

Internal Market White Paper

Research Briefing

October 2020



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Paper overview:

On 16 July the UK Government published its White Paper on the UK internal market, setting out proposals to enshrine a new Market Access Commitment in law at the end of the transition period in December 2020. The paper considers the UK Government's rationale, outlines the key elements of the proposals, and considers some of the issues arising from the White Paper and economic modelling used to underpin it. It also sets out initial stakeholder reactions to the White Paper.



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1. Introduction

The UK Government laid the **United Kingdom Internal Market Bill (284KB)** on 9 September. This followed a **four week consultation** on the internal market aspects of the Bill between July and August 2020.

The Bill has passed through the House of Commons and has begun its passage through the Lords. The UK Government has outlined its view that the Bill's provisions need to be in force by the time the EU transition period comes to an end on 31 December 2020.

The Bill includes provisions:

- that set new rules on how legislatures and governments in the UK can legislate to regulate goods and services in future;
- provisions on the regulation of professional qualifications in the UK;
- provisions on the implementation of the Northern Ireland-Ireland protocol;
- provisions to give UK Ministers new spending powers in devolved areas;
- and provisions to reserve powers related to subsidy control.

The UK Government has stated that all seven Parts of the Bill require the legislative consent of the devolved legislatures.

The Bill has proved controversial. The UK Government has stated that the internal market provisions in the Bill are needed to manage divergence in the UK post-Brexit but the devolved governments **have called** these provisions a 'power grab'. The UK Government has said that the powers in relation to the Northern Ireland-Ireland Protocol are needed as a backstop should negotiations and talks with the EU fail even though they breach international law. The EU institutions **have reacted strongly** to the Bill and said it could threaten an agreement on a future relationship. Following opposition to some of the Protocol provisions in the Bill, the UK Government has already agreed an amendment with its backbench members.

This briefing summarises the main provisions in each part of the Bill, considers some of the main issues that have arisen in relation to each part, considers how the provisions of the Bill might affect Wales and the Senedd and provides hypothetical examples of how the Bill's provisions might work in practice. A summary of reactions to the Bill is also included.

This is an updated version of this paper which reflects amendments made during the Bill's passage through the House of Commons.

2. UK Market Access: Goods

Part 1 of the Bill establishes UK internal market principles for goods. The principles are:

- the mutual recognition principle for goods,
- the non-discrimination principle for goods.

2.1. Mutual Recognition Principle for Goods

The **mutual recognition principle** for goods is set out in clause 2. The principle means that goods made, or imported into, one part of the United Kingdom that **comply** with relevant legislative requirements in **that part** of the United Kingdom, can be sold in the **other** parts of the United Kingdom, **without having to comply** with any relevant legislative requirements in those other parts.

In addition, if **one** part of the United Kingdom has **no** relevant legislative requirements that apply to the goods produced or imported there (i.e. they are unregulated) then the goods can still be sold in the **other** parts of the United Kingdom, **without having to comply** with any relevant legislative requirements that apply to the goods in those other parts of the United Kingdom.

The relevant legislative requirements are called "**relevant requirements**" in the Bill. Clause 3 defines "relevant requirements" as any legislation which prohibits the sale of goods by reference to:

- a) the characteristics of the goods (such as their composition, age or quality);
- b) the presentation of the goods (such as packaging or labelling);
- c) the production of the goods (such as the place where they were produced, including the rearing, keeping or slaughtering of animals);
- d) the identification or tracing of an animal (such as tagging or micro-chipping);
- e) the inspection, assessment, registration, certification, approval or authorisation of the goods;
- f) the documentation or information that must be kept or must accompany the goods;

g) anything else which must, or must not be done, in relation to the goods before they can be sold.

Clause 3(4) – 3(6) provides that any ‘manner of sale requirement’ which is a statutory requirement relating to matters such as manner in which goods are sold, where they are sold, to who and their price are excluded from the mutual recognition principle, unless they are ‘designed artificially’ to avoid the operation of the mutual recognition principle.

The inclusion of “price” as a manner of sale requirement means that the sale of goods by reference to price (such as minimum unit pricing legislation) should be outside the scope of the mutual recognition principle. Therefore, the minimum alcohol pricing example has been removed from this updated briefing.

Hypothetical example 1: **Genetically Modified Crops**

Legislation in England allows the sale of food made using genetically modified crops, provided the food has been certified.

Legislation in Wales prohibits the sale of food made using genetically modified crops.

Could a manufacturer based in England sell food made using genetically modified crops in Wales, provided it has been certified? Let’s consider the following example:

- The food is made in one part of the United Kingdom (England).
- The food can lawfully be sold in England because it complies with the relevant requirement that it has been certified.
- The prohibition on the sale of the food in Wales does not apply to the food. The mutual recognition principle applies and the food can be sold in Wales.

What if the Welsh Government was able to prove that the food was unsafe and poses a serious threat to the health of humans? If so, it could be excluded from the mutual recognition principle by virtue of Schedule 1 to the Bill – but Schedule 1 sets out several conditions that must be met before such an exclusion would apply.

Clause 4 excludes certain things from the mutual recognition principle. If, the day before clause 4 comes into force, **one** part of the United Kingdom has a relevant requirement that is not replicated in **each** of the other three parts of the United Kingdom (i.e. the relevant requirement is something unique to one part of the United Kingdom), then the mutual recognition principle will not apply. However,

if the unique requirement is subsequently **changed substantively**, the mutual recognition principle will apply.

Hypothetical example 2: **Content of soft drink**

Legislation in Scotland prohibits more than 0.5 gm of sugar from being included in a bottle of soft drink. The legislation is in force the day before clause 4 comes into force.

The sugar content of the bottle of soft drink in England, Wales and Northern Ireland is unregulated.

Could soft drink manufactured abroad be imported into England and sold in Scotland despite its sugar content being higher than 0.5gm?

- The soft drink has been imported into one part of the United Kingdom (England)
- The soft drink can be sold lawfully in England because there are no relevant requirements to be complied with (sugar content of soft drinks is unregulated in England)
- But the Scottish legislation on sugar content is a unique relevant requirement that is in force before clause 4 comes into force. The mutual recognition principle does not apply and the bottle of soft drink can't be sold in Scotland because its sugar content is higher than 0.5gm.

After clause 4 comes into force Scotland reduces the amount of sugar that can be included in a bottle of soft drink to 0.2gm. Following this change, could a soft drink manufactured abroad and imported into England be sold in Scotland despite its sugar content being higher than 0.2gm?

- The soft drink has been imported into one part of the United Kingdom (England)
- The soft drink can be sold lawfully in England because there are no relevant requirements to be complied with (sugar content of soft drinks is unregulated in England)
- The maximum sugar content requirement in Scottish legislation has substantively changed after clause 4 came into force. The mutual recognition principle applies and soft drink containing more than 0.2gm of sugar can be sold in Scotland.

Sales made for the purpose of a **public function** are not captured by the principle of mutual recognition.

NHS Prescription

(Example taken from the Bill's Explanatory Notes)

The supply of medication by the NHS to a patient through a prescription would not be covered as it is a sale made by a public authority fulfilling a public function.

2.2. Non-discrimination Principle for Goods

The **non-discrimination principle** for goods is set out in clause 5. The non-discrimination principle means that direct or indirect discrimination based on **differential treatment** of local and incoming goods is prohibited.

The differential treatment would have to arise out of a “relevant requirement”. Clause 6 defines a “relevant requirement” of a part of the United Kingdom as any legislation that applies to goods sold in that part and includes:

- a) the circumstances or manner in which goods are sold (for example, when, by whom, to whom or the terms on what they may be sold);
- b) the transportation, storage, handling or display of goods;
- c) the inspection, approval or authorisation of goods;
- d) the regulation of businesses that engage in the sale of certain goods.

The full list of the kind of legislation within the scope of the non-discrimination principle is in clause 6(3) of the Bill.

Direct discrimination is defined in clause 7. If a relevant requirement applies to incoming goods but does not apply to local goods, and the relevant requirement puts incoming goods at a disadvantage compared to local goods, then it is direct discrimination and will not be allowed.

Hypothetical example 3: **Sale of bicycles**

Scotland legislation says that bicycles made in Wales must be displayed in Scottish shops in a less prominent manner than bicycles made in Scotland. Is this direct discrimination?

- The Scotland legislation does not apply to local goods (bicycles made in Scotland).
- The Scotland legislation puts incoming goods (bicycles made in Wales) at a disadvantage compared to the local goods.
- This Scotland legislation is directly discriminatory and is not allowed under the Bill.

Indirect discrimination is defined in clause 8. If a relevant requirement does not amount to direct discrimination but still puts incoming goods at a **disadvantage**, causes a **significant adverse effect on the competition** in the market for the goods in the United Kingdom and cannot reasonably be considered a **necessary means of achieving a legitimate aim**, then it is indirect discrimination and will not be allowed.

Clause 8(6) says that the legitimate aims are:

- a) the protection of the life or health of humans, animals or plants;

the protection of public safety or

Hypothetical example 4: **Transport of Live Animals**

Northern Ireland legislation says that live animals arriving in markets for sale in Northern Ireland must not have travelled for more than 110 miles from where they were last reared.

Does this indirectly discriminate against farmers who wish to transport live animals from England to Northern Ireland, but cannot do so because the distance travelled would always be more than 110 miles?

- The Northern Ireland legislation applies to live animals transported from England in a way that disadvantages farmers in England compared to farmers in Northern Ireland by making it more difficult (in this case impossible) to transport live animals from England to Northern Ireland for sale.
- To be indirectly discriminatory, the Northern Ireland would also have to cause a significant adverse effect on competition in the market for live animals in the United Kingdom.
- However, if the Northern Ireland legislation is a necessary means of achieving the legitimate aim of protecting the health of animals, then it is not indirect discrimination. This may result in litigation as to whether the 110 mile limit is necessary to protect the health of animals. If 110 miles was chosen just because that is the furthest distance that can be travelled within Northern Ireland, the limit is unlikely to be justifiable.

Note also that this form of indirect discrimination has such an impact on England (and much of Wales and Scotland) that it may even amount to direct discrimination.

Clause 9 says that any legislation **in force on the day before** clause 9 comes into force is **excluded** from the principle of non-discrimination. However, if that legislation then **changes substantively**, it will be subject to the principle of non-discrimination.

2.3. Exclusions from Market Access Principles for Goods

Schedule 1 lists policy areas that are **excluded** from the principle of mutual recognition and non-discrimination for goods. The list includes threats to **human, animal or plant health, chemicals** and **taxation, some measures relating to fertilisers and pesticides**.

Also, Acts of Parliament that contain relevant requirements that apply in both the originating part and the destination part of the United Kingdom are excluded from the principle of non-discrimination.

Hypothetical example 5: **Sale of goods during an epidemic**

England legislation prohibits in England the sale of any goods from Wales, because there is an epidemic in Wales that has not reached England. Is this direct discrimination?

- If the England legislation can be reasonably justified as a response to a public health emergency, then it is not direct discrimination by virtue of the threat to human health exclusion in Schedule 1.

Sales made for the purpose of a **public function** are not captured by the principle of non-discrimination.

2.4. Guidance relating to Part 1

Clause 12 provides powers to the Secretary of State to issue guidance on any matter relating to the practical operation of the United Kingdom market access principles or the effect of any provision in Part 1.

Guidance can be issue to the public generally or to specific categories of people such as traders or bodies who have an enforcement function in relation to any regulatory requirements captured under Part 1 of the Bill. The power includes powers to withdraw or revise that guidance. The Secretary of State does not need to consult anyone including the devolved governments or the new Office for the Internal Market before issuing any such guidance.

2.5. Northern Ireland

Clause 11 modifies the market access principles for goods in relation to Northern Ireland.

The mutual recognition principle for goods applies to “qualifying Northern Ireland goods” as if they were produced, or imported into, Northern Ireland. But the mutual recognition principle does not apply to any other goods produced in, or imported into, Northern Ireland unless they move from Northern Ireland to England, Wales or Scotland in the same way as goods imported into those places from outside the United Kingdom.

For the purposes of the non-discrimination principle, goods that are not qualifying Northern Ireland goods do not have a relevant connection with Northern Ireland, and so the non-discrimination principle would not apply.

Clause 43 in Part 5 of the Bill defines “qualifying Northern Ireland goods” by reference to section 8C(6) of the EU (Withdrawal) Act 2018, which in turn provides that “qualifying Northern Ireland goods” has the meaning given by a Minister of the Crown by regulations. No such regulations have been made yet.

3. UK Market Access: Services

Part 2 of the Bill governs the regulation of service providers in the United Kingdom. Part 2:

- establishes a principle of mutual recognition of authorisations to provide services, and
- prohibits discrimination by a service regulator against a service provider.

3.1. Mutual Recognition of Authorisations to Provide Services

The principle of **mutual recognition of authorisations to provide services** is set out in clause 18. Where a service provider is required to have the **permission** of a regulator before providing services in **one** part of the United Kingdom, that requirement does not apply to a person who is already **authorised** to provide those services in **another** part of the United Kingdom.

Hypothetical example 6: **Private Landlord Services**

Wales legislation says that a person who wishes to provide private landlord services (i.e. private rented accommodation) in Wales must have the permission of the Wales regulator before the person can provide the services.

England legislation says that a person who wishes to provide private landlord services (i.e. private rented accommodation) in England must have the permission of the England regulator before the person can provide the services.

- A person who has the permission of a regulator to provide private landlord services in England can provide those services in Wales under the mutual recognition principle. And vice versa.
- However, if the Wales legislation is in force on the day before clause 16 comes into force, the Wales legislation will not be an authorisation requirement and the mutual recognition principle will not apply because of the exclusion in clause 16(5)(c)(i).
- Also, if the Wales legislation requires landlords to be registered in respect of specific properties, the Wales legislation will not be an authorisation requirement and it will not be captured by the mutual recognition principle because of the exclusion in clause 18(3).
- If, on the other hand, the England legislation was not in force on the day before clause 16 came into force, or the England legislation authorises landlords on a blanket basis for any property (as opposed to requiring authorisation for each individual property), then the England legislation is an authorisation requirement and will be captured by the mutual recognition principle.
- This would mean that a landlord who has permission from an England regulator to be a landlord in England could take advantage of the mutual recognition principle and be a landlord in Wales without getting permission from the Wales regulator.
- Note the mutual recognition principle does not apply to social housing services.

3.2. Discrimination by a Service Regulator Against a Service Provider

Under clause 19, **direct discrimination** by a service regulator against a service provider has no effect. If legislation says that a service provider cannot provide a service unless the service provider **satisfies a requirement**, and the requirement:

- a) has the effect of treating the service provider **less favourably** than other service providers, and
- b) the reason for the less favourable treatment is the service provider's "**relevant connection**" (or lack of relevant connection) to a part of the United Kingdom,

then the requirement is directly discriminatory and has no effect.

But such a requirement will not amount to direct discrimination if it can be reasonably justified as a response to a **public health emergency**.

A service provider has a relevant connection to a part of the United Kingdom if the service provider:

- a) has a registered office, place of business or residence in that part;
- b) provides services from that part; or
- c) has members, partners, offices or staff with a registered office, place of business, or residence in that part.

Under clause 20, **indirect discrimination** by a service regulator against a service provider has no effect. If legislation says that a service provider cannot provide a service unless the service provider **satisfies a requirement**, and the requirement:

- a) is not directly discriminatory (as described above),
- b) would put the service provider at a **disadvantage** in the part of the United Kingdom where the requirement applies;
- c) has an **adverse market effect**; and
- d) cannot be considered **a necessary means of achieving a legitimate aim**,

then the requirement is indirectly discriminatory and has no effect.

Clause 20(6) says that the legitimate aims are:

- a) the protection of life or the health of humans, animals or plants;
- b) the protection of public safety or security;
- c) the efficient administration of justice.

Hypothetical example 7: **Agricultural Workers**

Legislation in Wales requires agricultural workers to have Welsh language skills, in order to maintain Welsh language communities in rural areas. Is this indirect discrimination?

- The Wales legislation is not direct discrimination, but it may put an agricultural worker from England at a disadvantage compared to an agricultural worker from Wales (because an agricultural worker from Wales is more likely to be able to speak Welsh).
- To amount to indirect discrimination, the Wales legislation would also have to cause a significant adverse effect on competition in the market for agricultural workers in the United Kingdom.
- There is no legitimate aim that could justify the Wales legislation so, if it causes a significant adverse effect on the market, it would be indirect discrimination.

3.3. Services that are excluded

Clause 17 sets out a list of things that are **not covered** by Part 2 of the Bill. Clause 16(5)(c)(i) also excludes any legislation that is in force the day before clause 16 comes into force. Therefore, **existing requirements** will not form part of mutual recognition unless clauses 16(6) and 16(7) apply.

Hypothetical example 8: **Change in service requirement**

Clause 16(6) states that a pre-existing requirement that corresponds to a requirement elsewhere in the UK is brought within scope if the corresponding requirement is 'substantively changed'. Clause 16(7) states that a requirement is corresponding if it is the same or substantively the same.

- 2018: Wales requirement about Service X in force.
- 2019: Equivalent England requirement about Service X in force.
- 2020: UK Internal Market Act comes into force.
- 2022: Wales requirement about Service X remains unchanged, therefore not captured by the internal market principles.
- 2023: Equivalent England requirement about Service X changes substantively, therefore both the England and the Wales requirements about Service X captured by the internal market principles, despite no change in the Wales requirement.

Schedule 2 also contains a list of services that are **excluded** from Part 2. The list include healthcare services, social housing services, social care services and transport services.

Main issues Goods and Services

3.4. Practical effect of the legislation

As set out in chapters 2 and 3 of this briefing the Bill introduces two key principles to govern how goods and services are regulated and sold after the end of the EU transition period. The first principle is that of mutual recognition and the second is non-discrimination. These principles apply to both goods and services.

The definition of goods in the Bill is broad. It does not just contain the sale of goods but also things such as their labelling, composition, packaging, production methods and place of production. It also includes goods imported into the UK. Therefore goods imported into the UK will only have to meet the conditions for the country in which they are imported into to enable them to be sold anywhere else in the UK.

Services cover a wide variety of sectors including construction, tourism, accountancy, plumbers and electricians, estate agents and letting agents, wholesalers, private education and business-related services such as office management or advertising.

The definition of indirect discrimination is broad and covers any legislation that might put goods or service providers incoming into one part of the UK from another at a 'disadvantage' and has an 'adverse market effect'. The Bill provides a definition of 'adverse market effect' in clauses 8 and 20 but not a test for 'disadvantage'. Indirect discrimination can be justified on limited grounds, i.e. the legitimate aims set out in clause 20(6).

The principle of non-discrimination is a principle which governs the EU Single Market. Indirect discrimination has been a contested principle in the EU Single Market and the subject of a number of court cases in the EU including ones relating to the UK. The Welsh Government's Counsel General and Minister for European Transition (Counsel General) has called the inclusion of the indirect discrimination principle in the legislation as 'particularly egregious'.

The Welsh Government's Counsel General **has stated** that Part 1-2 of the Bill will lead to a 'hollowing out' of the Senedd's legislative competence whilst the UK

Government has stated that the Bill provides the devolved governments and legislatures with the same freedom as they have now to legislate so what is the actual practical effect of the Bill?

Parts 1 and 2 of the Bill do not create any new reservations in the [Government of Wales Act](#) and do not restrict the Welsh Government or Senedd from legislating in areas which are currently **devolved**. The key effect of the Bill is to limit who and what will be covered by any new primary or secondary legislation made after the Bill is passed.

For example the Welsh Government could chose to introduce new regulations about the labelling of sugary drinks but after the Bill is passed, these regulations will only apply to Welsh producers - they won't be able to enforce new labelling requirements on producers elsewhere in the UK or goods imported into the UK, even when they are sold in Wales. The devolved governments argue that this could make the effect of any new legislation null and void given the amount of goods that flow between the countries of the UK. It would also require a Welsh Government to make the choice of putting their producers at a competitive disadvantage as compared to others in the UK. The same would be true of services. Producers or service providers could opt however to follow higher standards if for example there was consumer demand for it.

The [Explanatory Notes \(600KB PDF\)](#) to the Bill laid in the House of Commons on the Bill introduction outline that whilst the provisions of Part 1 and 2 of the Bill do not change the devolution settlements directly, the provisions:

[..] 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.

The same is true of secondary legislation made by UK ministers for England.

The [Regulatory Impact Assessment \(RIA\) \(103 MB PDF\)](#) that accompanies the Bill states that one of the non-monetised costs of the Bill is that it could limit the intended societal impact of devolved legislation:

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 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.

The RIA also states in relation to services that there may be less accountability of service providers as they will be able to choose which parts of the UK's regulatory requirements they meet whilst operating elsewhere in the UK.

The RIA outlines the UK Government's view that these non-monetised costs would be offset by a reduction in costs to business.

There are some exemptions in the Bill to these two key principles as set out above.

3.5. Maintaining Standards

In the **White Paper** which preceded the Bill the UK Government stated that it was committed to maintaining high standards within the UK internal market when the UK leaves the EU and in some cases setting higher standards. It said it would do this by working with the devolved governments on setting new joint policy frameworks in areas previously covered by EU law. These include areas such as fisheries, air quality, food labelling and agricultural support. This programme of work is known as the common frameworks programme and has been on-going for a number of years. Senedd Research has produced **an explainer blog** which describes this programme of work in more detail and **a briefing** which summarises progress made on the programme to date.

Standard levels

This work on maintaining standards is important because of the effect of enshrining in law the mutual recognition and non-discrimination principles. As explained above the practical effect of the legislation could mean that where different standards exist across the UK, producers could move their production operations of their goods to the nation with lowest possible standards in place.

Governments who set higher standards for their own producers would have to do so knowing that they would put their producers at a competitive disadvantage. In addition, in relation to goods the Bill provides that where no standards apply i.e. a sector is unregulated in one part of the UK it would not be required to meet standards anywhere else. Under the terms of the Bill if there is divergence in the way the governments of the UK regulate for services, businesses could be incentivised to choose to be regulated in a part of the UK which has the lowest regulatory requirements whilst still providing the majority of its services elsewhere.

Agreeing jointly to minimum standards across the UK in some policy areas would be one way of preventing a general lowering of standards. In the EU's Single Market common or harmonised standards, as they are known, apply to **70-75% of goods on the market (178KB PDF)**. Meaning that the principles of mutual recognition and non-discrimination only apply in 25% of the market, this would not currently be the case in the UK.

Common Frameworks

Both the Welsh and Scottish governments have suggested that the completion of the common frameworks programme where the governments of the UK jointly agree to minimum standards could be an alternative to the proposals set out in the Bill. The delivery of the common frameworks programme has been delayed due to the Covid-19 pandemic and the on-going UK-EU negotiations.

The Scottish Government's Cabinet Secretary for Constitution, Europe and External Affairs, Michael Russell MSP, **has outlined his view** that work on the common frameworks programme could be accelerated if there was a political will so but the Bill's RIA cites the lack of progress on the programme as a reason for introducing the Bill. The UK Government has also outlined its view that the common frameworks programme is insufficient to manage regulatory divergence in all areas at the end of transition.

Market bias

Some commentators **such as Professor Nicola McEwan and Professor Michael Dougan**, have also highlighted the inherent disparity within the UK market as England, making up 87% of the market, dominates in size. This means that there could be an inherent incentive for goods producers to follow English standards given the relative size of the market be the standards higher or lower.

3.6. Exemptions

The Bill does provide for some specific exemptions to the general principles of mutual recognition of goods and services. These are set out in detail above.

There is also a general exemption that the Bill won't apply retrospectively to legislation already in force on the day the provisions in the Bill come into force unless they are subject to 'substantive change'. The Bill does not provide a definition of 'substantive change' so it isn't possible to know how much change would need to be made to a piece of legislation before it would no longer be

covered by this exemption. This means that governments may be unwilling to make changes to update existing legislation if they feared that it would amount to a substantive change and come under the Bill's provisions once passed.

Exemptions are also allowed under the rules governing the EU's Single Market. These exemptions, which were previously available to governments in the UK, are broader in scope than the exemptions provided for in the Bill. For example in the EU's Single Market Member States can diverge from the principles on public interest grounds such as environmental standards, protection of heritage or morality. A [**summary of the different exemptions**](#) that Member States can use under the rules governing the EU's Single Market are summarised in the briefing produced for Senedd Committee's by Dr Kathryn Wright of York University.

Professor Catherine Barnard has [**set out some of the areas**](#) that are exempted under the rules of the EU Single Market regulation, that don't appear in the Bill and provides an example of the differences.

Whilst the Bill does provide exemptions on the face of the Bill these can be changed by the Secretary of State using subordinate legislation powers. For example the Secretary of State can amend the Schedule 1 exemptions for goods and also Schedule 2 which sets out which service sectors are covered by the Bill. These regulations are subject to the standard "draft affirmative" procedure in the UK Parliament.

However, in relation to Schedule 2 the Secretary of State can, during the first three months the Bill is passed, legislate to bring sectors that are excluded within the scope of the Bill using the emergency "made affirmative" procedure. This means that regulations changing who was exempt would automatically come into force as soon as they were made (and even before they were laid before the UK Parliament). They would then need to be approved by both Houses of Parliament within 40 days of the date they were made. For example health services are currently exempt from the provisions of the Bill but could be brought within it by regulations made by the Secretary of State under this procedure during the first 3 months of the Bill.

The Bill does not include a duty for the Secretary of State to consult anyone before making regulations that amend Schedules 1 or 2.

The Bill's exemptions in relation to services were also amended during the Bill's passage through the House of Commons. In the Bill as introduced to the House of Commons, requirements in relation to the authorisation or regulation of services

were exempt provided they were passed before the Bill is enacted. The Bill has now been amended so that if the same or similar regulations exist elsewhere in the UK before the Bill is passed, and if those regulations are 'substantively changed' in one part of the UK, then all regulations that are corresponding would fall within the scope of the Bill.

3.7. Other Secretary of State powers

The Secretary of State also has powers to amend which requirements on the sale of goods come within the scope of the Bill and which requirements on the non-discrimination of goods come within the scope of the Bill. The Secretary of State has to consult the devolved governments before making amendments that would do this but is not required to take account of any views or representations made by the devolved government.

Clause 12 of the Bill provides the Secretary of State with powers to issue guidance on the operation of Parts 1 and 2 of the Bill. These powers includes issuing guidance to traders operating in all parts of the UK and devolved bodies with regulatory or enforcement functions captured by these parts of the Bill. There is no requirement to consult devolved governments or stakeholders before such guidance is issued.

4. Professional Qualifications

Clause 22 introduces the automatic recognition principle in relation to professional qualifications and regulations. Where an individual wants to practice a profession in one part of the UK ("the relevant part") but qualified in another part of the UK ("the other part") they would be automatically treated as qualified in respect of their profession in the relevant part.

Hypothetical example 9: Qualifications

Legislation in Wales (the relevant part in this example) says that a certain profession requires three A Levels.

Legislation in the rest of the United Kingdom (the other part) requires five GCSEs.

Can a person from Scotland, who doesn't have any A levels, carry out that profession in Wales? Yes. If they have five GCSEs, they are qualified for the profession in Scotland, and if they are qualified for the profession in Scotland then the automatic recognition principle means that they are treated as if they are qualified to practice in Wales.

In its response to the White Paper proposals, the Welsh Government demonstrated their concerns with this in the context of teachers qualifications. This is discussed further below.

Where certain qualifications or experience is required to practice a profession in the relevant part, but none are needed to practice that profession in the other part, a person from the other part can still practice in the relevant part without having to obtain any qualifications.

Hypothetical example 10: Training

Legislation in Wales says that a certain profession requires one year of training experience.

Legislation in the rest of the United Kingdom doesn't require any experience for the same profession.

Can a person from England with no experience carry out that profession in Wales? Yes. The automatic recognition principle means that they are treated as if they have the experience needed to practice in Wales.

The automatic recognition principle doesn't apply if there is an alternative process for recognising an individual's professional qualifications or experience. The process must comply with specific principles set out in clause 24 of the Bill which focus on the individual demonstrating the knowledge and skills need to practise the profession.

The alternative process for recognising qualifications will be administered by

the relevant professional regulator or, if there is not one, the UK Government or devolved institution responsible for the profession.

Under clause 25, the automatic recognition principle will not apply to provisions that are in force on the date the Bill is passed. However, if a provision **changes the circumstances** in which individuals are qualified in relation to a particular profession **after** the date the Bill is passed, then the automatic recognition principle will apply.

The automatic recognition principle will not apply to provisions limiting the ability to practice a legal profession either. This is the case even if a provision changes the requirements for qualifying into the legal profession after the date the Bill is passed.

Clause 26 applies where the ability to practice a particular profession in the one part of the UK is subject to a requirement or restriction. These requirements or restrictions could be requirements related to registration, monitoring, insurance or continuing professional development. Professionals qualified in another part of the UK cannot be treated less favourably in respect of these requirements than those qualified in the relevant part, based on where in the UK their qualifications or experience were obtained, or the type of qualifications they have (unless the latter is justified).

Clause 27 is an interpretation clause. It also deals with cases where there are two or more routes to practise and none of them complies with clause 24 (process enabling a UK resident to seek recognition of their professional qualifications or experience). For the purposes of automatic recognition principle, a qualified UK resident gets the benefit of the least demanding route.

Hypothetical example 11: Alternative routes to qualification

If those with qualification A were allowed to practise the profession without further individual assessment and those with qualification B were allowed to practise the profession only after a further individual assessment, a qualified UK resident would be automatically recognised without having to undergo the further individual assessment

Main issues

Part 3 of the Bill introduces a system for the recognition of professional qualifications across the UK internal market. This will allow professionals qualified in one of the four UK nations to access the same profession in a different nation without needing to requalify (subject to exceptions).

This part of the Bill is concerned with access to professions that are regulated in law. For example, access to certain professions or occupations often require a person to have specific professional qualifications (such as a degree, diploma or award). Examples include a Bachelor of Medicine degree or a Postgraduate Certificate in Education. Some professions may also set requirements to hold more general qualifications to a certain level (such as a certain number of GCSEs or A levels), or to have undertaken certain types of experience.

The [Explanatory Notes](#) (600KB PDF) state that there is currently no overarching system or consistent approach for the recognition of professional qualifications between the nations in the UK. It argues that if professional divergence increases across the UK, professionals could experience greater limitations on their ability to practise across the UK than exists currently.

However, in its [response](#) (636 KB PDF) to the White Paper, the Welsh Government argued that this was an area of divergence which already exists and commented that “each nation of the UK already has its own regulators overseeing areas such as social care and education”.

In demonstrating its concern about the White Paper proposals, the Welsh Government provided a case study on teachers’ qualifications. It noted that the routes to achieving Qualified Teacher Status (“QTS”) in Wales and England have diverged significantly between both nations over a number of years. It stated that the entry requirements to the teaching profession were lower in England and that England was moving towards an unregulated professional space. It

argued that the worst case scenario of the proposed system of mutual recognition could be the significant reduction of the standards of the teaching workforce in Wales. It was also concerned that potential student teachers could be attracted by lower cost and lower standard routes into teaching in England and seek to undertake their training there before returning to teach in Wales, undermining the requirements set to gain QTS in Wales. The Welsh Government's response to the White Paper confirms however that teachers trained and awarded QTS in England are currently automatically recognised as being able to teach in Wales.

Under the general principle in clause 22.2 of the Bill, a person qualified in relation to a profession in England would be treated as if it were qualified in relation to the same profession in Wales.

In the context of the Welsh Government's case study above (and on the basis that the current policy of automatic QTS recognition was reversed in Wales): the effect of the Bill seems to be that the regulator could require an individual from outside Wales to comply with qualification requirements existing in Wales before the Act came into force. However, should the regulator subsequently introduce new requirements or amend existing requirements for qualifications, for prospective or existing teachers in Wales, the automatic recognition principle would apply. Whilst the new qualification requirements could be enforced against teachers in Wales, they could not be enforced against teachers from outside Wales seeking to teach in Wales.

In **his statement** on the Bill the Welsh Government's Counsel General stated:

Part 3 seeks to impose the same approach on professional qualifications, though, declaring my interest as a lawyer, I note that the legal profession itself is exempt. But, as a lawyer also, I can also point out that this is a complex piece of drafting that will also bring joy to litigants up and down the land. We are not yet clear whether this would actually make it impossible to prevent teachers from other parts of the UK who lack the qualifications and experience required by our legislation from registering with the Education Workforce Council to teach in Wales, but it could tie that council up in legal knots for years to come.

4.1. Disapplication of automatic recognition

Where two professional qualifications from different parts of the UK cannot be considered equivalent, the following extract from the Regulatory Impact Assessment alludes to the fact that the alternative process for recognition could be used::

[...] the Bill will enable legislation to disapply the principle of automatic recognition for the profession in question. Administrations will then

be able to provide for a pathway which allows differences in the requirements to be considered and a decision to be taken as to whether, and on what basis, a person should be allowed access to the profession in another part of the country.

The initial establishment, implementation and subsequent operation of a regime by a regulator or administration is likely to necessitate a significant investment of resources.

5. Independent Advice and Monitoring of UK Internal Market

Part 4 of the Bill provides for the Competition and Markets Authority (“CMA”) to be given a set of reporting, advisory, monitoring functions on the operation of the internal market and information gathering powers to support these functions.

In carrying out its functions under the Bill, Clause 29 (**introduced** at **Report stage**) requires the CMA to have regard to the objective of supporting, through the application of economic and other technical expertise, the effective operation of the internal market in the UK.

5.1. Monitoring and Reporting

The CMA is given new reporting, advising and monitoring functions in relation to the operation of the internal market. These are set out in clauses 31-37 of the Bill.

The CMA **must** prepare and publish a report on the operation of the internal market and the effectiveness of the operation of the internal market, at least once every 12 months. Within every 5 year period, the CMA must prepare a report on the effectiveness of the internal market provisions in Parts 1-3 of the Bill and the impact of the operation of those provisions on the development of the internal market in the UK. Copies of these reports will be laid before all four of the UK’s legislatures.

The CMA **may** prepare and publish other reports, as set out in clauses 31-34. A report may be requested on the impact on the operation of the internal market of new regulatory provisions prior to them taking effect, provisions which have already been passed or made in law or provisions which may be considered to have detrimental effects on the UK market. The CMA may report on its own accord, or if a report is requested by one of the devolved administrations or UK Government. However, the CMA may decline a request made for a report, as long as it provides

the requesting authority a notice of its reasons for doing so, and publishes a notice in a manner that it considers appropriate.

The CMA are required to prepare and publish general advice and information about how it will perform these functions, including what factors it may take into account in deciding whether or not to exercise any of its functions.

5.2. Information gathering powers

The CMA are also provided with powers to gather information in support of its monitoring, advising and reporting functions. The CMA may request any documentation for these purposes, and may request that a person who carries on a business provides such estimates, forecasts and returns or other information as specified in their information notice.

The CMA are provided with enforcement powers in cases of non-compliance, and may impose penalties not exceeding £30,000 for a fixed amount penalty, or £15,000 if the amount is calculated by reference to a daily rate. The Secretary of State has regulation making powers in respect of the penalties issued under this Part, however the penalties cannot exceed the amounts noted above. The CMA will not be able to issue a financial penalty on the UK Government, Scottish Government, Welsh Government or Northern Ireland Executive.

Main issues

5.3. Governance of the CMA

In its **Internal Market White Paper**, the UK Government committed to a new independent body having a role in overseeing the functioning of the UK internal market. The Bill confers these functions on the CMA.

The CMA was established in 2013 by the **Enterprise and Regulatory Reform Act** (“Enterprise Act 2013”) and is an independent non-Ministerial department which performs its functions on behalf of the Crown. Its work is led by a Chief Executive and overseen by a Board and it works to promote competition for the benefit of consumers, both within and outside the UK. It has a number of responsibilities including protecting consumers from unfair trading practices, investigating mergers between organisations to prevent a reduction in competition and taking enforcement action in relation to anti-competitive practices by businesses and individuals.

The **Explanatory Notes (600KB PDF)** to the Bill confirmed that a new ‘Office for the Internal Market’ (“OIM”) would be established within the CMA. However, **as introduced** the Bill did not expressly contain the title “Office for the Internal Market” on its face. A **UK Government amendment** agreed at **Report stage** amended the original drafting by expressly providing that the CMA may delegate its functions under the Act to an Office for the Internal Market task group (“OIM Task Group”).

Constitutional arrangements for the OIM were also introduced at **Report stage** by way of a **UK Government amendment** inserting Schedule 3 into the Bill. Schedule 3 would amend the Enterprise Act 2013 by introducing provisions enabling the Secretary of State to appoint an ‘OIM Panel Chair’ and “other persons appointed to membership of the Office for the Internal Market panel” (“the OIM Panel”).

Before making such appointments, however, the Secretary of State must consult the devolved Ministers. In a **briefing on the UK internal market**, Professor Michael Keating, in written evidence to the Scottish Parliament’s Finance and Constitution Committee, suggested it “might have been expected” that an advisory body such as the OIM would be “jointly appointed” by the UK and devolved governments. However, **the Committee** noted that the new consultation requirement “does not go as far” as “jointly appointed”, as several witnesses to their Committee had recommended.

For the purposes of carrying out the CMA’s function under the Bill, the OIM Panel Chair (who will also be appointed to the CMA board) may constitute OIM Task Groups. Each Task Group would consist of at least three members from the OIM panel and must act independently of the CMA board in exercising their functions.

The UK Government **states** that the OIM was chosen to oversee the UK internal market after assessing the White Paper consultation responses and considering a range of potential delivery vehicle options. It is expected to be fully operational by the end of 2021.

The White Paper did not provide much detail on what governance and institutional mechanisms would be established to oversee the internal market in the UK. Whilst it confirmed that the evolution and overall shape of the UK’s internal market would be overseen by the UK Parliament, it was silent on the role of the devolved legislatures in this process. The extent to which the devolved nations may contribute towards or influence the future shape of the UK Internal Market remains unknown.

In respect of an overarching governance mechanism to oversee the UK internal market, the White Paper suggested a range of options including an independent body with close links to the UK Parliament and devolved legislatures; an expert committee; or a body accountable directly to the UK Parliament.

In its response to the White Paper consultation, the **Welsh Government said** (636 KB PDF) that the section in the White Paper focused on governance and independent monitoring was light on detail, specifically “in terms of the functions, constitution and accountability of an independent body”. It argued that references to a possible oversight role for the UK Parliament suggested that there would be no role for the devolved legislatures. The Welsh Government considered this to be “wholly unacceptable” as any new system would impact the whole of the UK.

The Counsel General has **indicated** that the Welsh Government could agree to the proposals in Part 4 of the Bill subject to changes to the governance of the CMA:

The functions proposed for this Office are ones which we broadly could endorse, but it is wholly inappropriate that a non-Ministerial Department of the UK Government, whose main function relates to matters which are wholly reserved, should be given this role without extensive reform of its governance arrangements.

5.4. Functions of the OIM

The main functions of the OIM are outlined under the heading ‘Bill Provisions’ above. One of its central functions is monitoring and reporting upon the functioning of the internal market.

The Bill states that if a government considers a regulation passed by another has an ‘actual or anticipated detrimental impact on the functioning of the UK internal market’, Part 4 of the Bill provides that the UK Government and devolved governments can request that the CMA provide a report on the impacts of such regulation. However, the CMA can refuse such a request. If they do report, then the CMA must arrange for a copy to be laid before the Senedd within 6 months of reporting. If such a report is laid before the Senedd, new sub-clauses (agreed at **Report stage** and inserted under Clause 35) provide that the ‘Responsible Authority’ must make a statement to ‘Parliament’. In the context of Wales, this means that: (dependent upon whether the regulatory provision was within ‘Welsh devolved competence’) either the Welsh Ministers must make a statement to the Senedd, or the Secretary of State must make a statement to the UK Parliament.

Given the non-binding nature of the CMA’s reports, it is unclear what impact in

practice they are intended to have. There is no statutory duty on a legislature or government to take action in response to such reports. Further, sub-clause 28(7) (**introduced** by the UK Government and agreed at **Report stage**) attaches ‘absolute privilege’ to any advice given or report made by the CMA in the exercise of its functions under the Bill, for the purposes of defamation law.

The **Institute for Government’s Bill explainer** concludes that the “Office for the Internal Market has very limited powers and in many cases can choose not to exercise them”.

5.5. Intergovernmental relations – dispute resolution

Whilst the White Paper stated that intergovernmental dispute resolution mechanisms would need to be improved for the purposes of the UK internal market; it did not expressly state how this would be done. It also did not say who would ultimately be responsible for dispute resolution and how parity between the four governments within these mechanisms would be delivered.

The Bill does not provide for an express dispute resolution mechanisms in relation to the UK internal market.

The UK Government’s response to the White Paper consultation states that the Government intended to set out a “consensual approach” and that the CMA’s reports are intended to “support intergovernmental collaboration and coordination”.

Where there is a matter of dispute, the **press release accompanying the Bill** states that this would be a matter for the respective legislatures supported by their administrations and intergovernmental processes “to determine how to take action in response, minimising the need to seek court action”. Whilst this statement does not clarify how disputes will be resolved and which intergovernmental processes will be applicable, it seemingly envisages a role for the courts. At **Committee stage**, the UK Under-Secretary of State for Business, Energy and Industrial Strategy Paul Scully stated:

Ultimately, yes, the courts are there as a last resort, but if we have the inter- governmental relationships and build on those, as trusted partners, we will not have to resort to that.

The **RIA** (1.03 MB PDF) accompanying the Bill confirms that any dispute resolution mechanisms will be based on existing arrangements and are not anticipated to require additional resource. However, it also stated that distinct intergovernmental

arrangements would be developed to resolve potential disagreements and disputes to regulation. On this prospect, Professor Nicola McEwen **believes** that it will now be even harder to reach agreement in the ongoing IGR review as “instead of building structures to make governments work together” the Internal Market Bill ‘all but cuts devolved governments out of the process.

The RIA also confirms that intergovernmental arrangements will “not replace potential court challenge”. However, whilst this alludes to the ability of businesses and individuals to enforce rights associated with the Bill in court, the Bill does not seem to create any rights or mechanisms for redress beyond those which already exist through existing judicial review channels. This is a process which can be expensive for individuals and businesses.

5.6. Role of OIM in disputes

The Government’s response states that the expansion of the CMA’s remit to include the UK internal market functions will not position it as an enforcer of the principles set out in the Bill.

The provisions in the Bill suggest that the OIM will fulfil a different function to the one currently exercised by the European Commission in the context of the EU’s Single Market. Whilst the European Commission can bring infringement proceedings against a Member State for failing to comply with the rules of the internal market and refer cases to the European Court of Justice, it appears that the OIM’s role in dispute resolution will be limited to providing reports to the relevant disputing parties to assist them.

According to the Institute of Government’s **explainer** on the Bill, “it is not clear how disputes around the functioning of the internal market will be managed”.

6. Protocol on Ireland-Northern Ireland

Part 5 of the Bill makes provisions in respect of the **Northern Ireland/Ireland Protocol** (“the Northern Ireland Protocol”) (603KB PDF), which was agreed in October 2019 as part of the Withdrawal Agreement. The Northern Ireland Protocol sets out post-Brexit arrangements for the Ireland-Northern Ireland border, which is the only UK-EU land border. It comes into force from 1 January 2021. The UK and the EU agreed in its preamble that nothing within it:

[P]revents the UK from ensuring unfettered market access for goods moving from Northern Ireland to the rest of the UK’s internal market.

The preamble also sets out how it “respects the essential State functions and territorial integrity of the UK.” Article 6 of the Northern Ireland Protocol, entitled ‘Protection of the UK internal market,’ commits the UK-EU Joint Committee to keep Article 6 under constant review and to adopt recommendations with a view to the avoidance of controls at Northern Ireland’s ports and airports.

6.1. Regulation making powers - Clauses 44, 45 and 47

Broad regulation making powers are provided to Ministers of the Crown and the Secretary of State in respect of provisions contained in the Northern Ireland Protocol (clauses 44 and 45). Significantly, the provisions in this Bill expressly provide that such regulation making powers may provide that rights, powers and obligations that would apply otherwise under relevant international or domestic law are not recognised or enforceable.

Clause 47 expressly provides that the powers available to Ministers under clauses 44 and 45 and any regulations made under them, are to be regarded as having effect notwithstanding any incompatibility or inconsistency with “relevant international or domestic law”, including any provision of the Northern Ireland Protocol, any other provisions of the UK-EU Withdrawal Agreement or any other legislation specified, including EU law, international law and any order, judgment or decision of any court or tribunal (clause 47(8)).

However, new clause 47(8) as amended means that rights provided by the European Convention on Human Right (ECHR) are not included in this definition of “relevant international or domestic law”. In the UK, the ECHR was incorporated into domestic legislation by the Human Rights Act 1998 (HRA98).

New clause 47(2)(a) disapplies section 6(1) of the HRA98 when making regulations under clause 44(1) on the application of exit procedures to goods, or descriptions of goods, moving from Northern Ireland to Great Britain. Clause 45(1) on the state aid provisions of the Northern Ireland Protocol (Article 10). Section 6(1) makes it unlawful for public authorities to act in a way which is incompatible with ECHR rights. The effect of this is that, whilst ECHR rights are no longer included in the definition of ‘relevant international or domestic law,’ public authorities, including Ministers making regulations under the powers in clauses 44(1) and 45(1) are no longer duty-bound to act in a way that is compatible with ECHR rights.

New clause 47(3) provides that regulations under clauses 44(1) and 45(1) are to be treated as primary legislation for the purpose of the HRA98. Section 21(1) of the HRA98 defines primary legislation. It does not include an order or other

instrument made under primary legislation by Welsh Ministers.

New clause 47(4) provides that no court or tribunal may entertain any proceedings for questioning the validity or lawfulness of regulations under clauses 44(1) or 45(1) other than proceedings on a relevant claim or application. In such cases, the jurisdiction and powers of a court or tribunal are subject to the 'notwithstanding' clauses set out above.

New clause 47(5) provides that the standard time limit to apply for a judicial review of regulations under clauses 44 and 45 cannot be extended under any circumstances.

Article 13(2) of the Northern Ireland Protocol places a specific requirement to implement and apply its provisions in conformity with the relevant case law of the Court of Justice of the European Union (CJEU), where they relate to EU law. Under section 47(8)(g) of the Bill, this duty can be disapplied.

Clause 44 provides a Minister of the Crown with regulation making powers in relation to the procedures or other formalities applying to goods, when moving from Northern Ireland to Great Britain, whether these procedures are set out in the Northern Ireland Protocol or otherwise. The regulation making powers may disapply or modify the application of such procedures, or may state or restate whether a procedure applies or not.

The Secretary of State is provided with powers to make provision in connection with Article 10 of the Northern Ireland Protocol regarding state aid. Clause 45 provides that the Secretary of State may disapply or modify the effect of Article 10, and may make provision about the interpretation of Article 10. Article 10 is contingent on the UK's compliance with international law obligations provided in **Annex 2 to the World Trade Organisation Agreement on Agriculture**. Consequently, providing the Secretary of State with regulation making powers to disapply the effect of Article 10 authorises the Secretary of State to breach international law obligations.

Examples of the type of provisions that may be provided for in Regulations, include provisions so that Article 10 is not to be interpreted otherwise than in accordance with regulations made by the Secretary of State and not in accordance with any case law of the European Court or legislative act of the EU. Another example is that persons will have no right of action of any sort in respect of aid except in accordance with the regulations. Such provisions raises questions about the impact on citizens' rights, and goes against section 7A of the European Union

(Withdrawal) Act 2018 (the 2018 Act) which gives direct effect to the law deriving from the Withdrawal Agreement. Section 7A of the 2018 Act is subsequently modified, bringing attention to the effect of the provisions made in the Bill in relation to the Northern Ireland Protocol. The overall effect of these provisions is that ultimately, provisions agreed upon as part of the Withdrawal Agreement can be disapplied entirely.

6.2. Parliamentary consent for Clauses 44, 45 and 47

The Bill was amended so as to require UK Parliament's consent for regulations made under the Bill. The Bill now requires that:

1. Regulations that are subject to the affirmative resolution procedure must be laid before and approved by a resolution in both Houses.
2. Regulations that are subject to the made affirmative resolution procedure must be:
 - Laid before Parliament 'as soon as reasonably practicable after being made;' and
 - Will cease to have effect within 40 days unless both Houses approve the regulations by resolution.

Regulations made under the powers in clauses 44 and 45 within the first six months, described as the "initial period", are subject to the affirmative procedure and will be subject to the procedure set out in bullet point 2. above Regulations made after the initial period are subject to the affirmative procedure and will be subject to the procedure set out in bullet point 1 above. This process will apply after the first six months of the Bill entering into force.

The UK Government **published guidance on 17 September 2020** on the use of the notwithstanding clauses. It confirms that Parliament will be:

[A]sked to support the use of the provisions in Clauses 42, 43 and 45 [new clauses 44, 45 and 47], and any similar subsequent provisions, only in the case of, in our view, the EU being engaged in a material breach of its duties of good faith or other obligations, and thereby undermining the fundamental purpose of the Northern Ireland Protocol.

A number of broad examples are provided to illustrate examples of behaviour that could be considered as material breaches.

6.3. Functions to be exercised by the Welsh Ministers

Other provisions in Part 5 provide that an appropriate authority, including the

Welsh Ministers, must have special regard to a number of matters when using any powers related to the implementation of the Northern Ireland Protocol or the movement of goods within the UK (clause 42). Such matters include:

- maintaining Northern Ireland’s integral place in the UK’s internal market,
- respecting Northern Ireland’s place as part of the UK’s customs territory,
- and the need to facilitate the free flow of trade between Great Britain and Northern Ireland, with the aim of streamlining trade and maintaining and strengthening the integrity and operation of the internal market.

It is also provided in the UK Government’s **Explanatory Notes** (600 KB PDF) that the provisions in this part “support the delivery of the UK Government’s commitment to unfettered access for NI goods moving from Northern Ireland to Great Britain.” An appropriate authority is prevented from exercising any function in a way that would result in any new checks, controls or administrative processes on qualifying goods as they move from Northern Ireland to Great Britain from being used. The Bill also prevents the use of existing checks, controls or processes from being used for the first time or for a new purpose. Exceptions exist to both scenarios and additional exceptions were added to the Bill by amendments. These exceptions allow for functions necessary for VAT or excise duty in consequence of the Northern Ireland Protocol and to deal with a threat to biosecurity in Great Britain.

Main issues

The Bill’s provisions on the Northern Ireland Protocol present a number of key issues for Wales. Firstly, in regards to their impact on the UK-EU relationship and secondly, in regards to Wales’ compliance with, and implementation of, its international obligations.

6.4. Impact on the UK-EU relationship

6.4.a Future relationship negotiations

On 8 September, the Secretary of State for Northern Ireland, Brandon Lewis, **confirmed to the House of Commons** that the Bill’s provisions in relation to the Northern Ireland Protocol constitute a breach of international law because they permit the UK to depart from its obligations under the Withdrawal Agreement.

The EU has made clear that the future UK-EU relationship is contingent on the

full implementation of the Withdrawal Agreement and that the UK's violation of its terms poses a risk to the ongoing negotiations. This was reiterated by the **EU Commission's Vice President Šefčovič** and **later by the European Parliament**, which stated that it will not ratify any future UK-EU agreement if the UK breaches, or threatens to breach, the Withdrawal Agreement.

The **Welsh Government's no deal action planning document**, published in September 2019, identified the 'reputational damage' of a no deal Brexit as a strategic risk which could exacerbate the other potential impacts set out in the plan. It states that:

If the European and international community lose confidence in the UK and its governance as a result of an abrupt, no deal exit from the EU, there could be immediate and lasting damage to the UK's international reputation.

On 17 September, the **Counsel General** said that the risk of a no deal Brexit remains "uncomfortably high."

6.4.b European Convention on Human Rights (ECHR)

, The **EU has made clear that** future UK-EU security cooperation is conditional on the UK's continued adherence to the ECHR. This requires the UK giving continued effect to related domestic legislation (including the Human Rights Act 1998). According to **Mark Elliot, Professor of Public Law at the University of Cambridge** and former legal advisor to the House of Lords Constitution Committee, the Bill 'attempts to limit the extent to which the HRA98 applies.' The **EU's draft legal text** warns that the EU will suspend its security cooperation if changes are made to the UK's domestic legislation, and which will only be reinstated if the UK returns to current arrangements.

The envisaged security cooperation outlined by the EU includes cooperation to prevent, detect, investigate and prosecute criminal offences. This means cooperation between agencies in the UK, the EU and individual EU Member States. It also includes anti-money laundering and terrorist financing. This cooperation requires the transfer of personal data, which may only take place when the EU Commission considers that the UK has ensured an adequate level of data protection. The UK Government **published its papers** for seeking a data adequacy decision on 13 March 2020 and is awaiting a decision from the EU..

The ECHR constitutes one of the safeguards provided for in the **Belfast (Good Friday) Agreement**. That Agreement requires that decisions and legislation do

not infringe the Convention. A commitment to the ECHR was also included in the UK-EU **Political Declaration**, agreed in October 2019 alongside the Withdrawal Agreement. 6.5 Withdrawal Agreement dispute settlement procedure

The **UK Government's guidance** (284KB PDF) clarifying the use of provisions relating to the Northern Ireland Protocol refers to the “appropriate formal dispute settlement mechanisms.” This appears to be a reference to the Withdrawal Agreement's general dispute settlement procedure, set out in Title III, although enforcement mechanisms in relation to the Northern Ireland Protocol are also possible under its Article 12.

The general procedure contains a duty of cooperation on the UK and the EU to endeavour at all times to work together on its interpretation and application (Article 167). It also requires UK-EU disputes arising from the agreement to be resolved via its own dispute settlement procedure and prevents the UK and the EU from seeking recourse to their disputes by any other means. This is set out in an exclusivity clause (Article 168).

The dispute settlement procedure begins with consultation and communication at the UK-EU Joint Committee and can escalate to arbitration. An arbitration panel must deliver its ruling within 12 months of its establishment, or within 6 months for urgent cases (Article 173). Where a dispute raises a question of interpretation of EU law, the arbitration panel must request a ruling from the CJEU, which is binding on the arbitration panel (Article 174).

In addition to the impact on the future relationship negotiations, the **EU Commission has warned** that it will “not be shy” in using the Withdrawal Agreement's mechanisms and legal remedies to address violations of the UK's legal obligations. Whilst the Withdrawal Agreement provides for the suspension of the Agreement, in whole or in part (excepting provisions relating to citizens' rights), and for financial penalties, it does not provide for termination of, or withdrawal from, the agreement. The only reference to termination is contained in Article 18 of the Northern Ireland Protocol, the provisions of which would cease to apply should the people of Northern Ireland withhold their democratic consent.

The UK and the EU are both able to appear before international dispute resolution fora outside of this dispute procedure, although this presents further challenges. Beyond the end of the transition period, the CJEU will continue to have jurisdiction over some parts of the Withdrawal Agreement, including the Northern Ireland Protocol, for as long as they remain in force, although the Bill's provisions could be used to negate this role in the ways set out above. The CJEU's role in other areas

of the future UK-EU relationship will depend on the outcome of the negotiations. Both [the UK's](#) (PDF, 1.32MB) and [EU's draft legal texts](#) contained provision for dispute settlement.

Infringement proceedings launched against the UK

The UK-EU Joint Committee held an extraordinary meeting on 10 September following the introduction of the Bill. At the meeting, the [EU requested](#) that certain provisions be removed from the Bill by the end of September. The Joint Committee met again on 28 September as part of its regular schedule, following which the UK's Chancellor of the Duchy of Lancaster, [Michael Gove, advised](#) that the measures would not be withdrawn.

Following the passing of the EU's deadline, on 1 October, the EU Commission launched infringement proceedings against the UK. In a [statement, President Ursula Von Der Leyen](#), advised that the Bill 'by its very nature' constitutes a breach of the 'good faith' obligation contained in Article 5 of the Withdrawal Agreement. The EU sent a formal notice of infringement and provided one month for the UK Government to respond.

6.5. Wales' compliance with, and implementation of, its international obligations

Wales and the Northern Ireland Protocol

Under section 22 of the European Union (Withdrawal Agreement) Act 2020, the Welsh Government was granted broad regulation making powers to implement the Northern Ireland Protocol, within areas of devolved competence. The effect of clause 40 of this Bill is that Welsh Ministers must have special regard to a number of matters when exercising functions for the purpose of implementing, or dealing with matters out of, or related to, the Northern Ireland Protocol or the movement of goods within the UK.

In his statement on the Bill on 15 September, the Counsel General advised that the Bill's provisions regarding the Northern Ireland Protocol are "utterly repugnant" (paragraph 363) and that:

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 that a Government could propose ministerial powers that so directly flout both domestic law and international agreements.

The provisions in this Part also exacerbate a potential threat to Welsh ports by incentivising freight from the island of Ireland to use ferry routes from Northern Ireland to Great Britain.

According to **the Welsh Government**, a third of the current traffic between Holyhead and Dublin is destined for, or originates from, Northern Ireland. The implications of the Northern Ireland Protocol for Wales' external trade was set out by **the UK Trade Policy Observatory** in research commissioned by the Welsh Government.

Wales' devolution settlement and international obligations

The Welsh Government and Senedd are responsible for implementing international obligations in devolved areas of competence. It is unclear whether the Bill will require Welsh Ministers and the Senedd to act in a manner which is incompatible with the Withdrawal Agreement, and therefore with international law. Much will depend on the scope of any regulations made under clauses 42 and 43 - regulations which may have effect notwithstanding any relevant international or domestic law which they may be incompatible with, as set out in clause 45.

Wales' devolution settlement requires adherence to international obligations in the following ways:

Compatibility of Welsh Ministerial action

In relation to Wales' international obligations, under section 82 of the Government of Wales Act 2006, the Secretary of State is able to direct Welsh Ministers to take action to give effect to an international obligation. Conversely, the Secretary of State is able to direct Welsh Ministers not to take a proposed action, if it would be incompatible with any international obligation. The Secretary of State may also revoke subordinate legislation made by Welsh Ministers if it is considered to be incompatible with international obligations, or in the interests of defence or national security. To date, section 82 has not been invoked.

The devolution settlement is silent on the position of Welsh Ministers in the event that the proposed actions of the Secretary of State are considered to be incompatible with international obligations.

Compatibility of Senedd legislation

Section 114(1)(d) of the Government of Wales Act 2006 provides that a Secretary of State may make an order prohibiting a Senedd Cymru Bill from being submitted for Royal Assent if they have reasonable grounds to believe that the Bill would be

incompatible with any international obligation. This permits the UK Government to step in and prevent the Senedd from legislating in breach of international obligations.

The devolution settlement is silent on the position of Senedd Cymru in the event that proposed UK Government legislation in an area of devolved competence is considered to be incompatible with international obligations.

Ministerial Code

Paragraph 1.3 of the Welsh Government's **Ministerial Code** places a duty on the Welsh Ministers to comply with the law and explicitly includes international law and treaty obligations. UK Government Ministers are also under a duty to comply with the law. In 2015, the UK Government amended **its Ministerial Code** to remove the wording "international law and treaty obligations" in relation to the Ministerial duty of compliance. However, the **Court of Appeal later ruled** that the removal of the wording did not change the obligation on UK Government Ministers to comply with international law and treaty obligations.

7. Financial Assistance and Subsidy Control

Clauses 48 and 49 give UK Government the power to provide financial assistance to any person for, or in connection with, a wide range of specified purposes. These purposes include promoting economic development, providing infrastructure, supporting cultural activities and events, and supporting educational and training activities and exchanges. It gives the UK Government power to fund activity in policy areas devolved to Wales.

Clause 50 reserves to the UK Parliament the exclusive ability to legislate for a subsidy control regime once the UK ceases to follow EU state aid rules. In respect of Wales, the clause adds the regulation of distortive and harmful subsidies to the list of reserved matters in Schedule 7A to the **Government of Wales Act** 2006.

Main issues

Part 6 of the Bill creates a new power allowing UK Ministers of the Crown to provide funding for economic development, infrastructure, culture, sporting activities, international educational and training activities and exchanges.

The UK Government **says** the Bill will allow it to meet its commitments to deliver replacements for EU programmes, such as a UK Shared Prosperity Fund, replacing

the current EU structural funds regime. The Welsh and Scottish Governments have been critical of these plans in the past, arguing that they should to be fully involved in any replacement scheme.

7.1. Financial Assistance: overview

In general, the UK Government can only spend money if it has been authorised to do so by legislation.

Analysis by the [House of Common Library on the Bill](#) contrasts such legislative authorisation under the [Industrial Development Act 1982](#) and the provisions under the Bill.

Under, the Act Industrial Development Act places strict conditions on how financial assistance must be provided. In particular, such assistance must be likely to benefit the economy of the UK (or any part of it), it must be in the national interest that assistance be provided in the way proposed, and it must not be possible for the assistance to be provided in any other way. The Act also sets a limit of £12 billion (which can be increased, with the Treasury's consent, to a maximum of £16 billion) on the total amount of assistance that can be provided to all recipients.

By contrast, clause 48 of the Bill would give the UK Government broad powers to provide assistance with the powers subject to very few restrictions. In particular, under clause 48(2) of the Bill, any measure that is likely to contribute (either directly or indirectly) to economic development would be permissible. This, the House of Commons briefing suggested, would cover an extremely wide range of activities without a limit on the amount of assistance that could be provided under the Bill.

7.2. Interaction with devolved governments

The [Explanatory Notes](#) (600KB PDF) acknowledge that the purposes of Part 6 of the Bill “fall within wholly or partly devolved areas”. The note further states that the new powers “sit alongside the existing powers by which the UK Government can fund in relation to devolved matters across the devolved nations, in particular the Industrial Development Act 1982”. This, the [Explanatory Notes](#) (600KB PDF) state, “creates a means for the UK Government to provide funding across a range of largely devolved areas that would sit alongside any funding provided by the devolved administrations in those areas”.

Professor Daniel Wincott in his article on the Bill has **argued** that if the UK Government plans to invest in devolved areas without the involvement of the devolved governments then the ‘challenge to devolution is clear’.

The Welsh Government’s Counsel General **has said** that Part 6 of the Bill gives UK Ministers:

[...] for the first time in the 21 years since devolution powers to fund activity in policy areas which are devolved to Wales – not just in economic development but in health, housing and education infrastructure, sport and culture.

He further stated that “a Government in Westminster that seeks both the power to spend in devolved areas, and the power to control the funding available, is a government that seeks to neuter devolution”.

Finance Ministers for Wales, Scotland and Northern Ireland have **voiced their collective concerns** about the financial implications the UK Internal Market Bill will have on devolved governments. Commenting on the Bill after a joint meeting, Finance Minister for Wales, Rebecca Evans MS said:

I am deeply concerned that the Bill gives UK Ministers, for the first time since devolution, powers to fund activity in areas which are clearly devolved to Wales.

In Wales funding decisions are taken in partnership with local communities, to ensure that they reflect the needs of the people in Wales. The powers set out in the Bill completely undermine devolution and will see decisions currently taken in Wales clawed back by the UK Government.

During Committee Stage debate on Part 6 of the Bill, Minister of State for Constitution and Devolution, **Chloe Smith MP confirmed** that devolved Administrations will continue to receive funding through the block grant and the Barnett formula, where appropriate. In respect of the scope of the financial assistance powers in the Bill, she stated:

[T]he plans for investment will be at a strategic level, including on UK-wide projects, which would not be suitable to be blocked by any one part of the country.

7.3. Subsidy Control

As a member of the EU, the UK has been subject to EU rules on State Aid which

are regulated by the European Commission. These rules also apply to the UK during the transition period.

The **Welsh Government has argued** that state aid is devolved as it is not a reserved matter under any heading of the Reserved Matters Schedule in the Government of Wales Act 2006. In contrast, the UK Government has long stated its belief that the regulation of state aid was a reserved matter, meaning that the issue is the responsibility of the UK Parliament alone and that the devolved legislatures are not be able to legislate in this area.

The current devolution settlements do not include any express general reservations on subsidy control.

The **White Paper reaffirmed** the UK Government's stance that subsidy control was reserved and proposed to make it explicit in the Bill by legislating for new reservations on subsidy control in the respective devolution settlements.

Details of a proposed future scheme were revealed by the Secretary of State for Business, Energy and Industrial Strategy, the Rt Hon Alok Sharma MP on 09 September 2020. He announced that the Government will set up a new, independent subsidy regime based on the WTO rules on restricting harmful subsidies for when the transition period ends. In the coming months, the Government will also hold a consultation on whether the UK should adopt subsidy rules that go further than its international commitments.

The RIA for the Bill **states (1.03MB PDF)**:

Devolved administrations will remain responsible for their own spending decisions on subsidies (how much, to whom and for what) within the architecture of any future subsidy control mechanism; this mirrors their current position, under EU State Aid rules.

Commenting on the Bill proposals to reserve subsidy control, the Counsel General, Jeremy Miles MS, suggested that the intention was to “shut [the Welsh Government] out from co-creation of a robust state aid regime for the whole of the UK” and that it was “a significant threat to Welsh businesses”.

8. Legislative Competence

Under the Legislative Consent Convention, the UK Parliament does not normally legislate in areas of devolved competence or alter the competence of the devolved legislatures or governments without the consent of the devolved legislatures.

Annex A of [Explanatory Notes\(600KB PDF\)](#) on Bill provides that a legislative consent motion is required for all seven parts of the Bill, in relation to Wales, Scotland and Northern Ireland. The Secretary of State for Business, Energy & Industrial Strategy (BEIS) also emphasized in his [letter to the Chair of the Select Committee on Welsh Affairs in the House of Commons](#), that legislative consent motions for the Bill from all three devolved legislatures will be requested.

The Secretary of State for BEIS outlines in the letter that the UK Government will continue to work closely with the devolved administrations to understand and respond to any concern which they may have.

The [Counsel General's oral statement](#) on 15 September, stated that the Welsh Government considers this a “badly thought through” and “highly damaging piece of legislation”. The Welsh Government provides that it will work with politicians in Parliament to ensure that the Bill does not become law unless it is “overhauled through amendment”.

On 25 September 2020 the Welsh Government laid a [Legislative Consent Memorandum](#) (LCM) (213KB PDF) on the Bill before the Senedd. The LCM concludes by saying:

“the Senedd’s consent is required for the 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.”

On 15 October the Welsh Government [published a series of proposed amendments](#) to the Bill that it says it would require in order for it to be able to recommend its consent to the Bill. The Welsh Government outlined that the Scottish Government was supportive of the amendments but did not work jointly with the Welsh Government as it remains fundamentally opposed to the proposals in the Bill.

8.1. Impact on competence

Examples are provided in this Briefing outlining the practical implications the

provisions in this Bill may have on the Senedd's ability to exercise its powers in future. . The practical impact is particularly evident in relation to access to goods (Part 1), services (Part 2) and professional qualifications (Part 3).

Other key issues identified in relation to competence, as addressed already in this Briefing include:

- Schedule 7A to the Government of Wales Act 2006 is amended by Part 7. Clause 50(3) reserves to the UK Parliament the exclusive ability to legislate for a subsidy control regime once the UK ceases to follow state aid rules.
- Schedule 7B to GOWA 2006 is also modified by clause 51(2), as the Internal Market Bill is included as a protected enactment, meaning that Senedd legislation cannot modify the Bill.
- The provisions in Part 6 provide the UK Government with powers to provide financial assistance in any area of the UK. Financial assistance may be provided in relation to a number of devolved areas including health, education and housing.

9. Reactions

9.1. Devolution

Ahead of the publication of the Bill, the Welsh Government **Counsel General said** the Bill represented 'an attack on democracy' and that the Welsh Government would do 'everything we can' to challenge it'. He said he saw '**no prospect**' of the Senedd granting legislative consent. The **Counsel General made a statement** on the Bill in Plenary on 15 September, saying that:

- Parts 1-3 of the Bill on market access would make the Senedd's powers to legislate in devolved areas 'meaningless' and undermine intergovernmental work on common frameworks;
- unlike the EU Single Market, the provisions on market access would not offer the protection of a floor of standards; the principles of subsidiarity or proportionality; or public policy exceptions;
- the complexity of the market access provisions would 'bring joy to litigants';
- he could broadly endorse the role proposed for the Office for the Internal Market in Part 4, but a UK Government body should not take on such a role without 'extensive reform of its governance arrangements';

- the powers for UK ministers to spend in devolved areas represented an attempt to 'neuter devolution';
- the reservation of state aid in Part 7 would 'shut us out from co-creation of a robust state aid regime'; and
- Part 5 on the Protocol on Ireland and Northern Ireland would run counter to the rule of law.

The **Scottish Government said** on 8 September that it would be impossible for it to recommend consent to the Bill. In a statement to the Scottish Parliament on 10 September, the **Constitution Secretary said** that the Bill was 'the biggest threat to devolution' since 1999 and raised similar concerns to the Welsh Government. In a letter to the UK Government, **Business Secretary Fiona Hyslop** explained the Scottish Government's position on the market access provisions in the Bill in more detail. The **Scottish Government has also said** it will publish 'a full rebuttal' of the Bill. On 8 October, the **Scottish Government notified** the Clerk of the House of Commons that the Scottish Parliament voted to withhold its consent to the Bill. Members of the Scottish Parliament (MSPs) **voted by 90 to 28** on 7 October.

The House of Commons considered Part 4 of the Bill on the role of the Office for the Internal Market on 15 September. Responding to the debate for the Government, **Parliamentary Under-Secretary of State at BEIS Paul Scully said:**

The Bill [...] works alongside these common frameworks to provide a broader structural underpinning, and offers additional protections to the status quo of UK trade, ensuring certainty for businesses and investors in the form of a backstop—if I may say that—of regulatory coherence. The UK Government continue to work closely and constructively with the devolved Administrations.

The Northern Ireland Executive is divided on the Internal Market Bill. However, **ministers responsible for infrastructure in the Welsh Government, Scottish Government and Northern Ireland Executive wrote** a joint letter to the UK's Transport Secretary on 16 September. The ministers raised concerns about the UK Government's decision to announce a review of connectivity without consultation on 30 June. They note that:

Sections of the Internal Market Bill – notably section 46 – create a mechanism for the UK Government to spend money in areas related to infrastructure that are clearly devolved to Scotland, Wales and Northern Ireland and without any required engagement with the devolved governments. The connectivity review must not be positioned to create a list of schemes by which that new power can then be utilised without our consent as devolved ministers with devolved responsibility.

On 17 September, **finance ministers from the Welsh Government, Scottish Government and Northern Ireland Executive also jointly expressed concern** that the spending powers in the Bill would “override the existing devolution settlement”.

The House of Commons considered Part 6 of the Bill on financial assistance on 16 September. **Minister for the Constitution Chloe Smith said** that the UK Government:

[...] want to continue to work with the devolved Administrations and local authorities to ensure that this power is used to best effect, augmenting the existing powers used to support citizens across the UK.

She said that “[t]he power means that we can consider infrastructure investment across the boundaries of the nations [...]and it leaves the competences of our devolved Administrations intact”.

9.2. Protocol on Ireland and Northern Ireland

The UK Government’s **legal position** confirms that the clauses relating to the Northern Ireland Protocol enable powers to be exercised in a way that is incompatible with the Withdrawal Agreement. The position asserts that the principle of parliamentary sovereignty permits this:

Parliament is sovereign as a matter of domestic law and can pass legislation which is in breach of the UK’s Treaty obligations. Parliament would not be acting unconstitutionally in enacting such legislation (...) Under this approach, treaty obligations only become binding to the extent that they are enshrined in domestic legislation.

The **Prime Minister previously advised** the House of Commons that the legislation was needed “to protect the Northern Irish peace process and the Good Friday Agreement” **and that** “it is intended to uphold the economic, political and territorial integrity of the United Kingdom.”

EU response

European Commission President, Ursula Von Der Leyen initially **tweeted that** a breach of international law would “undermine trust” and quoted the international law principle of *pacta sunt servanda*, codified in Article 26 of the Vienna Convention on the Law of Treaties 1969, that every treaty in force is binding upon the parties to it and must be performed by them in good faith. Later, in her **State of the Union address**, the Commission President quoted former Prime Minister, Margaret Thatcher, that:

“Britain does not break Treaties. It would be bad for Britain, bad for relations with the rest of the world, and bad for any future Treaty on trade.” This was true then, and it is true today.

The EU Commission has launched infringement proceedings against the UK on 1 October, discussed above in section 6.5.

The leaders of the European Parliament’s political parties and its UK Coordination Group **issued a joint statement** warning that “under no circumstances” would they ratify any agreement that breaches, or threatens to breach, the Withdrawal Agreement.

Ireland response

Ireland’s Taoiseach, **Micheál Martin confirmed** on 13 September that the EU27 Member States were united in calling for the full implementation of the Withdrawal Agreement. In an **interview with CNN**, he described the UK’s approach as “moving away from the norms of conduct and diplomacy.” He advised that he had urged the Prime Minister to urgently re-engage with the EU. **Ireland’s Minister for Foreign Affairs and Defence**, Simon Coveney, described the language used by the UK Government as “inflammatory.”