

# The Welsh Government's Legislative Consent Memorandum on the United Kingdom Internal Market Bill

November 2020



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**Legislation, Justice and Constitution Committee**  
**Welsh Parliament**  
**Cardiff Bay**  
**CF99 1SN**

Tel: **0300 200 6565**  
Email: **[SeneddLJC@senedd.wales](mailto:SeneddLJC@senedd.wales)**  
Twitter: **[@SeneddLJC](https://twitter.com/SeneddLJC)**

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# About the Committee

The Committee was established on 15 June 2016. Its remit can be found at:  
[www.senedd.wales/SeneddLJC](http://www.senedd.wales/SeneddLJC)

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## Committee Chair:



**Mick Antoniw MS**  
Welsh Labour

## Current Committee membership:



**Carwyn Jones MS**  
Welsh Labour



**Dai Lloyd MS**  
Plaid Cymru



**David Melding MS**  
Welsh Conservatives

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# 1. Background

## The UK Government's United Kingdom Internal Market Bill

1. The UK Government's United Kingdom Internal Market Bill<sup>1</sup> (the Bill) received its first reading in the House of Commons on 9 September 2020. It completed its passage through the House of Commons on 29 September 2020 and is currently in the House of Lords.<sup>2</sup>
2. The introduction of the Bill into the UK Parliament followed the publication of a UK Government White Paper in July 2020.<sup>3</sup> Following an invitation to comment,<sup>4</sup> we responded on 7 August 2020<sup>5</sup> and received a reply from the UK Government on 12 October 2020.<sup>6</sup>
3. The Bill introduced to the House of Commons consisted of 54 clauses arranged into 7 Parts and two Schedules. The Bill includes:
  - provisions in Parts 1 and 2 to establish a new market access principle for goods and new principles of mutual recognition and non-discrimination in relation to the regulations of services in the UK;
  - provisions in Part 3 to establish a new requirement on the mutual recognition of professional qualifications in the UK so that within certain limits individuals who have qualified in one part of the UK are automatically entitled to practice in another part of the UK;
  - provisions in Part 4 that give new powers to the Competition Market Authority (CMA) to oversee the operation of the internal market, and to monitor and report on the effectiveness of the operation of the internal

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<sup>1</sup> [United Kingdom Internal Market Bill 2019-21 \[Bill 177\]](#)

<sup>2</sup> This report does not take account of Report Stage in the House of Lords

<sup>3</sup> Department for Business, Energy and Industrial Strategy, [UK Internal Market](#), July 2020, CP278

<sup>4</sup> Letter from The Rt Hon Alok Sharma MP, Secretary of State for Business, Energy & Industrial Strategy and The Rt Hon Simon Hart MP, Secretary of State for Wales, [Launch of the UK internal market White Paper and consultation](#), 16 July 2020

<sup>5</sup> Letter to The Rt Hon Alok Sharma MP, Secretary of State for Business, Energy & Industrial Strategy and The Rt Hon Simon Hart MP, Secretary of State for Wales, [UK internal market White Paper and consultation](#), 7 August 2020

<sup>6</sup> [Letter from The Rt Hon Alok Sharma MP, Secretary of State for Business, Energy & Industrial Strategy and The Rt Hon Simon Hart MP, Secretary of State for Wales](#), 12 October 2020

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market through a newly established body within the CMA, the Office for the Internal Market (OIM);

- provisions in Part 5 to vary or disapply some elements of the Northern Ireland-Ireland Protocol in relation to exit declarations for goods moving between Northern Ireland and Great Britain and State-Aid provisions contained in the UK-EU Withdrawal Agreement. Regulations made by the Secretary of State under these provisions are to be regarded as having effect notwithstanding any incompatibility or inconsistency with any provisions of the Northern Ireland Protocol, EU withdrawal agreement and other specified legislation (including other EU law or international law);
- provisions in Part 6 to give UK Ministers new powers to provide financial assistance across the UK for subjects including economic development, cultural activities, infrastructure, education and international education and exchange activities;
- provisions in Part 7 that introduce new reservations on subsidy control (i.e. state aid) into the *Government of Wales Act 2006* and the other devolution settlements in the UK;
- provisions in Part 7 to make the Bill a protected enactment under the *Government of Wales Act 2006* meaning that the Senedd could not legislate to alter its provisions as they apply to devolved areas.

4. A detailed summary of the Bill is included in Senedd Research and Senedd Legal Services briefings.<sup>7</sup>

5. The Explanatory Notes to the Bill state that:

“As part of its vision for the UK internal market, the Government is also engaging in a process to agree a common approach to regulatory alignment with the devolved administrations. The Common Frameworks Programme aims to protect the UK internal market by

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<sup>7</sup> Welsh Parliament Senedd Research, [UK Internal Market Bill Research and Legal Briefing](#), 23 September 2020; Welsh Parliament Senedd Research, [UK Internal Market Bill Research and Legal Briefing](#), October 2020

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providing high levels of regulatory coherence in specific policy areas through close collaboration with devolved administrations.”<sup>8</sup>

6. The Joint Ministerial Committee (EU Negotiations) established a set of principles on common frameworks in October 2017.<sup>9</sup> The principles included:

- establishing common frameworks where they are necessary in order to enable the functioning of the UK internal market, while acknowledging policy divergence and ensuring compliance with international obligations, and
- that frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:
  - be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent;
  - maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules;
  - lead to a significant increase in decision-making powers for the devolved administrations.

7. We wrote to the Secretary of State for Wales, the Rt Hon Simon Hart MP, on 18 September 2020,<sup>10</sup> seeking confirmation that the UK Government would not seek to pass the Bill without the consent of the Senedd, given that such consent had been requested. We received a reply on 3 October 2020, in which the Secretary of State said:

“We are working closely with the Welsh Government as the Bill progresses through Parliament to understand and respond to the concerns outlined in the legislative consent memorandum published on 25 September. It is very much the Government’s intention that this

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<sup>8</sup> UK Government, [United Kingdom Internal Market Bill Explanatory Notes](#), September 2020, paragraph 8

<sup>9</sup> [Joint Ministerial Committee \(EU Negotiations\) Communiqué](#), 16 October 2017

<sup>10</sup> Letter to Rt Hon Simon Hart MP, Secretary of State for Wales, [UK Internal Market Bill](#), 18 September 2020

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work will result in a recommendation that the Senedd supports the Bill.”<sup>11</sup>

**8.** On 24 September 2020, we published a statement on the Bill setting out our initial views.<sup>12</sup>

## The Welsh Government's Legislative Consent Memorandum

**9.** On 15 September 2020, the Counsel General, Jeremy Miles MS (the Counsel General) provided an oral statement on the Bill.<sup>13</sup>

**10.** On 25 September 2020, the Welsh Government laid before the Senedd a Legislative Consent Memorandum (LCM) in respect of the Bill.<sup>14</sup>

**11.** The Business Committee referred the LCM for scrutiny to the Legislation, Justice and Constitution Committee and External Affairs and Additional Legislation Committee, with a reporting deadline of 19 November 2020.<sup>15</sup> The deadline was subsequently extended to 26 November 2020.<sup>16</sup>

**12.** The Welsh Government's LCM states that each provision of the Bill requires the consent of the Senedd and notes that its assessment “would seem to be shared by the UK Government” according to Annex A to the Bill's explanatory notes.<sup>17</sup>

**13.** The LCM identifies the provisions of the Bill that engage Standing Order 29<sup>18</sup> relating to legislative consent. In particular, as regards clause 49 (Protection of Act against modification), subsequently re-numbered as clause 51 following House of Commons amendments, the LCM states:

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<sup>11</sup> Letter to the Chair from Rt Hon Simon Hart MP, Secretary of State for Wales, [UK Internal Market Bill](#), 3 October 2020

<sup>12</sup> Legislation, Justice and Constitution Committee, [Statement by the Committee: United Kingdom Internal Market Bill](#), 24 September 2020

<sup>13</sup> Welsh Government, [Oral Statement: UK Internal Market Bill](#), 15 September 2020

<sup>14</sup> Welsh Government, [Legislative Consent Memorandum: United Kingdom Internal Market Bill](#), 25 September 2020

<sup>15</sup> Business Committee, [Timetable for consideration of the Legislative Consent Memorandum on the UK Internal Market Bill](#), September 2020

<sup>16</sup> Business Committee, [Revised timetable for consideration of the Legislative Consent Memorandum on the UK Internal Market Bill](#), November 2020

<sup>17</sup> LCM, paragraph 6

<sup>18</sup> Welsh Parliament, [Senedd Business: Standing Orders of the Welsh Parliament](#), November 2020

“Clause 49 of the Bill seeks to amend paragraph 5 of Schedule 7B to the Government of Wales Act 2006 so that the entire Bill is specified as a protected enactment. Each provision will therefore modify the legislative competence of the Senedd by adding to the category of legislation that it cannot amend and therefore engage standing order 29.1(ii). Consent is required for the Bill as a whole.”<sup>19</sup>

**14.** The LCM also states:

“The Welsh Government does not accept that the measures proposed in the Bill are in any way proportionate to the objectives which the UK Government claims for it. The Welsh Government is not opposed to the principle of an internal market for the UK, nor are we opposed to a UK wide subsidy regime. However, the proposals in the Bill go far beyond the structure that may be needed to ensure economic and regulatory cooperation between the nations of the UK and, if enacted, would undermine the long-established powers of the Senedd and Welsh Ministers to regulate in relation to matters within devolved competence.”<sup>20</sup>

**15.** The Welsh Government raises objections in the LCM to elements of each Part of the Bill, as follows:

- as regards Parts 1 to 3, on grounds that they automatically apply market access principles without appropriate exceptions, without any requirement to maintain high standards, and without requiring intergovernmental agreement to be reached in the first instance, through common frameworks;<sup>21</sup>
- as regards Part 4, while open to the creation of an independent OIM with an advisory role, the Welsh Government does not believe that the CMA as currently constituted provides a suitable vehicle for this office;<sup>22</sup>

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<sup>19</sup> LCM paragraph 7

<sup>20</sup> LCM paragraph 72

<sup>21</sup> LCM, paragraph 75

<sup>22</sup> LCM, paragraph 76

- as regards Part 5, on the basis that clauses in that part breach international law;<sup>23</sup>
- as regards Part 6, on the basis that the new financial assistance powers it creates and to be exercised by UK Government Ministers are unnecessary and will undermine spending decisions made by the Senedd and the Welsh Ministers, and have no link to the market access principles contained in Parts 1 to 4;<sup>24</sup>
- as regards Part 7, the Welsh Government considers that a state aid regime, to be reserved under clause 48 (currently, clause 50), should be achieved through discussion and negotiation between the four parts of the UK and objects to clause 49 (currently, clause 51) by which the Bill would become a protected enactment.<sup>25</sup>

**16.** In conclusion, the Welsh Government states that it “will not be in a position to recommend that consent be given unless the Bill is substantially amended to address our significant concerns”.<sup>26</sup>

## The Welsh Government's proposed amendments to the Bill

**17.** In its LCM, the Welsh Government indicated it was working on proposed amendments to the Bill.<sup>27</sup> On 15 October 2020, a Welsh Government Written Statement<sup>28</sup> indicated that the Counsel General had written to the Lord Speaker and political parties in the House of Lords<sup>29</sup> “to urge their support for a set of amendments to the United Kingdom Internal Market Bill which, as currently drafted, represents a fundamental attack on devolution.”<sup>30</sup>

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<sup>23</sup> LCM, paragraph 77

<sup>24</sup> LCM, paragraph 78

<sup>25</sup> LCM, paragraphs 79-80

<sup>26</sup> LCM, paragraph 84

<sup>27</sup> LCM, paragraph 81

<sup>28</sup> Welsh Government Written Statement, [Welsh Government amendments to the United Kingdom Internal Market Bill](#), 15 October 2020

<sup>29</sup> Letter from Jeremy Miles MS, Counsel General to The Rt. Hon. The Lord Fowler, Lord Speaker, House of Lords, [United Kingdom Internal Market Bill](#), 15 October 2020

<sup>30</sup> Amendments are set out in documents attached to the [Written Statement](#)

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## 2. Committee Consideration

**18.** We took evidence from Jeremy Miles MS, the Counsel General on 21 September 2020<sup>31</sup> and 2 November 2020.<sup>32</sup> We have noted the reports of the Finance and Constitution Committee of the Scottish Parliament<sup>33</sup> and three Committees of the House of Lords: the Constitution Committee,<sup>34</sup> the Delegated Powers and Regulatory Reform Committee<sup>35</sup> and the European Committee.<sup>36</sup> We have also noted work by Professor Jo Hunt and Professor Dan Wincott from the Wales Governance Centre on *The Constitutional Implications of the UK Internal Market Proposals*<sup>37</sup> and work on the *EU Internal Market*<sup>38</sup> completed by Dr Kathryn Wright of York University under the Senedd's Brexit Academic Framework.<sup>39</sup>

### Overview

**19.** The Counsel General explained that the Welsh Government considers an internal market to be “a good concept and in the interests of Welsh businesses and Welsh consumers ... but not done in this way.”<sup>40</sup> He indicated that the Bill was “an imposition”,<sup>41</sup> noting also that the Welsh Government had not had any

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<sup>31</sup> Legislation, Justice and Constitution (LJC) Committee, RoP, 21 September 2020

<sup>32</sup> LJC Committee, RoP, 2 November 2020, This evidence session was held with members of the External Affairs and Additional Legislation Committee and Finance Committee in attendance.

<sup>33</sup> Letter to the Cabinet Secretary for the Constitution, Europe and External Affairs and Chancellor of the Duchy of Lancaster from Bruce Crawford MSP, Convener, Finance and Constitution Committee, Scottish Parliament, UK Internal Market Bill and Legislative Consent Memorandum, 6 October 2020

<sup>34</sup> House of Lords Constitution Committee, 17th Report of Session 2019–21, United Kingdom Internal Market Bill, 16 October 2020, HL Paper 151

<sup>35</sup> House of Lords, Delegated Powers and Regulatory Reform Committee, 24th Report of Session 2019–21, United Kingdom Internal Market Bill, 17 September 2020, HL Paper 130

<sup>36</sup> House of Lords, European Union Committee, 14th Report of Session 2019–21, The United Kingdom Internal Market Bill: Part 5, 16 October 2020, HL Paper 147

<sup>37</sup> Professor Jo Hunt and Professor Dan Wincott, Wales Governance Centre, Cardiff University School of Law and Politics, The Constitutional Implications of the Internal Market Proposals, 29 September 2020

<sup>38</sup> Dr Kathryn Wright, York University, EU Internal Market Briefing, 28 August 2020

<sup>39</sup> Academic Engagement with the Senedd

<sup>40</sup> LJC Committee, RoP [45], 21 September 2020

<sup>41</sup> LJC Committee, RoP [45], 21 September 2020

involvement in the preparation of the Bill itself,<sup>42</sup> and suggested that common frameworks were a better way of proceeding.<sup>43</sup>

**20.** The Counsel General thought that “there is a clear assault on devolution contained within the provisions of this Bill”.<sup>44</sup> He noted that the Bill when enacted would be a protected enactment, a status which is “generally reserved for constitutional legislation”.<sup>45</sup> The Counsel General also noted that the Bill covered matters not obviously linked to the internal market, highlighting the financial assistance provisions in Part 6 as an example.<sup>46</sup>

**21.** The Counsel General said during his oral statement that the Bill provided the UK Government:

“with a quick way of hollowing out the rights of this Senedd to regulate within those areas of devolved competence as it sees fit.”<sup>47</sup>

**22.** As well as the Bill being a protected enactment,<sup>48</sup> the Counsel General explained that it also “hollowed out” the Senedd’s legislative competence by:

- undermining collaborative work between governments over the last two years on common frameworks;<sup>49</sup>
- requiring, through the principles of mutual recognition and non-discrimination in Parts 1 and 2, the acceptance of goods and services with lower standards, whether or not they conform with Welsh rules,<sup>50</sup> citing examples of single-use plastics<sup>51</sup> and antibiotic and hormone-injected beef,<sup>52</sup>

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<sup>42</sup> LJC Committee, RoP [18], 21 September 2020

<sup>43</sup> LJC Committee, RoP [45], 21 September 2020

<sup>44</sup> LJC Committee, RoP [5], 21 September 2020

<sup>45</sup> LJC Committee, RoP [6], 21 September 2020; see also LJC Committee, RoP [84], 2 November 2020

<sup>46</sup> LJC Committee, RoP [7], 21 September 2020

<sup>47</sup> RoP [360], 15 September 2020

<sup>48</sup> LJC Committee, RoP [12], 21 September 2020

<sup>49</sup> LJC Committee, RoP [9], 21 September 2020

<sup>50</sup> LJC Committee, RoP [9], 21 September 2020

<sup>51</sup> LJC Committee, RoP [10], 21 September 2020

<sup>52</sup> LJC Committee, RoP [28], 21 September 2020

- attempting to circumvent devolution and the power of the Senedd and Welsh Ministers by virtue of clause 46 (currently clause 48), which allows the UK Government to spend in devolved areas;<sup>53</sup>
- a straightforward change to the devolution settlement by virtue of state-aid provisions in Part 7 of the Bill, which explicitly add to the list of reserved matters in the *Government of Wales Act 2006*.<sup>54</sup>

**23.** In their analysis of the constitutional implications of the Bill, Professor Jo Hunt and Professor Dan Wincott conclude:

“If passed into law in its current form it will have a significant, largely centralising, impact on the balance of the UK territorial constitution.”<sup>55</sup>

## Market Access and Oversight

### Impact of Parts 1 to 3 of the Bill on the Senedd's ability to make law

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**24.** The Explanatory Notes to the Bill, as introduced in the House of Commons (in a section headed “Constitutional embedding and devolved competence”) state that Parts 1 to 3 of the Bill will:

“[...] create a new limit on the effect of legislation made in exercise of devolved legislative or executive competence. For example, clause 2(1) disapplies any legislative requirements that do not comply with the mutual recognition principle.”<sup>56</sup>

**25.** In addition, the Bill's impact assessment outlines that the Bill could limit the intended societal impact of devolved legislation, as a non-monetised cost:

“In certain instances, where parts of the UK pursue separate policies, the scale of the intended public benefit of local (devolved) measures might not be fully realised due to the more limited number of goods and services to which the policy applies, compared to the

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<sup>53</sup> LJC Committee, RoP [11], 21 September 2020

<sup>54</sup> LJC Committee, RoP [11], 21 September 2020

<sup>55</sup> Professor Jo Hunt and Professor Dan Wincott, Wales Governance Centre, Cardiff University School of Law and Politics, *The Constitutional Implications of the Internal Market Proposals*, September 2020

<sup>56</sup> UK Government, *United Kingdom Internal Market Bill Explanatory Notes*, 9 September 2020, paragraph 75 (as introduced in the House of Commons)

counterfactual of separate regulations without mutual recognition. This results from the fact that goods/services originating from elsewhere in the UK may, when placed on the local market, could be complying with different regulations adopted elsewhere in the UK. This could mean that societal benefits that could otherwise have occurred, were it not for mutual recognition, would be foregone.”<sup>57</sup>

**26.** The impact assessment outlines the UK Government's view that these non-monetised costs would be offset by a reduction in costs to business.<sup>58</sup>

**27.** As set out above in the overview, the Counsel General has made clear his view that the Bill will lead to a “hollowing out” of devolved competence, providing examples of policy areas which illustrated his view that the ability of the Senedd to enforce devolved legislation in future would be undermined. This section of the report considers these issues in more detail.

**28.** In highlighting “the conflict between the devolution settlement and the content of the Bill”,<sup>59</sup> the Counsel General expressed concern that the Bill could undermine high standards in terms of animal health, food, environmental standards “that people in Wales have enjoyed and have been proud of throughout the period of devolution”.<sup>60</sup> The Counsel General noted that businesses “welcome the idea of a baseline standard”, adding “we do need to ensure that that is contained within the Bill”.<sup>61</sup>

**29.** He also highlighted the practical impact of the Bill:

“Anyone who does a weekly shop should be interested in the impact of this Bill. And if you're a tenant in the private sector here in Wales, then you should certainly be interested, because one of the services that we anticipate that will be captured by the Bill is the ability of any landlord who can operate in any part of the UK to be able to operate here in

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<sup>57</sup> Department for Business, Energy and Industrial Strategy, UK Internal Market Bill Impact Assessment, 9 September 2020, page 3

<sup>58</sup> Department for Business, Energy and Industrial Strategy, UK Internal Market Bill Impact Assessment, 9 September 2020, page 3

<sup>59</sup> LJC Committee, RoP [34], 21 September 2020

<sup>60</sup> LJC Committee, RoP [24], 21 September 2020

<sup>61</sup> LJC Committee, RoP [25], 21 September 2020



Wales, whether they meet the standards in terms of regulations relating to landlords or not.”<sup>62</sup>

**30.** More broadly the Counsel General told us:

“The fundamental problem is [...] the existence of a broadly based market access principle without any reference to the devolution settlement or a need to agree is itself a disincentive to the operation of what we would suggest is a more nimble, low-bureaucracy, fast-moving, responsive way of dealing with the internal market, which I’m sure we would all think is the right outcome.”<sup>63</sup>

**31.** New laws passed by the Senedd after the Bill comes into force would be captured by the Bill. In practice, this means that new Welsh laws would be disapplied and of no effect to the extent that they did not comply with the requirements of the Bill. However, the Bill contains exemptions, excluding pre-existing laws, from the market-access provisions in certain circumstances.

**32.** In respect of goods, pre-existing laws that are unique to one part of the United Kingdom, will not be captured by the Bill. Similarly, in respect of services, the Bill will not apply to pre-existing laws, whether or not they are unique to one part of the United Kingdom. However, in respect of both goods and services, any “substantive change” (which is not defined in the Bill) made to a pre-existing statutory requirement after the Bill comes into force would bring it into the scope of the Bill and subject to the market-access provisions.

**33.** We asked the Counsel General how this principle of substantive change could impact on the updating of the statute book and ensuring that policies are innovative and fit for purpose for current needs. He told us:

“Well, I think the risk is there ... Even if it’s just from the point of view of law that is largely consolidating but making some changes at the margin, I just think you’d set the bar very much higher for those sorts of sensible changes that any Government would want to make, really. So, the Bill casts a long shadow in that sense.”<sup>64</sup>

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<sup>62</sup> LJC Committee, RoP [30], 21 September 2020

<sup>63</sup> LJC Committee, RoP [33], 2 November 2020

<sup>64</sup> LJC Committee, RoP [58], 21 September 2020

**34.** The Counsel General also referred to the possible reluctance to develop policy, in case it is caught by the Bill, as a “chilling effect”.<sup>65</sup> He also used this phrase in the context of the Bill’s effect on devolved powers more generally, citing the example of hormone-injected beef:

“... we could continue our policy objection to that as a Parliament and as Ministers in Wales, but not be able to deliver that on the ground, because it wouldn’t be possible if this became an Act, in its current form, to prevent that being sold in Welsh supermarkets. So, there’s a risk that the Senedd passes the legislation but doesn’t have the levers to deliver it on the ground. Now, what that means, of course, in practical terms is that it has a chilling effect on devolved powers. Now, the Senedd isn’t going to go out of its way to pass legislation that can’t be enforced on the ground, I would expect. It’ll create a chilling effect on the ability of the Senedd and Ministers to take action in devolved areas that we currently do.”<sup>66</sup>

**35.** The House of Lords Constitution Committee report also drew attention to these issues by acknowledging that “the implications for devolved competence will depend heavily on [...] the [...] minimum standards for England, as the economically dominant part of the UK”.<sup>67</sup>

**36.** The House of Lords Constitution Committee report also said:

“There is no reason why principles for the successful operation of the UK domestic market cannot be arrived at consensually and there is already broad political agreement on the need to avoid erecting new barriers to trade.”<sup>68</sup>

**37.** Professor Jo Hunt and Professor Dan Wincott suggest that the evidence put forward by the UK Government on the need for the market access principles in the Bill is predicted on hypothetical evidence of divergence automatically taking place at the end of the transition period:

“The UK Internal Market proposals aim to prevent the emergence of a hypothetical threat to UK economic prosperity – new regulatory

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<sup>65</sup> LJC Committee, RoP [61-62], 21 September 2020

<sup>66</sup> LJC Committee, RoP [86], 2 November 2020

<sup>67</sup> HL Paper 151, paragraph 23

<sup>68</sup> HL Paper 151, Summary

frictions that could undermine economic performance. The threat is hypothetical or counterfactual in the sense that its possible future realisation is dependent on actions that have not yet taken place. New devolved regulation is presented as the main potential source of this new friction. Since the devolved economies are also described as bearing a disproportionate brunt of the costs of new friction, it is hard to see why the devolved governments would introduce it, without good reasons for doing so.”<sup>69</sup>

**38.** The Box overleaf highlights our assessment of the issues that have been raised in evidence regarding the impact of the Bill on law-making by the Senedd.

#### Comparison with the EU Single Market

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**39.** The UK Government has suggested that the Bill is needed to manage regulatory divergence in the UK once it “leaves the EU’s legal order” and the rules of the EU Single Market that currently apply in the UK fall away.<sup>70</sup>

**40.** The Counsel General outlined in his evidence three ways in which the provisions included in this Bill would have a more far reaching effect than the limits currently placed on devolved legislatures under the rules governing the EU’s single market. He outlined that the reach of the Bill in devolved areas is further than EU retained law; that public policy exemptions to the market access principles contained in the Bill are more limited than those currently allowed under EU law and that there is not the same floor of standards in the Bill that is present via the high degree of legal harmonisations of standards in the EU’s single market.<sup>71</sup>

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<sup>69</sup> Professor Jo Hunt and Professor Dan Wincott, Wales Governance Centre, Cardiff University School of Law and Politics, The Constitutional Implications of the Internal Market Proposals, September 2020

<sup>70</sup> Department for Business, Energy and Industrial Strategy, UK Internal Market, July 2020, CP278

<sup>71</sup> LJC Committee, RoP [64-65], 21 September 2020

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## **Box: Examples of how the United Kingdom Internal Market Bill could impact on Senedd law-making**

### **Hormone-treated beef**

Public health and animal welfare are devolved in Wales. Therefore, the Senedd could legislate to ban, in Wales, the production and sale of beef treated with synthetic hormones, on the grounds of public health and animal welfare.

If another part of the United Kingdom allowed the sale of beef treated with synthetic hormones, then it could also be sold in Wales, despite the Welsh ban. This would have a detrimental effect on public health in Wales and animal welfare in general.

### **Single-use plastics**

The environment is devolved in Wales. Therefore, the Senedd could legislate to set high environmental standards by introducing a certification process for the sale of plastics in Wales, which would require sellers to demonstrate that plastics meet certain environmental standards. Single-use plastics would not meet the required standards.

If another part of the United Kingdom did not set such high environmental standards, then plastics that did not meet the Welsh standards (including single-use plastics) could be sold in Wales, because the non-discrimination principle would apply. This would lower environmental standards in Wales, the sea around Wales and beyond.

### **Landlords**

Housing is devolved in Wales. The Senedd has legislated to regulate private landlords in Wales, requiring landlords to be registered, in order to improve standards in the private rented sector.

If landlords in another part of the United Kingdom were not regulated and did not meet the standards required to be a landlord in Wales, they could still provide landlord services in Wales despite the Welsh legislation. This would mean that the Wales-designed solution to private renting would not always apply in Wales.

**41.** In her paper on the operation of the EU's internal market, Dr Kathryn Wright of York University highlights that in the EU's Single Market, harmonised standards apply to 70-75% of goods on the market.<sup>72</sup> This means that the principles of mutual recognition and non-discrimination only apply to goods totalling 25% of the market; this would not currently be the case in the UK. The paper also set out the breadth of public policy exemptions available in relation to the market access principles as enshrined in EU law.

**42.** In its report, the Scottish Parliament's Finance and Constitution Committee heard similar evidence and concluded:

"The evidence considered by the Committee suggests that the Bill will result in less regulatory autonomy for the devolved nations than currently exists. The main reason for this is that the market access principles in the Bill and especially the mutual recognition principles are more far reaching than the equivalent principles within the EU. This means that regulatory standards agreed by the UK Parliament could effectively be imposed on the devolved nations."<sup>73</sup>

**43.** In its report, the House of Lords Constitution Committee noted that:

"[...] the Bill takes power to override future devolved legislation. As such, it would limit the scope for the devolved administrations to pursue policy divergence, for example by restricting the "legitimate aims" for which such divergence has previously been permitted by the equivalent provisions of EU law."<sup>74</sup>

## Governance, oversight and dispute resolution

**44.** One area where the Counsel General said discussion with the UK Government had taken place was in relation to the OIM.<sup>75</sup> He agreed that there was value in an office such as the OIM but explained that amendment was needed to the Bill to ensure that the four Governments of the UK have equal

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<sup>72</sup> Dr Kathryn Wright, York University, EU Internal Market [Briefing](#), 28 August 2020

<sup>73</sup> Letter to the Cabinet Secretary for the Constitution, Europe and External Affairs and Chancellor of the Duchy of Lancaster to the Bruce Crawford MSP, Convener, Finance and Constitution Committee, Scottish Parliament, [UK Internal Market Bill and Legislative Consent Memorandum](#), 6 October 2020, paragraph 33

<sup>74</sup> HL Paper 151, paragraph 19

<sup>75</sup> LJC Committee, RoP [79], 21 September 2020

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access to its operations and that devolved governments have some element of control.<sup>76</sup> He further stated that the OIM should not be part of the CMA “because that is a non-ministerial department of the UK Government, and is politically accountable, through BEIS, to the Westminster Parliament.”<sup>77</sup> He stated that in order for this element of the Bill to be acceptable to the Welsh Government, “substantial reform” would be needed.<sup>78</sup>

**45.** We note that the Welsh Government’s proposed amendments to the Bill include amendments to the functioning of the OIM. We also note that the Bill was amended by the UK Government during its passage through the House of Commons to require that the devolved governments are consulted before making appointments to the OIM Panel and appointing the Chair of the OIM panel.

**46.** Whilst the Bill provides for the CMA to establish an OIM with an oversight provision it does not itself establish any new dispute resolution or adjudication mechanism for disputes related to the internal market. According to the Institute for Government “it is not clear how disputes around the functioning of the internal market will be managed”.<sup>79</sup>

**47.** The Bill’s Impact Assessment implies that the courts will play a role in enforcement.<sup>80</sup> The Counsel General told us:

“I do think that one will find oneself in a situation where the courts are called upon to adjudicate on very significant questions that touch on the devolution settlement, possibly quite frequently.”<sup>81</sup>

**48.** In its comments on the OIM, the House of Lords Constitution Committee stated:

“It may be that the governance arrangements for policing the internal market will be determined as part of the wider review of intergovernmental relations. However, if that is the UK Government’s

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<sup>76</sup> LJC Committee, RoP [79], 21 September 2020

<sup>77</sup> LJC Committee, RoP [79], 21 September 2020

<sup>78</sup> LJC Committee, RoP [79], 21 September 2020

<sup>79</sup> Institute for Government, [UK Internal Market Bill](#), October 2020

<sup>80</sup> Department for Business, Energy and Industrial Strategy, UK Internal Market Bill Impact Assessment, September 2020, page 29

<sup>81</sup> LJC Committee, RoP [14], 21 September 2020

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intention, it leaves a significant gap in the operation of the United Kingdom Internal Market Bill that must be addressed.

The Government should explain why the Competition and Markets Authority is the right body to have oversight of the monitoring of the UK internal market and why an Office of the Internal Market could not have been established independently, under the joint control of the UK Government and the devolved administrations.

The Government should seek to make the Office of the Internal Market more clearly accountable to the different legislatures in the UK.”<sup>82</sup>

**49.** More broadly, the House of Lords Constitution Committee felt the UK Government should “explain why a joint decision-making process for adjusting the proposed internal market arrangements was not included in the Bill”;<sup>83</sup> that there was a need for “better Joint Ministerial Committee structures and processes”<sup>84</sup> and recommended that the Bill not be commenced “before the conclusion of the intergovernmental relations review and publication of the Dunlop review.”<sup>85</sup>

## Common Frameworks as an alternative

**50.** On the specific issue of why the Bill undermined the governments’ work on common frameworks, the Counsel General elaborated on why the Bill was problematic. He said:

“The problem with introducing the principle of mutual recognition in the way that this Bill does is that it bluntly removes the incentive from the UK Government to engage in the common frameworks mechanism, because you’ve already got an overriding principle that renders that unnecessary, in a sense ... So, I think the Bill starts from the wrong perspective, really. That’s why, if you have a common

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<sup>82</sup> HL Paper 151, paragraphs 34-36

<sup>83</sup> HL Paper 151, paragraph 31

<sup>84</sup> HL Paper 151, paragraph 69

<sup>85</sup> HL Paper 151, paragraph 71. The intergovernmental relations review is referred to in a [Joint Ministerial Committee communiqué](#) of 14 March 2018 and [The Dunlop Review into UK Government Union capability](#) was announced on 4 July 2019

frameworks mechanism, that provides both the certainty required and the devolution assurance required.”<sup>86</sup>

**51.** He added that:

“The common frameworks start at the moment from a shared place ... and I think there’s a possibility of operating them in a kind of progressive way, as they’re being scrutinised and finalised. I think that would provide an alternative, then, to the Bill as it’s currently drafted.”<sup>87</sup>

**52.** As indicated above, the EU single market is largely governed by harmonised minimum standards. However, this approach is not replicated in the Bill. Given this fact, we asked the Counsel General whether the approach the Bill adopts would inevitably lead to “a race to the bottom”. In responding, the Counsel General said:

“Indeed, and that’s where the common framework is the solution to this, because that provides the mechanism for an agreed set of standards or agreed range, if you like, within which countries can vary and diverge. That’s why that’s such a powerful part of the answer to this, I think.”<sup>88</sup>

**53.** The UK governance machinery that currently exists to resolve disputes does not meet the standard we expect from a dispute resolution process. In seeking to compare the use of common frameworks with the Bill and this existing dispute resolution process, we asked the Counsel General how much confidence he had that the provisions in the Bill (once enacted) will operate fairly across the UK, rather than being geared towards one part of the UK. He replied by acknowledging the existing conflict saying “it is obviously not right to pass legislation that enhances that conflict and [...] that is a risk in this Bill.”<sup>89</sup> The Counsel General illustrated this point by noting the addition of state aid to the list of reservations in Schedule 7A to the *Government of Wales Act 2006*, saying:

“The UK Government, on behalf of England, is responsible for economic development in England and obviously must prioritise the interests of England in relation to economic development in that sense. So, to have

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<sup>86</sup> LJC Committee, RoP [102], 21 September 2020

<sup>87</sup> LJC Committee, RoP [104], 21 September 2020

<sup>88</sup> LJC Committee, RoP [67-68], 21 September 2020

<sup>89</sup> LJC Committee, RoP [43], 21 September 2020



on top of that UK-wide powers in relation to state aid, I think, puts into very stark relief the conflict that arises because of our current arrangements.”<sup>90</sup>

**54.** In its assessment of the relationship between the Bill and common frameworks, the House of Lords Constitution Committee made the following points:

“We consider that adhering to the principles agreed for formulating common frameworks would improve the likelihood of reaching agreement on how to progress the Bill. We are not convinced that opportunities for managing the UK internal market through the common frameworks process have been exhausted. This contributes to our doubts about the necessity for the Bill.

[...]

The Government should explain why the Bill does not mention common frameworks and how it expects the arrangements for the UK internal market will relate to the common frameworks.

The Government has failed to explain why a combination of retained EU law, its existing powers to amend that law, and common frameworks could not provide the certainty required at the end of the transition period to secure an effective UK internal market. Such an approach would obviate the need for the Bill.”<sup>91</sup>

## Breach of international law and the rule of law

**55.** The Counsel General said that the Bill's provisions regarding the Northern Ireland Protocol in Part 5 of the Bill were “utterly repugnant”.<sup>92</sup> He said:

“Anyone who believes in the importance of the rule of law, and the importance of abiding to legal agreements you have freely entered into, even if for the simple expedient of ensuring that other parties in future will be willing to make agreements with you, will be appalled

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<sup>90</sup> LJC Committee, RoP [43], 21 September 2020

<sup>91</sup> HL Paper 151, paragraphs 57 and 61-62

<sup>92</sup> RoP, [364], 15 September 2020

that a Government could propose ministerial powers that so directly flout both domestic law and international agreements.”<sup>93</sup>

**56.** When questioned on Part 5 of the Bill, the Counsel General told us that:

“It is inconceivable that the [Welsh] Government would recommend to the Senedd a piece of legislation that breaches international law, Chair. There’s no question of that.”<sup>94</sup>

**57.** We also questioned the Counsel General about the implications arising from the Bill of the Welsh Ministers being placed in a position where they would have no choice but to breach their own Ministerial Code and whether this was a cause for concern. He said:

“Yes, and I can’t imagine that Welsh Ministers would act in that way in the future, for reasons that we would all understand [...] There’s certainly, within the architecture of the Bill, a concern around this [...] There are two clauses, substantively, in this area that trigger, if you like, this concern. One is around exit procedures for goods moving from Northern Ireland directly to Great Britain—we as a Government here would not have a role to play in that space—and the second is in relation to state aid, which I suppose might be one in which there is a broader set of concerns.”<sup>95</sup>

**58.** Committees in the House of Lords also expressed concern with Part 5 of the Bill.

**59.** The House of Lords Constitution Committee stated that:

“We do not doubt that Parliament has the legal authority to enact violations of the UK’s international legal obligations. However, it does not follow that such action is consistent with the rule of law. Clauses 44, 45 and 47 explicitly authorise ministers to breach the UK’s obligations in international law and attempt to place significant limits on judicial review of certain regulations made under it. Those clauses represent a disregard for the rule of law.”<sup>96</sup>

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<sup>93</sup> RoP, [364], 15 September 2020

<sup>94</sup> LJC Committee, RoP [35], 2 November 2020

<sup>95</sup> LJC Committee, RoP [54-55], 2 November 2020

<sup>96</sup> HL Paper 151, paragraph 229

**60.** The House of Lords European Committee noted that, until the UK Government formally retracts the Secretary of State for Northern Ireland's statement of 8 September 2020 that the Bill "break[s] international law in a very specific and limited way" and "puts forward a coherent and consistent argument to support the lawfulness of the Bill, it is difficult to avoid the conclusion that Part 5 of the Bill does indeed contravene international law".<sup>97</sup> It also considered that, through its actions, the UK Government "has damaged the United Kingdom's international reputation as a defender of the rule of law."<sup>98</sup>

**61.** The House of Lords Delegated Powers and Regulatory Reform Committee suggested that clauses 42 and 43 of the Bill involve an inappropriate delegation of power in allowing Ministers to disregard any contrary provision of international or domestic law.<sup>99</sup>

### The use of delegated powers in the Bill

**62.** In its report on the Bill, the House of Lords Delegated Powers and Regulatory Reform Committee described some of the delegated powers being taken by Ministers of the Crown as "extraordinary" while also stating that "others are unprecedented".<sup>100</sup> The House of Lords Constitution Committee agreed with these views and also called many of the delegated powers in the Bill "constitutionally unacceptable".<sup>101</sup>

**63.** The House of Lords Constitution Committee also stated:

"In the context of devolution, it is troubling that substantive changes to the UK internal market scheme could be affected by delegated powers, which are subject to relatively limited parliamentary scrutiny and do not require the consent of the devolved legislatures. As the operation of the devolution arrangements and the respective power of the devolved institutions are constitutional matters, we would expect to see them amended by primary rather than secondary legislation—or by using a statutory procedure that requires the consent of the devolved legislatures. It would also reassure the devolved administrations if changes to the internal market arrangements were

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<sup>97</sup> HL Paper 147, paragraphs 96-97

<sup>98</sup> HL Paper 147, paragraph 106

<sup>99</sup> HL Paper 130, paragraph 38

<sup>100</sup> HL Paper 130, paragraph 2

<sup>101</sup> HL Paper 151, paragraph 126

subject to the parliamentary scrutiny brought to bear on primary legislation, which allows for amendments to be considered, and over a period of time which permits their views to be heard.”<sup>102</sup>

## Financial Assistance Powers

**64.** Professor Jo Hunt and Professor Dan Wincott concluded that there is little that appears to connect the broad financial provisions provided by Part 6 of the Bill to the operation of the UK Internal Market and Parts 1 to 4 of the Bill:

“The UK Internal Market Bill proposes new financial powers for the UK Government. There does not seem to be any close mechanical relationship between these new powers and the basic operation of the proposed Internal Market. Some discussion around the Bill suggests that these powers are seen as replacing EU funding streams. The UK Government has long promised a discussion of a replacement for those funds in the form of a so-called ‘Shared Prosperity Fund’. It is not clear whether the financial powers in the Bill replace that strategy, implement it or are entirely separate from it.”<sup>103</sup>

**65.** This broad point was reiterated by the Counsel General who said that there are “parts of the Bill that aren’t obviously linked to the internal market”, saying these related to the “financial assistance provisions and the later parts of the Bill”.<sup>104</sup>

**66.** Minister of State, Chloe Smith MP confirmed during a House of Commons committee stage debate on the Bill that “devolved Administrations will continue to receive funding through the block grant and the Barnett formula, where appropriate”.<sup>105</sup> However, the Welsh Government’s LCM on the Bill stated there was “no detail or commitment within the provisions of the Bill which would provide a legal basis” for the assurance that the “financial assistance powers [...] would be in addition to the funding currently received via the block grant”.<sup>106</sup> When asked if the Welsh Government has received any further information on the

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<sup>102</sup> HL Paper 151, paragraph 25

<sup>103</sup> Professor Jo Hunt and Professor Dan Wincott, Wales Governance Centre, Cardiff University School of Law and Politics, The Constitutional Implications of the Internal Market Proposals, September 2020

<sup>104</sup> LJC Committee, RoP [7], 21 September 2020

<sup>105</sup> House of Commons Debate, 16 September 2020, col 438

<sup>106</sup> LCM, paragraph 83

UK Government's intent in terms of using the financial assistance powers, the Counsel General replied:

"The brief answer to that question is 'no'. I have raised the issue myself more than once with Ministers. I've not received a response. We've been given no assurances on the impact of this element on the block grant. There is nothing on the face of the Bill that gives any assurances to us that there is a constructive way of using these powers."<sup>107</sup>

**67.** The House of Lords Constitution Committee said that the UK Government should explain why the Bill includes "a broad power for the UK Government to spend money in devolved territories" (which could apply more widely than to the internal market) and "how any such spending would affect block grant funding."<sup>108</sup>

**68.** Clause 48 of the Bill (currently clause 50) will reserve subsidy control to the UK Parliament. The issue of state-aid has been a disputed area within the common frameworks programme. The Welsh Government has objected to the inclusion of this clause in the Bill and has previously argued that subsidy control is devolved as it is not a reserved matter under any heading of the Reserved Matters Schedule in the *Government of Wales Act 2006*.<sup>109</sup>

**69.** The Counsel General acknowledged that there may be a need for UK-wide legislation to manage any subsidy regime that exists within the UK.<sup>110</sup> He went on to say:

"I think it is in the interests of the UK and all its constituent parts to have a consistent state aid regime that applies in all parts of the United Kingdom; [...] But it needs to be co-designed by the four Governments, and not imposed by one. We, ourselves, would have been very happy simply to retain the EU law provisions in relation to this, but even if that isn't the starting point, it needs to be co-designed by the four Governments. On the events of the last few days, what this demonstrates is that our current constitutional arrangements, designed as they are, inevitably put the UK Government in a position of conflict of interest in certain areas. It is the Government that is responsible for

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<sup>107</sup> LJC Committee, RoP [61-62], 2 November 2020

<sup>108</sup> HL Paper 151, paragraphs 39 and 43

<sup>109</sup> Welsh Government Written Statement, [The State Aid \(EU Exit\) Regulations 2019](#), 25 January 2019

<sup>110</sup> LJC Committee, RoP [71], 2 November 2020

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economic development in England. So, it is not consistent with that to also be the regulator, if you like, of a UK-wide subsidy regime. There needs to be a set of arrangements, co-designed and applied in parity across all four parts of the UK, recognising that each of the four Governments have their own responsibilities to their own territories for economic development.”<sup>111</sup>

**70.** The Scottish Parliament's Finance and Constitution Committee said that the UK Government should involve and secure the support of the devolved administrations in devising the future UK subsidy control or subsidy control framework.<sup>112</sup>

## Application of the Sewel Convention

**71.** We are aware of comments made by UK Government Ministers which suggest that the UK Government may override any decisions of the devolved legislatures not to provide consent to the Bill.<sup>113</sup> In light of these comments, we asked the Counsel General about the implications for the Sewel convention. In responding, the Counsel General made the following comments:

“When we were looking at the UK Government proceeding without the consent of the three devolved Parliaments earlier in the year, it was made pretty clear, I felt, in correspondence both by Stephen Barclay and by Michael Gove—from memory—that the circumstances were exceptional and there were various other formulations that, bluntly, set the bar very high. Now, you could regard that, as I did at the time, as a positive in the sense of narrowing the scope for the UK Parliament proceeding in the absence of consent, which I'm sure we would all regard as the point of the Sewel convention. That set of circumstances does not apply in this legislation, and I think the UK Government would

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<sup>111</sup> LJC Committee, RoP [72], 2 November 2020

<sup>112</sup> Letter to the Cabinet Secretary for the Constitution, Europe and External Affairs and Chancellor of the Duchy of Lancaster to the Bruce Crawford MSP, Convener, Finance and Constitution Committee, Scottish Parliament, UK Internal Market Bill and Legislative Consent Memorandum, 6 October 2020, paragraph 123

<sup>113</sup> Official Report, Finance and Constitution Committee, 29 September 2020, col 13; House of Lords Debate, 28 October 2020, col 304

struggle to justify proceeding in the absence of consent from the devolved Parliaments.”<sup>114</sup>

## Rationale for Welsh Government proposals to amend the Bill

**72.** In light of the proposals for amendments put forward by the Welsh Government (see paragraph 17 above), we sought to ascertain further clarity regarding its approach to the Bill. This was because of the Welsh Government's opposition to the Bill and its suggested alternative approach to use common frameworks. The Counsel General told us:

“Well, our overall strategy as a Government has been to amend the Bill to make it one that is capable of being consented, but I'm not myself optimistic we'll see sufficient change of direction on the part of the UK Government as would be necessary. We're now obviously seeking to get the Bill amended in the House of Lords and, in parallel with that, having official-level discussions and ministerial-level discussions as well [...] what we've done is to publish our own model amendments and use those to seek to persuade peers to lay parallel amendments to those, effectively, and all of our model amendments, I think, apart from one, which was slightly changed, have been tabled in the form that we were hoping they would. [...] Both the Second Reading on the nineteenth of last month and the two days of committee have shown, I think, that our concerns about the Bill are very widely shared.

[...] But, basically, our overall position, Chair, hasn't changed: the Bill isn't needed and it'll have a significant impact on devolution in the UK.”<sup>115</sup>

**73.** When questioned further on this approach, he said:

“Just to be clear, we do oppose the Bill. We're saying that it's unnecessary, and we believe in and support the principle of a strong internal market across the UK that would safeguard the interests of the people of Wales and Welsh business, but this isn't the way to ensure we achieve that. But the political and legislative fact of the matter is that the UK Government has brought the Bill before the Parliament in Westminster. That has happened, and so the question for us as a Government is how we respond to that. There's no point pretending it

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<sup>114</sup> LJC Committee, RoP [77], 2 November 2020

<sup>115</sup> LJC Committee, RoP [5-6], 2 November 2020

hasn't happened. So, we have two choices. One is to engage and to try and amend the Bill, although we don't believe it's necessary, and the second approach is to not do that. The Scottish Government is in a similar position, although they don't agree with the principle of the Bill. We need to ensure that we can achieve amendments to the Bill, if possible, because, if it is enacted, we need to reduce the negative impact of the Bill, and the Act as it will be at that point."<sup>116</sup>

**74.** In terms of the model amendments put forward, the Counsel General said that they reflect the position that common frameworks should be used as the way to pursue a UK internal market.<sup>117</sup> He explained that:

"[...] our approach in the amendments is to create time and space, if you like, for the common frameworks programme to bear fruit. We think that is the way for delivering an internal market. So, our amendments effectively switch off the broad application of market access principles, and so in order for them to be introduced, they would effectively be introduced by exception in the final analysis, if the common frameworks haven't worked, essentially—haven't been able to secure an agreed outcome between the four Governments."<sup>118</sup>

**75.** The Counsel General said that this approach was a comparable arrangement to the provisions the Welsh Government agreed in the inter-governmental agreement relating to section 12 of the *European Union (Withdrawal) Act 2018*.<sup>119</sup>

**76.** He also explained that the Welsh Government's suggested amendments to the OIM provisions in the Bill "essentially match the kind of changes that we want to see".<sup>120</sup>

**77.** We asked the Counsel General about the role intergovernmental agreements might in play in seeking to alleviate the Welsh Government's concerns with the Bill. He said:

"[...] one level of common frameworks are inter-governmental agreements, aren't they, so we obviously accept that that is available as

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<sup>116</sup> LJC Committee, RoP [25], 2 November 2020

<sup>117</sup> LJC Committee, RoP [31], 2 November 2020

<sup>118</sup> LJC Committee, RoP [29], 2 November 2020

<sup>119</sup> LJC Committee, RoP [30], 2 November 2020

<sup>120</sup> LJC Committee, RoP [29], 2 November 2020



part of the overall picture for the common market here. Clearly, in terms of how one deals with the legislation itself, the First Minister has said previously, obviously, that it's not our preferred approach, but in a kind of mixed ecology, if you like, then you might see the common frameworks coming into play in that sense. But I think anything broader than that, particularly in some of the challenges that I've already described to you ... I don't think we are anywhere near the kind of place where an inter-governmental agreement could sensibly be the solution to those. So, I suppose our stance on that would be that there is some scope, I suppose, with an inter-governmental agreement, to solve some of these things, but we are quite some way away from where that would need to be for that to be a live discussion."<sup>121</sup>

**78.** He added:

"Well, conceptually, our starting point is, since we want to put the emphasis on common frameworks, that inter-governmental relations and inter-governmental agreements ought to be driving it, and that's in a macro sense, if you like. But in terms of [...] how you correct things in the Bill that would not be satisfactory, I just think it's too early to tell, really. Clearly, there are some objections to the Bill that clearly aren't capable of being dealt with by inter-governmental agreements because they change the devolution settlement that provides powers for the UK Government in devolved areas, so obviously those are just unacceptable. But whether there are, at the margins, errors that inter-governmental arrangements might help ameliorate, I think it's obviously too early to tell at this point. The Bill is having a really tough time in Parliament, so I think we need to see what it looks like when it comes out the other end."<sup>122</sup>

## Our view

### The absence of a draft Bill

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**79.** In our letter to the UK Government on 7 August 2020, in response to its White Paper, we identified the potential for any subsequent Bill to have profound constitutional implications for the UK. In the event of such a Bill being proposed,

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<sup>121</sup> LJC Committee, RoP [106], 21 September 2020

<sup>122</sup> LJC Committee, RoP [43], 2 November 2020,

we advocated the need for it to be published in draft and subject to widespread consultation. That this did not happen is regrettable and in our view unacceptable.

### The need for the Bill

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**80.** In our letter of 7 August 2020, and related to this point, we also indicated our belief that the UK Government should not have been introducing such a significant Bill at the end of the process of leaving the European Union. This point is accentuated by the constructive and collaborative work that has been undertaken and is ongoing in relation to common frameworks. As we said in our statement issued on 24 September 2020 following the publication of the Bill:

“We recognise and endorse the need for a UK internal market after leaving the EU. On that basis we support the approach being taken to establish common frameworks, which appeared to be progressing, albeit slowly, on the basis of a welcome UK-wide shared governance.

The introduction of the UK Government's Internal Market Bill breaches the principles agreed in October 2017 for establishing common frameworks to accommodate a UK internal market. Furthermore, it appears to have been developed in isolation from other governments, undermining not only the development of those common frameworks but also the trust and goodwill needed to ensure effective governance in the UK.

[...]

Moreover, the legislation appears rushed, poorly thought-through and heavyhanded, particularly against the backdrop of progress being made on common frameworks. These frameworks are a way of delivering the same overarching benefits without necessitating a Bill that erodes trust and could have long-lasting unintended consequences. There was therefore no urgency for such a Bill and it would have been better to use the opportunities provided by discussions on frameworks to draft a Bill built on consensus and co-operation.”

**81.** We re-iterate these views and believe that, at least initially, it would have been more appropriate to have followed the common frameworks route.

**82.** We also note that any concerns the UK Government may have about compliance with international obligations at devolved level can already be

adequately addressed by existing provisions in the *Government of Wales Act 2006*, the *Scotland Act 1998* and the *Northern Ireland Act 1998*. In other words, there is no need to impose upon the devolved legislatures and governments a constitutionally embedded internal market in order to ensure that international obligations are complied with at the devolved level.

**83.** We regret the speed at which the Bill has been presented and, to the extent that legislation may be required to underpin the internal market, we are unconvinced of the UK Government's argument that it needs to be in place by the end of the transition period. Moreover, without agreement from the devolved governments on its main principles, any primary legislation regulating the internal market would risk damaging the current constitutional settlement.

#### Provisions on market access relating to goods and services

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**84.** The Bill's character as a constitutional statute is clear from its impact on the devolution settlement and its status as a protected enactment. As the UK Government's original Explanatory Notes stated:

“...the Bill's provisions create a new limit on the effect of legislation made in exercise of devolved legislative or executive competence.”

**85.** We foresee that the effect of such limits would be profound.

**86.** Under the Bill, much existing Welsh law would not fall under the internal market regime. However, this is of little comfort as any “substantive change” to statutory requirements concerning goods and services under such laws negates this exclusion and protection. As drafted, it strikes us that the Bill introduces a perverse incentive for the Welsh Government and Senedd to avoid innovation in policy and law making. Any attempt to update, refine or otherwise amend standards or regulations existing when the Bill is passed would risk bringing such standards within the internal market regime. This will have consequences as it could lead to primary legislation that has already been passed by the Senedd in relation to goods and services being disapplied in Wales to the extent that the standards applied to those goods and services do not comply with the requirements of the Bill. This also has substantial implications for the Welsh Government's legislative consolidation and codification programme. The risk is further compounded by the fact that “substantive change” is undefined in the Bill. In our view this makes any amendments to existing statutory requirements vulnerable to litigation.

**87.** In addition to the consequences identified relating to amending existing laws, the Bill will also have an impact when the Senedd proposes to legislate for new laws in new policy areas.

**88.** It is clear to us that the Bill would frustrate the Welsh Government's ability to determine easily whether it is practical to legislate and greatly impact the Senedd's capability to make coherent and accessible laws that meet the needs and aspirations of Welsh citizens.

**89.** The same argument applies to backbench Members seeking to introduce their own legislative proposals, either through tabling amendments to Bills that have been introduced in the Senedd or through winning the ballot for a Member Bill under Standing Order 26.87.

**90.** Parts 1 to 3 of the Bill do not amend Schedules 7A or 7B to the *Government of Wales Act 2006*, which define the Senedd's legislative competence. However, it seems fundamentally flawed to us that the Senedd will effectively be dissuaded from passing laws within that legislative competence by virtue of the Bill, even when those new laws are designed to meet the specific needs of Wales and its citizens. This therefore adds an unnecessary barrier to the Senedd's ability to make its own laws.

**91.** This is important because while constitutional issues are often perceived as dry and of limited interest, they do have a direct impact on the daily lives of citizens. In the case of this Bill, it adds an unnecessary and uncalled for layer of complexity for consumers and businesses.

**92.** Consumers must be able to determine what standards apply to the products and services they buy. Under the Bill, it is unclear how consumers will be told when buying products and services which standards apply to those products and services. As for businesses, they must be able to understand what they are allowed to sell and where, but the Bill introduces complicated rules as to when the principles of mutual recognition and non-discrimination apply and when they do not.

**93.** In reaching these views, we also agree with the Counsel General and the Scottish Parliament's Finance and Constitution Committee that the scope of the provisions in the Bill go beyond the restrictions currently in place on devolved legislatures under the rules governing the EU's single market. As such, the Bill represents a new restriction on the ability of devolved legislatures to effectively implement new laws in areas of devolved competence.

**94.** With regard to the delegated powers in Parts 1 and 2 of the Bill, they give the Secretary of State power to:

- change the scope of the mutual recognition principle,
- change the scope of non-discrimination principle,
- decide which goods and services are captured by the Bill,
- change the scope of the legitimate aims under which certain non-discrimination principles do not apply.

**95.** In two instances, there is a duty on the Secretary of State to consult the devolved governments. This is an extremely weak duty, with no guarantees whatsoever that the Secretary of State will take notice of what the devolved governments say.

**96.** This is further evidence of the recentralising of control at the United Kingdom level. While regulations made by the Secretary of State under Parts 1 and 2 are subject to the affirmative resolution procedure (or the made affirmative procedure) in the UK Parliament, this does not provide us with the reassurance that the voice of Wales will be heard when these powers are used by the Secretary of State.

**97.** Further, the potential for such regulations to be approved by the UK Parliament despite opposition from Wales, Scotland or Northern Ireland, reinforces our belief that reaching agreement on such fundamental matters is essential for the integrity of the constitution and accordingly the stability of the UK.

**98.** For all these reasons we consider that the Bill presents a risk to devolution.

**99.** We therefore re-iterate these points made in our statement of 24 September 2020:

“The mutual recognition principle for goods and services contained in the Bill would make it impossible for the Welsh Government to propose effective legislation to address specific policy issues in Wales, for example in the field of housing and public health - the very essence of devolution. In some cases, the use of available powers could be rendered redundant.

[...]

At its core, the Bill appears to be an attempt to recentralise control in Westminster. As currently drafted, and contrary to the UK Government's narrative, there are no provisions in the Bill which give new powers to the Senedd – in fact it does the opposite, by expressly including new areas (e.g. subsidy control) as being outside the Senedd's powers. The Bill also gives the UK Government power to provide financial assistance in any part of the UK, to further UK Government priorities, rather than devolved priorities.”

## The rule of law

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**100.** We share the widespread concerns that have been expressed at the inclusion of Part 5 in the Bill and agree with the view of the Counsel General that its provisions are repugnant.

**101.** That a legislature should be asked to approve executive powers that can be used to breach international law is deeply concerning, especially when there is no justification for seeking such powers. That the powers are also intended to be immune from review by the courts is a threat to the rule of law. We consider that it would be unacceptable for any legislature to give its approval to such powers.

**102.** With regard to delegated powers given to the Secretary of State in Part 5 of the Bill relating to the Northern Ireland Protocol, we share the views of the Delegated Powers and Regulatory Reform Committee that they are unprecedented. Moreover, they appear to have been included in the Bill without any consideration as to how their use might impact upon the devolved legislatures and governments, each of which is required by statute to comply with international obligations.

**103.** We therefore welcome the decision of the House of Lords to remove Part 5 of the Bill.<sup>123</sup> Any decision to re-insert Part 5 would be a retrograde step and damage the global standing of the UK at a time when it is seeking to establish a new international role following its decision to leave the EU.

## Financial assistance powers

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**104.** We are also concerned at the inclusion of Part 6 in the Bill. There is no logical connection between the financial assistance powers and the operation of the internal market. Furthermore, the powers are exceptionally broad and the UK

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<sup>123</sup> House of Lords, Committee of the Whole House, 9 November 2020, cols 928-936

Government does not appear to have expressed a clear view about how it intends to use them. In our view, they represent a further unnecessary and confusing intrusion on the ability of the elected Senedd and the Welsh Government to act on behalf of citizens.

## Conclusions

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**105.** As the Bill makes provision in devolved areas, it engages the Sewel Convention, a point recognised by the UK Government. It was for that reason that we sought the views of the Secretary of State for Wales to ascertain how the convention would be applied in light of the Senedd's experience with the EU (Withdrawal Agreement) Bill, where legislative consent was denied but the UK Government and UK Parliament disregarded that decision because the circumstances were deemed "not normal". We are disappointed that the Secretary of State for Wales did not directly address the questions we raised.

**106.** If the Senedd decides to withhold legislative consent, that decision should be respected and the Bill should not proceed in its current form. We do not believe that the "not normal" exception to the Sewel convention applies to the Bill. This is because of our view that a UK-wide internal market, at least initially, can be better regulated through common frameworks (and existing powers), using the principles agreed in the JMC communique of October 2017. For that reason, we also do not believe that the circumstances of the Bill are "specific, singular and exceptional", the criteria applied by the UK Government in respect of its decision to set aside the decisions of the devolved legislatures not to consent to the EU (Withdrawal Agreement) Bill.<sup>124</sup>

**107.** Chapter 13 of our *Report on the UK Government's Wales Bill* stated that the process by which the Wales Bill had been conceived, developed and subjected to scrutiny had been flawed. It called for future changes related to constitutional matters to be based around better engagement and the building of consensus.<sup>125</sup> Our report *UK governance post-Brexit* also made the case for better inter-governmental relations.<sup>126</sup> The outcomes of the review of intergovernmental relations by the UK Government and the Dunlop review have yet to be published.

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<sup>124</sup> [Letter from Rt Hon Steve Barclay MP, Secretary of State for Exiting the European Union to Jeremy Miles MS, Counsel General](#), 14 January 2020

<sup>125</sup> Constitution and Legislative Affairs Committee, [Report on the UK Government's Wales Bill](#), October 2016, Chapter 13 Future constitutional change

<sup>126</sup> Constitution and Legislative Affairs Committee, [UK governance post-Brexit](#), February 2018

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**108.** Against this backdrop it is yet again disappointing and regrettable that a Bill with such profound implications for devolution has been developed in isolation from devolved governments. It is even more troubling that such a Bill has been developed at a time when the four governments appear to have been working collaboratively on common frameworks in line with a set of established principles and processes. As we acknowledge and indicate in a recent report,<sup>127</sup> while the delivery of such arrangements may require improvement, they do represent a positive step in the right direction.

**109.** The approach adopted by the UK Government in relation to the Bill runs the risk of creating unnecessary tension and distrust, at a time when a more collaborative and consensual approach would have been the better more effective option. Working by consensus and building trust to find common ground will invariably represent a better way of achieving solutions that deliver for all our citizens.

**110.** On 12 November 2020, together with the External Affairs and Additional Legislation Committee and Finance Committee, we wrote to UK Parliamentary Committees outlining our concerns with the Bill.<sup>128</sup>

**111.** It has not been our usual practice as a Committee to make a recommendation as to whether the Senedd should give its consent to provisions in UK Bills that are identified in legislative consent memoranda. However, in this instance we break with this general precedent as we consider that the Bill would have a profound effect on the devolution settlement and therefore, in our view, the Senedd should not give its consent to the Bill in its current form.

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<sup>127</sup> Legislation, Justice and Constitution Committee, [Common Framework Report: The Greenhouse Gas Emissions Trading Scheme Order 2020 as part of the UK Emissions Trading Scheme](#), October 2020

<sup>128</sup> Letter from the Chairs of the Legislation, Justice and Constitution Committee, the External Affairs and Additional Legislation Committee and the Finance Committee to UK Parliamentary Committees, [United Kingdom Internal Market Bill](#), 12 November 2020

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