

UK Internal Market Bill

Legislative Consent

November 2020

Based on our analysis of the Bill and the evidence received from the Welsh and UK Governments, we recommend that the Senedd withholds its consent for the UK Internal Market Bill.

We have arrived at this view because the Bill:

- is unnecessary to address the issues identified by the UK Government
- will reduce the Senedd's powers;
- will reduce the effect of many future laws passed by the Senedd, limiting the ability of the Senedd to deliver on the priorities of the people of Wales; and
- seeks to impose the UK Government's will on Wales, in a way that disproportionately favours the interests of England.

There are clear policy alternatives to the approach taken by the UK Government and no convincing case for the Bill's necessity has been made. Should the Senedd agree to withhold its legislative consent, this decision should be respected.



Introduction

1. Ensuring Welsh interests are safeguarded in the development of future intra-UK arrangements, for the management of policy areas that currently sit within EU frameworks or that are otherwise affected by EU exit, is central to our remit.
2. In our January 2017 report, *Implications for Wales of leaving the European Union*, we identified the possible need for common UK-wide approaches to certain areas of policy.¹
3. This issue re-emerged as we considered the EU (Withdrawal) Act 2018. In our December 2017 report on the Bill, we concluded that:

Decisions about future UK-wide policy frameworks must be agreed between the UK Government and the devolved governments and legislatures. They must not be imposed by the UK Government, even on a time-limited basis.²

4. Following the passing of the Bill into law, we turned our focus to the programme of work to develop UK-wide common policy frameworks. In our December 2019 report *Common policy frameworks: Assembly [Senedd] scrutiny*, we stated that:

[...] having a shared understanding across the nations of the UK of what a UK internal market constitutes, i.e. its foundation principles, objectives, parameters and constraints, is essential if future issues such as the agreement and implementation of future trade agreements are to be navigated successfully.³

5. In the same report, we concluded that:

Given the comparatively developed state of the intergovernmental arrangements relating to the frameworks programme, and the fact that JMC EN remains the political locus for both the UK internal market work stream and the frameworks programme, broadening the scope of

¹ External Affairs and Additional Legislation Committee, *Implications for Wales of leaving the European Union*, January 2017

² External Affairs and Additional Legislation Committee, *European Union (Withdrawal) Bill: Interim report on the Legislative Consent Memorandum*, December 2017

³ External Affairs and Additional Legislation Committee, *Common policy frameworks: Assembly [Senedd] scrutiny*, December 2019

the frameworks programme might offer a more pragmatic means of reorienting this work in terms of defining the UK internal market.⁴

- 6.** It can be seen from our previous work that we acknowledge the need for intra-UK cooperation in the management of some areas of policy. However, we have also consistently stated that this must be done on the basis of agreement between governments and legislatures and not imposed by the UK Government or Parliament against the will of the devolved governments and legislatures.
- 7.** On 16 July 2020, in a joint letter from the Secretary of State for Business, Energy, and Industrial Strategy, and, the Secretary of State for Wales, the UK Government invited us to respond to its White Paper consultation on the UK Internal Market Bill (“the Bill”).⁵
- 8.** Whilst welcoming the opportunity to respond, this letter arrived after the Senedd’s recess had begun and indicated a four-week consultation period, meaning that our opportunity to contribute within that timescale was limited.
- 9.** We alerted the Secretaries of State to this practical difficulty, by writing to them on 30 July 2020, whilst observing that four-weeks was a very short consultation period for such a significant and complex legislative proposal.⁶
- 10.** In the same letter, we posed a number of questions that were unanswered by the White Paper and provided a number of case studies to which we sought clarification on, in terms of the intended operation of a Bill and potential impacts a Bill could have on devolution.
- 11.** We received a reply from the Secretaries of State on 12 October 2020. This response provided limited replies to the questions we had posed and arrived after the Bill had already completed its passage through the House of Commons.⁷

⁴ External Affairs and Additional Legislation Committee, *Common policy frameworks: Assembly [Senedd] scrutiny*, December 2019

⁵ Letter from the Secretary of State for Business, Energy, and Industrial Strategy, and, the Secretary of State for Wales to the Chair of the EAAL Committee, *Launch of the UK internal market White Paper and consultation*, 16 July 2020

⁶ Letter from the Chair of the EAAL Committee to the Secretary of State for Business, Energy, and Industrial Strategy, and, the Secretary of State for Wales, *UK Internal Market White Paper*, 30 July 2020

⁷ Letter from the Secretary of State for Business, Energy, and Industrial Strategy, and, the Secretary of State for Wales to the Chair of the EAAL Committee, 12 October 2020

12. In the meantime, the Welsh Government made its position in relation to the White Paper clear in a letter to the Secretary of State for BEIS sent on 14 August 2020:

We have already made clear that we are not opposed to an internal market for the United Kingdom, neither are we opposed to legislation being brought forward to support the functioning of a UK Internal Market. Wales' interests, and those of the UK as a whole, are best served by ensuring smooth trading arrangements for businesses across all four nations. However, your proposals do not deliver this and in any case, this should be a collaborative piece of work in which all the governments within the UK have the opportunity to participate fully and on an equal basis.

Legislation of the kind proposed in your White Paper is simply not necessary, and we do not recognise the need for this type of solution as the UK Internal Market is already highly integrated.⁸

13. The Counsel General and Minister for European Transition (“the Counsel General”) appeared before us on 17 September 2020 and again on 5 November 2020.⁹

14. Our Chair also attended a meeting of the Legislation, Justice and Constitution Committee on the Bill, alongside the Chair of the Finance Committee. This meeting was held on 2 November 2020.¹⁰

15. The Welsh Government published its Legislative Consent Memorandum relating to the Bill on 25 September 2020.¹¹

16. The UK and Welsh Governments both state that all parts of the Bill fall subject to the legislative consent convention.¹²

⁸ Letter from the Counsel General and Brexit Minister to the Secretary of State for Business, Energy, and Industrial Strategy, 14 August 2020

⁹ See transcripts for EAAL meetings on 17 September 2020 and 5 November 2020.

¹⁰ RoP Legislation, Justice and Constitution Committee, 2 November 2020

¹¹ Welsh Government, *Legislative Consent Memorandum: UK Internal Market Bill*, 25 September 2020

¹² See Annex A of the UK Government's Explanatory Notes to the Bill and the Welsh Government's Legislative Consent Memorandum.

17. The analysis provided to us by the Senedd’s Legal Services confirms this to be the case.

18. The Welsh Government’s Legislative Consent Memorandum concludes that:

[T]he Senedd’s consent is required for the United Kingdom Internal Market Bill. But the Welsh Government will not be in a position to recommend that consent be given unless the Bill is substantially amended to address our significant concerns.

19. On 12 November 2020, Lord True, Minister of State at the Cabinet Office, appeared before us to answer questions in relation to the Bill.¹³

20. In addition, we commissioned a paper on the Bill from Professor Jo Hunt and Professor Dan Wincott, both of Cardiff University.¹⁴ Professors Hunt and Wincott also appeared before us on 15 October 2020.

21. We also commissioned a paper on the EU Internal Market from Dr Kathryn Wright of the University of York.¹⁵

22. Professor Hunt and Professor Wincott stated in their report that:

Until this Bill, no clear legal definition of a domestic Internal Market existed. The Bill provides a new legal framework for it [*the UK internal market*], one which is likely to place significant practical constraints on devolved policy competence. The choice to put legislation in place for the UK Internal Market which does not contain explicit constitutional protections for devolution and before developing a clear structure for other Common Frameworks or a new framework for intergovernmental relations (IGR) has constitutional implications.¹⁶

23. Our analysis of the Bill, and the evidence we have received, has led us to conclude that the Senedd should withhold its legislative consent for the Bill.

24. We have arrived at this view because the Bill:

¹³ RoP External Affairs and Additional Legislation Committee, 12 November 2020

¹⁴ Professor Jo Hunt and Professor Dan Wincott, *The Constitutional Implications of the UK Internal Market Proposal*, October 2020

¹⁵ Dr Kathryn Wright, University of York, *EU Internal Market Briefing*, 28 August 2020

¹⁶ Professor Jo Hunt and Professor Dan Wincott, *The Constitutional Implications of the UK Internal Market Proposal*, October 2020

1. is unnecessary to address the issues identified by the UK Government;
2. will reduce the Senedd's powers;
3. will reduce the effect of many future laws passed by the Senedd, limiting the ability of the Senedd to deliver on the priorities of the people of Wales; and
4. seeks to impose the UK Government's will on Wales, in a way that disproportionately favours the interests of England.

25. We have focused our consideration of the Bill on the devolution related issues that arise from it.

26. The remainder of this report explains our reasoning.

1. The Bill is unnecessary to address the issues identified by the UK Government

27. A clear alternative approach to managing the UK internal market already exists: that developed in relation to the common frameworks programme. This intergovernmental approach is underpinned by the European Union (Withdrawal) Act 2018 and the international obligation sections in the devolution statutes.

28. Additionally, the UK Government has not made a convincing case for the Bill, or provided examples of where there is a real and imminent threat of a devolved administration planning a significant policy divergence that would have an unduly distortive effect on the UK internal market.

The approach to establishing Common Frameworks offers an alternative

29. Unlike the Bill, which was produced and introduced unilaterally by the UK Government, common frameworks are negotiated on the basis of parity of esteem, co-design, and cooperation between the governments of the four nations of the UK.

30. The common frameworks programme may need some modest expansion to cover some additional areas of policy, but the crucial point we wish to convey is that, as an approach, it allows for a negotiated agreement between governments

and is underpinned by legislation that provides a series of devolution safeguards, including a role for the devolved legislatures.¹⁷

31. Additionally, to date, the programme has shown that fears of sudden policy divergence between the four nations of the UK are unfounded. This is demonstrated by the fact that UK Government powers under the EU (Withdrawal) Act 2018 to temporarily restrict the legislative competence of devolved legislatures have not been considered.

32. In our December 2019 report on Senedd scrutiny of common frameworks, we recommended that the approach to common frameworks be considered as an approach to managing the UK internal market more widely.¹⁸

33. The UK Government has stated that:

Common Frameworks on their own cannot guarantee the integrity of the entire UK internal market, being sector-specific and are not intended to address the totality of economic regulation. It is therefore clear that additional measures are needed to provide the robust protections required to preserve the status quo.¹⁹

34. This does not, in our view, make the case for this Bill. The UK Government's concerns could be addressed through intergovernmental cooperation, represented by the common frameworks programme, rather than through imposing arrangements on the devolved governments and legislatures that they have not been involved in designing..

35. The Bill does not provide for "*the status quo*" in devolution or market terms, as we elaborate on elsewhere in this report.

36. The common frameworks programme is not simply sector specific – each framework is developed to an overriding set of common principles and there are cross-cutting framework areas (such as mutual recognition of professional qualifications).

¹⁷ This is a reference to section 12 of the EU (Withdrawal) Act 2018 and associated Intergovernmental Agreement (October 2017)

¹⁸ External Affairs and Additional Legislation Committee, *Common policy frameworks: Assembly [Senedd] scrutiny*, December 2019

¹⁹ Letter from Lord Callanan, Minister for Climate Change and Corporate Responsibility, to Baroness Finlay, *United Kingdom Internal Market Bill – House of Lords Committee Stage*, 28 October 2020

The UK Government holds significant powers that underpin the common frameworks programme

37. In addition to the common frameworks programme of work, the UK Government holds significant powers under section 12 of the European Union (Withdrawal) Act 2018 to temporarily freeze areas of devolved legislative competence should any significant areas of divergence emerge in January 2021.²⁰

The UK Government already has the power to direct devolved Ministers to act, or not act, in order to ensure compliance with international obligations

38. The devolution settlement is underpinned by a duty to implement UK international obligations, including powers for the UK Government to direct the Welsh Ministers to do (or not do) something in order to conform with any UK international obligation and to revoke secondary legislation made by the Welsh Ministers it considers to be incompatible with UK international obligations, in the interests of defence or national security.²¹

The UK Government has been unable to provide evidence of where a devolved administration is planning a significant policy divergence

39. The UK Government has been unable to provide evidence of where a devolved administration is planning a significant policy divergence that would have an unduly distortive effect on the UK internal market or why existing intergovernmental mechanisms and the powers available to UK Ministers would be insufficient to manage such a situation.

40. In a letter to Baroness Finlay of Llandaff on 28 October 2020, Lord Callanan UK Government Minister in the BEIS department outlined three possible examples where divergence might occur in the UK after the end of the transition period.²²

41. The letter gives the example of the construction sector. It states that economic modelling shows that increased divergence in this sector could lead to increased costs for the sector after the UK leaves the EU. Construction standards is

²⁰ The European Union (Withdrawal) Act 2018 c.16

²¹ For Wales, this is provided for by section 82 of the Government of Wales Act 2006. See our 2019 report *UK International Agreements after Brexit: A role for the Assembly [Senedd]* for further details.

²² Letter from Lord Callanan, Minister for Climate Change and Corporate Responsibility, to Baroness Finlay, *United Kingdom Internal Market Bill – House of Lords Committee Stage*, 28 October 2020

not an area that is governed by the EU's Single Market. This means that the possibility for divergence exists now as it would do in January 2021. For example, building regulations have been devolved since 2011. This is not, therefore, an example of an area where there is a new risk of divergence, more an example of an area where the reach of the Internal Market Bill is greater than the current rules on the EU's single market.

42. The letter specifically mentions divergence in regulations on professional qualifications such as plumbing etc. It says the Bill is necessary to avoid this causing barriers to tradespeople working across countries, but mutual recognition of professional qualifications is one of the areas in which work on a common framework is on-going.

43. In relation to pesticides, the letter states:

All administrations are supported by the same regulator – the Health and Safety Executive (HSE) – which will aid consistency. We are also committed to working closely with the devolved administrations to jointly agree consistent maximum residue levels across Great Britain. Without the Bill's mutual recognition provisions, however, there is a significant risk that divergent regulation could be introduced, resulting in new trade barriers for food products between the different parts of the country. Depending on the particular decision, this could theoretically affect any agricultural or horticultural produce which has been treated with pesticides.

For example, different pesticide residue rules might mean wheat or fruit grown in England might not be lawful to sell in Wales, potatoes from Wales might not be lawful to sell in Scotland and so on.

44. Pesticides regulation is one of the areas where considerable work has been undertaken on agreeing a common framework. The letter does not explain why the issues identified in the example could not be addressed through this common framework or what evidence the UK Government has that the devolved governments will seek divergent policy from 1 January 2021. The Bill also explicitly excludes regulations on fertilisers and pesticides from the scope of the mutual recognition principle for goods.

45. On 18 November 2020, the House of Lords agreed non-governmental amendments to the Bill that attempt to exempt policy areas covered by the common frameworks process from the main provisions of the Bill. In responding

to the amendments, Lord True, on behalf of the UK Government, made it clear that the UK Government does not support the amendments.

2. The Bill will reduce the Senedd's powers

- 46.** The Bill reduces the Senedd's legislative competence in two ways:
- 1.** clause 44(3) of the Bill seeks to insert a new reservation under Schedule 7A to the Government of Wales Act (relating to state aid); and
 - 2.** clause 45(2) seeks to make the Bill (once an Act) a protected enactment i.e. making it unamendable by the Senedd in future.

The Bill provides no new powers to the Senedd or Welsh Ministers. This was confirmed by a senior UK Government Cabinet Office official at our meeting on 12 November 2020 whilst attending in support of Lord True, Minister of State at the Cabinet Office. ²³

3. The Bill will reduce the practical effect of many future laws passed by the Senedd, limiting the ability of the Senedd to deliver on the priorities of the people of Wales

- 47.** Parts 1 to 3 of the Bill, on market access, will place a new practical limit on the effect of devolved legislation. This was confirmed by the UK Government in its original Explanatory Notes to the Bill, which said that the Bill will:

[...] create a new limit on the effect of legislation made in exercise of devolved legislative or executive competence.²⁴

- 48.** Exemptions to the market access principles in Parts 1 to 3 of the Bill, which would allow devolved legislatures to develop legislation appropriate for the specific needs of their countries, are narrower in scope than those currently available under the rules that have governed the operations of the EU single market. For example, exemptions related to environmental or cultural protection are absent.

²³ Mr Bruno Williams, a Deputy Director in the Cabinet Office, confirmed this in response to questions from members of the Committee.

²⁴ UK Government, UK Internal Market Bill: Explanatory Notes (as laid in the House of Commons on 9 September 2020)

49. In a paper to the Committee, Dr Kathryn Wright, from the University of York, highlighted the exemptions or justifications that Member States are able to apply to legislation that may otherwise breach the laws of the EU's single market.²⁵

50. This makes the provisions in the Bill more limiting than the current market access principles in the EU single market, therefore reducing the freedom that the devolved legislatures currently have to develop distinctive and innovative policies.

4. The Bill seeks to impose the UK Government's will on Wales, in a way that disproportionately favours the interests of England

51. The size of the English market, compared to the other nations of the UK, is such that the effect of the market access principles will disproportionately favour English policy choices over those of the other nations of the UK.

52. Making the Bill a protected enactment means that the devolved legislatures cannot amend any of the Bill's provisions as they relate to their nations, but the UK Government, acting as it does on behalf of England in devolved areas of policy, is not restricted from making changes to the Bill through the UK Parliament in future.

53. The Bill provides wide powers for UK Ministers to make substantive changes to the Bill once enacted (and by extension the internal market) through secondary legislation with little parliamentary scrutiny.

54. For independent advice on, and monitoring of, the UK internal market, Part 4 of the Bill creates an Office for the Internal Market ("the OIM") that sits within the Competitions and Market Authority ("the CMA"). The CMA is a non-ministerial department of the UK Government with the Chair and board members appointed by the Secretary of State for Business, Energy and Industrial Strategy.²⁶

55. There is no role for the devolved governments or legislatures in the governance or oversight of the OIM or the CMA, though Welsh Ministers are to be consulted ahead of the UK Secretary of State appointing the Chair and members of the OIM panel.

56. Consequently, this arrangement favours the interests of England as the UK Government, which represents England only in devolved areas of policy, holds the power to make appointments to these bodies and to issue it with guidelines on its

²⁵ Dr Kathryn Wright, University of York, *EU Internal Market Briefing*, 28 August 2020

²⁶ See the Enterprise and Regulatory Reform Act 2013 c 24

functions in relation to the Bill with no equivalent role for the governments of the other three nations.

57. The UK Government has tabled amendments to the Bill that would create a duty for UK Ministers to consult devolved Ministers before exercising certain powers to be conferred upon UK Ministers by the Bill. For example, in relation to amending the “legitimate aims” in clauses 8 and 20, and exclusions from the rules about market access in Schedules 1 and 2. There is also a reporting duty proposed in relation to the exercise of powers to amend the list of exclusions from the rules about market access.²⁷

58. In relation to the CMA, amendments have been tabled to explicitly require the CMA to consider the whole of the United Kingdom whilst carrying out its functions under the Bill.

59. In making appointments to the OIM, a proposed amendment states that the UK Secretary of State “must have regard to the desirability of securing”, inter alia, “an appropriate balance among the members of that panel of persons who have skills, knowledge or experience relating to the operation of the United Kingdom internal market in different parts of the United Kingdom”. More significantly, the consent of the devolved Ministers would have to be sought. However, the Secretary of State could still make an appointment to the OIM panel without the consent of devolved Ministers after a month had elapsed since consent was sought.

60. A further amendment will require the CMA to lay its annual plan, proposals for its annual plan and its performance report before the devolved legislatures as well as the UK Parliament.

61. We welcome this amendment and the other amendments that provide a greater role for the devolved administrations. They do not, however, allay our concerns about the inherent imbalance created by the UK Government remaining able to exercise powers to adjust the rules of the internal market by regulation without the consent of the devolved legislatures, whilst, at the same time, acting in the interest of England only in areas of policy that are devolved.

62. The European Union (and its internal market) has mechanisms to guard against the centralisation of power, through the established principles of

²⁷ In light of the Bill’s consideration continuing as we publish this report, see the UK Parliament’s Bill page for the latest information on the fate of the amendments mentioned.

subsidiarity and proportionality. No equivalent principles are provided for in the Bill.

63. In considering the comparison with the European Union's internal market, we also observe that the UK proposals contain none of the wider institutional mechanisms for managing the market. For example, formalised intergovernmental decision making through the European Council, the shared administrative support of the European Commission, and the democratic oversight of the European Parliament. It is also worth noting the formalised consultative mechanisms that exist through institutions such as the Committee of the Regions and the European Economic and Social Committee. The Welsh Ministers, through the JMC Europe, had a meaningful role in contributing to and, on occasion, representing the overall UK position at an EU level. No such mechanism is available to Welsh Ministers in relation to current and future UK international obligations that might affect the UK internal market.

64. As regards Part 5 (financial assistance powers), the Bill gives the UK Government new powers to fund activity in policy areas devolved to Wales. We see no logical link between the requirements for such powers and the operation of a UK internal market. Furthermore, the implications of these powers on the Welsh block grant remain unclear. Again, there is an inherent imbalance in this arrangement, with the UK Government acting as the Government for the UK and the de facto government for England only in devolved areas.

65. Professor Jo Hunt and Professor Dan Wincott, in their paper for the Committee stated that:

This provision [on state aid] may be intended to prevent devolved governments developing policies that redistribute economic activity across territorial boundaries, more than enhancing overall levels of production. The implication of that reservation that the scope for devolved governments to support economic activity within, say, Scotland or Wales, might be restricted.²⁸

Legislative consent

66. The Senedd's decision on legislative consent must be respected. There is a clear policy alternative for managing the UK internal market; the Bill is not a

²⁸ Professor Jo Hunt and Professor Dan Wincott, *The Constitutional Implications of the UK Internal Market Proposal*, October 2020

necessary step for managing the UK internal market, nor is it a necessary step in leaving the transition period with the EU.

67. The UK Parliament chose to disregard the Senedd's decision to withhold legislative consent for the EU (Withdrawal Agreement) Act 2020.

68. At that time, the Secretary of State for Exiting the European Union wrote to the Counsel General to explain that the UK Government considered the EU (Withdrawal Agreement) Act 2020 to be an exception to the legislative consent convention as:

[...] the circumstances of our departure from the European Union are singular, specific, and exceptional.²⁹

69. The circumstances relating to the UK Internal Market Bill are fundamentally different and such an argument does not hold in relation to the legislative consent convention in this instance.

70. The UK Government has an alternative approach to take, should it choose, that is based on working collaboratively with the devolved nations.

71. There is no time pressure to deliver this legislation, as confirmed by Lord True, Minister of State at the Cabinet Office:

[...]it is not a sense that something terrible is going to happen on 1 January that is forcing this, but I think when you make policy—and you will understand, because of the responsibilities that you have in your legislature—there is always a prudential element here. So, something that is not immediately necessary, if it might become necessary one day, it is often better to make provision for that beforehand rather than wait for a crisis to arise, when you're chasing the crisis.

72. It is our view that the legislative consent convention unequivocally applies in the case of this Bill.

73. In keeping with the Committee's remit "*to ensure Welsh interests are safeguarded [...] in the intra-UK post-withdrawal arrangements for relevant policy, finance and legislation*" we conclude that the passing of this Bill, for the reasons outlined in this short report, runs contrary to Welsh interests.

²⁹ Letter from the Secretary of State for Exiting the European Union to the Counsel General and Minister for European Transition, 17 January 2020

RECOMMENDATION

Recommendation 1. We recommend that the Senedd withholds its legislative consent for the UK Internal Market Bill.