. For example, trading standards officers might be expected to ignore regulations that were inconsistent with the Bill's market access principles.

### **3. Does the Bill simply replicate EU law?**

Although its language echoes that of the European Union, the Bill proposes forms of mutual recognition and non-discrimination that differ from those principles as they operate in the European context. The UK Bill includes a much more restricted set of public policy justifications for exemptions from the market access principles than is permitted under EU law.

### **4. Do the market access principles weaken devolution?**

The Bill's version of these market access principles cuts more deeply into the practical ability of devolved governments to regulate economic activity than did their EU predecessors and limits the scope of territorial regulation more sharply. Frictionless economic exchange overrides all other aims of public policy.

### **5. How do the principles in the Bill relate to common frameworks?**

As the UK leaves the EU framework, all its governments agree that new UK policy frameworks may be needed. The UK Internal Market initially appeared as one strand of work within a broader set of common frameworks being negotiated among the governments. By abstracting the internal market from these frameworks and pushing ahead unilaterally against opposition from the authorities in Scotland and Wales, the UK Government is putting the common frameworks approach at risk.

### **6. Will the Bill ensure high regulatory standards?**

The Bill contains no provisions to guarantee high regulatory standards. Instead, it provides scope for businesses to sell products in a part of the UK that do not meet the standards set by the government in that part. The Bill may also create incentives for governments to compete for business by lowering the standards they require of goods and services produced in their territory.

## **7. Are the financial assistance powers necessary for the UK Internal Market to function effectively?**

In addition to market access principles, the Bill grants the UK Government new spending powers in a wide range of policymaking areas that fall under devolved authority, such as transport infrastructure, sports facilities and educational exchanges. There is little or no mechanical connection between the Bill's main provisions on market access and these new spending powers, which the devolved governments see as highly provocative.

## **8. Will the Bill promote cooperation and trust between governments?**

The substance of the Bill and the manner of its introduction have reduced relations between the Scottish and Welsh Governments on the one hand, and the UK Government on the other, to the worst level we have known. Since the start of devolution, the UK's approach to intergovernmental relations has been underdeveloped and fragile. There is an urgent need for new institutions and practices in this area. But, far from paving the way for building them up, the Bill has set back the prospects for these new developments.

## **9. Is the Bill necessary to enable businesses to trade freely across the UK?**

As the White Paper that preceded the Bill demonstrated, economic activity across the UK is already relatively frictionless. The dominance of England within the UK economy means that the economic costs of any divergence rules the devolved governments might introduce would fall in heavily disproportionate ways on their own economies. Moreover, there is no urgency about introducing internal market rules. In itself, the end of the transition period will not immediately throw up new internal economic barriers. Northern Ireland's distinct position gives rise to some significant issues here – we suggest one solution for them in the briefing's final section.

## **10. Can the Bill be improved?**

The UK Internal Market Bill is highly contentious. Its treatment of the Ireland/Northern Ireland Protocol has produced widely reported sharp disagreements. The devolved governments in Scotland and Wales also dispute the Bill's core provisions for the UK Internal Market and new UK Government financial powers. Given the fragility of relationships among the governments and the lack of any urgent need for a new framework, there is a case for going back to the drawing board with this legislation. Short of that, we set out a list of changes that might mitigate some its potentially damaging features.

## 1. WHAT ARE THE MARKET ACCESS PRINCIPLES?

The Bill aims to promote the functioning of the UK internal market by establishing two 'United Kingdom market access principles': mutual recognition and non-discrimination.

- **Mutual recognition** means that if goods or services produced in or imported into one part of the UK can be lawfully sold or supplied there, they can be lawfully sold or supplied in all other parts of the UK, even if they do not comply with local regulatory requirements.
- **Non-discrimination** means that goods or services regulated in one part of the UK and traded in another must not be treated less favourably than local goods. This principle covers both direct discrimination (i.e. rules that expressly treat incoming goods or services differently) and indirect discrimination (i.e. rules that appear neutral but, in practice, are more difficult for incoming goods or services to comply with).

**Part 1** applies the market access principles to **goods**. Mutual recognition applies to 'product requirements' – i.e. any legal requirements relating to the production, composition or presentation of goods – whereas non-discrimination applies to 'selling arrangements' – e.g., restrictions on how or to whom goods may be sold, transported or stored. For example, a rule restricting the sugar content or packaging of fizzy drinks would be subject to the mutual recognition principle, whereas a rule preventing the sale of fizzy drinks in vending machines would be subject to the non-discrimination principle.

**Part 2** relates to **services**. Here, mutual recognition means that anyone authorised to provide a service in one part of the UK is automatically entitled to provide those services elsewhere in the UK. The non-discrimination principle then applies to regulatory requirements affecting the provision of services.

**Part 3** provides for the automatic recognition of **professional qualifications** and requires equal treatment in respect of any requirements or restrictions affecting the practice of a particular profession, such as insurance or continuing professional development requirements.

### **Exclusions and Exceptions**

The Bill is concerned with future regulatory divergence. Market access principles do not apply to *existing* regulatory differences (such as the current minimum alcohol pricing rules in Scotland), but these would be brought into the scope of the Bill if they are substantively changed. Schedules 1 and 2 identify additional exclusions and exceptions:

- Regulations to address serious threats to human, animal or plant health, though in the case of product requirements, this is limited to the movement of pests and diseases, unsafe food or feed;
- the registration, evaluation, authorisation and restriction of chemicals
- taxation
- the provision of most public services;
- a defined range of other services, including in the communications, legal, financial, gambling, debt recovery and private security sectors

## **Scope**

The principles apply to requirements contained in both primary and secondary legislation enacted by both UK and devolved institutions after the internal market legislation has come into force.

The market access principles apply across England, Scotland, Wales and Northern Ireland in respect of services and professional qualifications. In relation to goods, the principles apply to goods coming from Northern Ireland into Great Britain. They do not apply to goods going from Great Britain into Northern Ireland, where this would be incompatible with the obligation under the Withdrawal Agreement's Protocol on Ireland/Northern Ireland for these goods to comply with EU law. The distinct position of Northern Ireland means that, even with the full implementation of this Bill, it is not correct to say that the UK internal market will operate on a 'full UK-wide basis'. Nor is it the case that this Bill would allow businesses to trade 'unhindered' with and in every part of the UK.

## **2. HOW WILL THE INTERNAL MARKET PRINCIPLES BE ENFORCED?**

The Bill provides that regulatory requirements which are incompatible with the market access principles are to be **disapplied**. Although not clear on the face of the Bill, we assume that relevant regulators (such as trading standards officers) will be obliged to ignore any incompatible rules, and that disputes about whether or not particular rules should be disapplied will be resolved by the courts. It is unclear by whom and in what circumstances the application of regulatory rules will be able to be challenged before the courts. Challenges could potentially arise many years after regulations are enacted.

There is no provision for legal challenge to regulations that are incompatible with the market access principles *before* they are adopted. However, Part 4 of the Bill enables the UK or devolved governments to seek advice from the Competition and Markets Authority (CMA) on the impact of a proposed regulation on the internal market; and also to seek advice on enacted rules in their own territory or other parts of the UK. For instance, the Scottish Government could seek advice on a Welsh regulation that it considered discriminated against Scottish producers.

The CMA also has a more general reporting function on the state of the UK internal market, but its reports are not legally binding. This leaves intergovernmental relations as the only available arena in which to resolve contentious issues. Clause 29(3)(b) also appears to exclude individuals or businesses from seeking advice from the CMA.

### **3. DOES THE BILL SIMPLY REPLICATE EU LAW?**

No.

Although the market access principles apply familiar concepts from EU law, they differ both in their technical details and in more fundamental respects. Most importantly:

- The nature and scope of application of the market access principles is different. For example, the definition of indirect discrimination is not the same as (and is more complicated than) EU law.
- The circumstances in which the mutual recognition rather than the non-discrimination rule will apply (or *vice versa*) are different to the position under EU law, and it is unclear how certain types of trading rules will be classified - e.g. restrictions on the *use* (rather than sale or marketing) of a product (such as the current ban on the use of electric shock training collars in Wales).
- The range of exclusions and exceptions from the mutual recognition and non-discrimination principles is significantly narrower than under EU law. For example, deposit return schemes are recognised as legitimate under EU law because they are a proportionate means of promoting environmental objectives. However, there is no scope for such justification in the UK Bill. This means that, to the extent that the provisions of the Deposit and Return Scheme for Scotland Regulations 2020, SSI 2020/154, which apply to drinks sold in single-use containers from July 2022 and place obligations on producers as well as retailers of such products, may fall under either of the market access principles, they cannot be justified on environmental protection grounds. As a consequence, these requirements may be disapplied to drinks entering the Scottish market from another part of the UK.
- The market access principles in the UK bill will impact differently on devolved competence, compared with EU law (see further question 4, below).

### **4. DO THE MARKET ACCESS PRINCIPLES WEAKEN DEVOLUTION?**

Yes.

The UK Government argues that the market access principles do not affect the powers of the devolved legislatures and governments, and that these will in fact

increase once the obligation to comply with EU law ceases to apply at the end of the transition period. There are, however, ways in which the Bill does restrict and constrain the devolved authorities' capacity to make effective policies.

At present, if a devolved legislature enacts a law which is incompatible with EU law, the legislation is invalid and of no effect. By contrast, devolved legislation which is incompatible with the UK market access principles will be valid, and will apply to local producers and service providers, but it will have **no effect** in relation to incoming goods or services that satisfy regulatory requirements in another part of the UK.

The market access principles undermine devolved competences in two ways.

- The UK Internal Market Bill itself will become a **protected enactment**, which the devolved legislatures will be unable to repeal or modify. They will therefore be unable to disapply the market access principles to particular sectors or particular pieces of legislation. Importantly, however, the UK Parliament will be able to override the market access principles when legislating for England. Accordingly, whereas EU law had a symmetrical effect on the UK Parliament and devolved legislatures, the UK Internal Market Bill will have an inherently **asymmetrical effect**.
- The Bill **narrows the territorial scope of devolved legislation**. Currently, devolved legislation applies to all of the relevant activity within the devolved territory. This will no longer be the case. A useful example is single use plastics. Since 1 October 2020, single use straws, cotton buds and stirrers have been banned in England bringing it in line with Wales and Scotland. From mid-2021, the Welsh Government is looking to ban a wider range of single-use plastic items, including balloon sticks, plates and cutlery. The Bill would not prevent the Senedd from legislating to ban single use plastics in such products, but such a ban would only apply to goods produced in Wales, or directly imported into Wales from outside the UK. They would not apply to goods entering Wales from other parts of the UK, nor could the Welsh Government prevent such products from being sold in Wales.

Narrowing the scope of devolved legislation could have the effect of rendering attempts at distinctive local regulation by the devolved institutions ineffective. The BEIS Impact Assessment acknowledges that the market access principles will reduce the ability to pursue targeted policy social and environmental policy objectives, with the result that the intended societal benefits that could have resulted from such policies 'would be foregone'. Once again, the effect is asymmetric. Because the English market is so much bigger than the devolved markets, English regulations are likely to apply by default throughout the UK.

Amendments introduced by the UK Government during the Commons stages exempted 'manner of sale requirements' from the principle of mutual recognition.



This was apparently intended to provide reassurance that minimum unit pricing for alcohol, introduced in Scotland, and subsequently adopted in Wales, to respond to the public health challenge resulting from excessive alcohol consumption would not be subject to mutual recognition constraints. However, were these regulations to be substantively altered in the future, they would be subject to the non-discrimination principle. As in the *Scotch Whisky Association* case,<sup>2</sup> the revised regulations would once again be open to challenge on the basis that they indirectly discriminated against alcohol produced in other parts of the UK, and could not reasonably be considered a necessary means of achieving the legitimate aim of protecting public health (an assessment which would depend on the state of evidence about the effectiveness of the measures and the availability of alternative policy mechanisms). While it is possible that revised regulations would be able to survive such challenge, the risk of challenge is likely to act as a disincentive to revising and updating the minimum pricing rules.

***The effect of the market access principles would therefore significantly undermine the purpose of devolution, which was to enable the devolved nations and regions to legislate according to their own local needs and political preferences.***

## **5. HOW DO THE PRINCIPLES IN THE BILL RELATE TO COMMON FRAMEWORKS?**

The UK and devolved governments have been working collaboratively to develop common frameworks in areas where they agree it is necessary to replace EU regulations with shared UK regulations or non-legislative frameworks. The principles established by the Joint Ministerial Committee made clear that common frameworks will be established where they are necessary in order to, among other things, 'enable the functioning of the UK internal market, while acknowledging policy divergence'.

Of the 154 policy areas listed in the 2020 Frameworks Analysis as areas where EU law intersects with devolved competence, 115 are considered to require no framework, 22 are thought to require a non-legislative framework, with just 18 considered to require a legislative framework.

Common frameworks are not mentioned in the Bill, and it is unclear whether regulatory rules established through the common frameworks process will be subject to the market access principles. The Nutrition related Labelling, Composition and Standards common framework, published on 9 October, notes that framework arrangements 'will also link into any future arrangements for the UK Internal Market', but it does not provide any clarity on how the two will be linked. Legislative frameworks could be a mechanism for securing regulatory harmonization, for example in food standards, emissions trading or food labelling. Legislative and non-legislative frameworks may also be an opportunity to agree minimum standards or

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<sup>2</sup> *Scotch Whisky Association v Lord Advocate* [2017] UKSC 76.

shared principles that nonetheless permit regulatory divergence. However, application of the market access principles to common frameworks may have a broader effect of reducing divergence, and risks undermining the objectives and principles that have guided frameworks discussions.

## **6. WILL THE BILL ENSURE HIGH REGULATORY STANDARDS?**

No.

While common frameworks could be a route to agreeing standards, there is nothing in the Bill to guarantee high regulatory standards. Indeed, there are two ways in which the Internal Market Bill could undermine high regulatory standards:

- Freezing existing regulatory differences at the point at which the Bill comes into force creates a disincentive on the part of devolved institutions to revise and strengthen regulatory schemes. It also undermines the potential for regulatory experimentation that has been a positive feature of devolution. For instance, the law on the sale of airguns is considerably tighter in Scotland and Northern Ireland than it is in England and Wales. In Scotland, there is a requirement for the commercial sale of air weapons to be in person (rather than over the internet).<sup>3</sup> This is likely to be regarded as indirectly discriminatory against suppliers based in other parts of the UK, and therefore would have to be justified as being reasonably necessary for the protection of public safety, which cannot be guaranteed if there are no equivalent rules elsewhere in the UK.
- The Bill creates conditions for potentially harmful regulatory competition between the four parts of the UK. Regulatory authorities in England, Scotland, Wales and Northern Ireland will place local producers and services providers at a competitive disadvantage if they adopt higher standards than elsewhere in the UK. Conversely, they may place them at a competitive advantage if they reduce regulatory requirements. Similar deregulatory effects have been found in other internal markets (particularly the US), where market access provisions are not accompanied by measures to harmonise regulatory standards or agree minimum standards. Deregulation to attract businesses to establish in their territory is a well-recognised means by which smaller jurisdictions can compete with larger ones ('the Delaware effect'). There may be particular pressure here in relation to food standards and animal welfare standards, both of which fall within devolved competence.

In addition, the principle of unfettered access from Northern Ireland goods into Great Britain legislated for in the UK Internal Market Bill could potentially cause issues if we see growing regulatory divergence between the UK and EU. There could be scenarios in which the principle of 'unfettered access' from NI into Great Britain could

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<sup>3</sup> Air Weapons and Licensing (Scotland) Act 2015, s 25.

undermine the effect of regulations in England, Scotland and Wales. For instance, fur is sold legally in the EU's single market and thus will be in free circulation in Northern Ireland. It is possible that legislation will be proposed in Westminster after the end of the transition period that will ban the sale of fur. The effects of this Bill mean that this would be a wholly ineffectual ban in England unless it is replicated in Senedd Cymru and the Scottish Parliament and is accompanied by more controls on goods entering GB from NI to prevent the access of banned goods.

## **7. ARE THE FINANCIAL ASSISTANCE POWERS NECESSARY FOR THE UK INTERNAL MARKET TO FUNCTION EFFECTIVELY?**

Part 6 of the Bill gives UK Ministers a new general power to provide financial assistance for a broad range of purposes that are otherwise devolved. The connection between this new spending power and the proposed regulatory structure for the UK Internal Market is not clear.

In principle, investment in some transport infrastructure might enhance economic exchanges across internal borders within the UK. For instance, since the Bill's publication, the Prime Minister and several UK Government ministers have spoken of directly funding a relief road to bypass the M4 Brynglas Tunnels, a notorious bottleneck near Newport in South Wales. If the relief road made travelling from South East Wales to Bristol and London faster, it might have economic benefits. But such interventions risk undermining the authority of the devolved institutions to determine infrastructure priorities in relation to devolved matters. The proposed M4 relief road has already been considered and rejected by the Welsh Government.

The new spending power extends much more widely than transport infrastructure, reaching into devolved areas with little obvious link to a frictionless internal market. The purposes for which the power can be used span: economic development; cultural and sporting activities, projects and events; educational and training activities and cross-UK and international exchanges; health, educational, cultural or sports facilities; courts and prison facilities; and housing. This new power comes with few restrictions, and is in addition to, and does not limit or replace, powers that UK Government Ministers already have to provide financial assistance.

The Bill provides very little detail about how this new power would interact with existing systems of territorial finance. The Explanatory Notes to the Bill suggest that the general spending power creates 'a means for the UK Government to provide funding across a range of largely devolved areas that would sit alongside any funding provided by the devolved administrations in those areas'. UK funding would be directed to 'local authorities, sectoral organisations, community groups, educational institutions and other bodies and persons'. The Impact Assessment notes that this would enable the UK Government to 'invest our money nationwide to invest in our COVID recovery and other domestic priorities including any direct replacements to EU programmes'. The reference to EU programmes suggests that

the devolved institutions would lose the autonomy they had over the allocation of structural funds once these are replaced by UK programme funding, such as the anticipated shared prosperity fund.

The scale of spending via the new powers, and the effect this may have on the existing system of calculating the block grant made by Treasury to Northern Ireland, Scotland and Wales, has not been made clear. Also unclear is whether the new spending powers would be used in collaboration, or in competition, with the devolved institutions. The tone of UK ministerial interventions on the Brynlass Tunnels by-pass issue suggests the spending power is driven more by political than economic ambitions. The UK Government appears set to adopt what it considers to be a more robust approach to relations with devolved governments, with greater intervention in areas that are within the constitutional responsibility of the devolved legislatures. Andrew Bowie, Conservative MP for West Aberdeenshire and Kincardine, adopted this posture in a recent Scotland on Sunday article (11 October), which he signed off by saying that 'this Internal Market Bill is just the start. The UK government is back in Scotland. Get used to it.' But spending on infrastructure, economic development and educational projects, for example, are likely to interact with other areas of devolved competence, such as planning, environmental impact assessment, or curriculum development, and would require cooperation with the devolved institutions.

## **8. WILL THE BILL PROMOTE CO-OPERATION AND TRUST BETWEEN GOVERNMENTS?**

No.

The process of negotiating and preparing for Brexit has seen an erosion of trust between the UK and devolved governments. This Bill, and the manner of its introduction, has done nothing to restore trust. If passed without the legislative consent of the devolved institutions, it is likely to lead to a further deterioration of intergovernmental relationships. ***We have never known relations between the Welsh and Scottish Governments on the one hand, and the UK Government on the other, to be as poor as they are today.***

Irrespective of the fate of this Bill, more effective intergovernmental relations are essential to the functioning of a UK internal market. Comparative experience suggests that a high level of trust in the equivalence of regulatory measures is necessary to enable an internal market to operate smoothly, and to prevent and resolve disputes.

The Bill risks undermining the development of common frameworks and the ongoing joint review of intergovernmental relations. In contrast to the collaborative approach that has guided these initiatives, the preparation of the Bill was a top-down process, with little engagement or consultation with the devolved governments, despite its constitutional significance for the functioning of devolution.

Against this backdrop, the Bill gives extensive delegated powers to the Secretary of State to amend key parts of the Bill without the consent of the devolved legislatures and, in many areas, without consulting devolved ministers. For example, Clause 8(7) empowers the Secretary of State to amend what is considered to be a 'legitimate aim' permitting indirect discrimination. Clause 10 and Clause 17 empower the Secretary of State to unilaterally amend by regulations the Schedule 1 and Schedule 2 exclusions from market access principles.

The provisions in the Bill are also likely to challenge the validity of the procedures permitting 'English Votes for English Laws'. Regulations that are within devolved areas of competence will be enacted by the UK Parliament for England alone but in effect these will be capable of being applied throughout the UK. This undermines any justification for excluding non-English MPs.

### **9. IS THE BILL NECESSARY TO ENABLE BUSINESSES TO TRADE FREELY ACROSS THE UK?**

In its current form, no.

A degree of regulatory variation within an internal market is clearly tolerable (indeed, regulatory variation currently exists in the UK and would continue to do so in the case of regulations already in force). Most internal markets, including the EU internal market, accept as justifiable some regulatory variation in order to protect public policy goals. Even before devolution, and even before the UK's membership of the EU, there were frequent regulatory differences within the UK. For instance, the Internal Market White Paper identifies differential building standards as a potential trade barrier. Yet, building standards in Scotland have been different from those in England since the adoption of national building control standards in the 1960s, reflecting differences in climate and the nature of the built environment. ***This Bill prioritises the removal of potential barriers to trade at the expense of all other public policy goals.***

As the common frameworks process demonstrates, where necessary, regulatory equivalence can be ensured through harmonisation rather than by the adoption of cross-cutting market access principles. There may be instances where unanticipated barriers to trade arise in areas not covered by regulatory frameworks, and some additional mechanism may be needed to deal with such cases. However, a more cooperative and consensual approach would be to confront such a need, if it arises in light of experience. Instead, the Bill assumes that divergence will emerge and that it will be detrimental. Blunting the tools of policy making in the devolved territories is deemed a price worth paying to guarantee unfettered access for business.

The UK Government's proposals for post-Brexit subsidy control may add to the legal uncertainty generated by the Bill. EU 'State Aid' rules are set not to apply in the UK

after the transition period ends.<sup>4</sup> The Bill expressly reserves the regulation of distortive or harmful subsidies to the UK Government. Devolved governments see no reason for the UK Government to have exclusive competence over subsidy control. These powers relate closely to devolved responsibilities for economic development and connect to local circumstances. The Bill provides no clarity about any new statutory framework for subsidy control. There have been indications that no such framework is planned. Its absence would allow the UK Government discretion to take largely unconstrained decisions about the allocation of public funds to persons supplying goods or services in the course of a business. Discretionary provision of state subsidies across the whole UK would introduce considerable uncertainty into the legal environment within which businesses operate, and could see further economic competition between the four parts of the UK.

Rather than producing certainty for businesses, as the UK Government claims, the lack of clarity within the Bill is likely to produce significant *uncertainty*. ***There remain many areas of ambiguity in the Bill. These are very likely to generate significant (and complex) litigation. The prospect of litigation represents a potentially substantial additional cost for businesses to weigh against the benefits of the Bill.***

It is worth stressing that the challenges posed by the UK Internal Market in general, and the proposals contained in the Bill in particular, are effectively separate and independent from the current negotiations between the UK and the EU over future trade relations. Whether or not those negotiations lead to a (modest) free trade agreement between the UK and the EU, this is likely to have only a marginal impact on the issues raised by the Bill.

## **10. CAN THE BILL BE IMPROVED?**

The Bill's implications for the Protocol on Ireland/Northern Ireland - and the UK government's expressed willingness to break international law - has provoked consternation internationally. In addition, relations between the Westminster Government and its counterparts in Cardiff and Edinburgh are as fractious as they have ever been. For all the UK Government's talk of a devolution power surge, the Scottish and Welsh governments perceive deep threats to devolution in the Bill as currently drafted. ***There is, then, a case for the Bill to be withdrawn to permit the development of a consensual and properly considered approach to the regulation of the UK internal market.***

It is not necessary for a new system to be in place for the whole of the UK by the end of the transition period. EU legal frameworks have already been given effect in

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<sup>4</sup> Article 10 of the Protocol on Ireland/Northern Ireland sees EU state aid rules applying to all trade that relates to the Protocol. This is to prevent UK government subsidising businesses or an industry in Northern Ireland in such a way that would give it an unfair advantage in competition with the rest of the EU's single market. Clause 45 of the UK Internal Market Bill seeks to give the UK Government the ability to curtail the scope of such rules.

domestic legislation as ‘retained EU law’ under the European Union (Withdrawal) Act 2018. If necessary, powers under s12 of that Act could be used to freeze retained EU law in areas identified as requiring a common legislative framework, if intergovernmental cooperation proved insufficient. In the meantime, a bespoke solution could address the urgent need to ensure access of goods from Northern Ireland to the GB market. Given that this principle of access is principally about market access rather than checks and controls on the movement of goods, in the absence of relevant common frameworks this could come through the use of secondary legislation. One example to date is the statutory instrument under the EU (Withdrawal) Act (2018) to define a NI good that qualifies for unfettered access to the British market.

If the Bill proceeds, it is unlikely to do so with the consent of the devolved institutions, adding further strains to intergovernmental relationships. However, there are amendments that could improve the Bill and minimise its adverse effects.

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### **We recommend:**

- Replacing the current system of legally-enforceable rights and obligations with a system of pre-legislative dialogue to identify and address potential trade barriers. This could include introducing more extensive requirements in the Bill for consultation and consent.
- Making clear that areas covered by common frameworks are not subject to the market access principles. This could incentivize the four administrations to complete the frameworks process.
- Adopting a broader range of exclusions and justifications for derogating from the market access principles in Schedules 1 and 2, at least as wide as are currently permitted under EU law. This would help to balance market access against the scope for devolved legislatures to set appropriate and innovative regulations in accordance with local needs, to the extent that is possible within the EU internal market.
- Making the powers given to UK ministers to change the scope or details of market access principles through secondary legislation subject to consent from both devolved ministers and legislatures. The consent procedure in s.12 of the European Union (Withdrawal) Act 2018 may be an appropriate model, providing space for detailed scrutiny of the proposals.
- A clearer explanation, justification and scrutiny of how, and to what extent, the financial assistance power interacts with the existing system of territorial finance, and with the proposed replacement for EU funding, the Shared Prosperity Fund. Particularly if the financial assistance power is envisaged as encompassing the Shared Prosperity Fund, we would expect a clear and

explicit statement of the relationship of the proposals to repeated UK Government commitments to respect the devolution settlements and maintain existing levels of funding, alongside mechanisms for cooperation and partnership in overseeing this Fund. If the new financial assistance power is to encompass the Shared Prosperity Fund, we recommend that it be removed from this Bill and be dealt with in a separate instrument.

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### **About the Authors:**

*Michael Dougan is Professor of European Law and Jean Monnet Chair in EU Law, University of Liverpool.*

*Katy Hayward is Professor of Political Sociology at Queen's University Belfast and a Senior Fellow of the UK in a Changing Europe initiative.*

*Jo Hunt is Professor of Law at the Wales Governance Centre, School of Law and Politics, Cardiff University.*

*Nicola McEwen is Professor of Territorial Politics at the University of Edinburgh, Co-Director of the Centre on Constitutional Change and a Senior Fellow of the UK in a Changing Europe initiative.*

*Aileen McHarg is Professor of Public Law and Human Rights at Durham Law School, Durham University.*

*Daniel Wincott is Blackwell Professor of Law and Society at the Wales Governance Centre, School of Law and Politics, Cardiff University and Director of the Economic and Social Research Council's Governance after Brexit Research Programme.*



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