

Internal Market White Paper

Research Briefing

September 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 and executive summary

On 16 July the UK Government published a White Paper seeking views on its proposals to legislate on the operation of the UK internal market. The consultation closes on 13 August.

The functioning of the UK's internal market is currently governed by EU law. Once the transition period comes to an end in December 2020 and some of the rules governing the EU's Single Market fall away, the governments of the UK will have more flexibility to diverge from EU rules and standards. The UK Government expresses concern that this could create new barriers to trade between the different nations of the UK. It is therefore proposing to enshrine in law a new Mutual Access Commitment. The proposals have proved controversial with both the Welsh and Scottish governments raising objections to the potential impact of these proposals on devolution.

The White Paper provides an overview of some of the key features of the legislation and how it will work but doesn't include draft clauses or provide detailed information on how all aspects of the proposals will operate. While it isn't therefore possible to reach definitive conclusions about its potential impacts, this paper identifies some of the key issues that may be of importance to Wales. These include:

- How will the proposed legislation prevent a race to the bottom in the UK for things such as food and product standards?
- What impact will the proposals have on the ability of the Senedd to legislate in areas within its devolved competence, and will any new restrictions apply retrospectively to Senedd legislation already passed?
- Will the proposals extend the reach of the UK internal market restrictions beyond those already in place under the rules of the EU's Single Market?
- How will the UK internal market be governed? What new intergovernmental arrangements will be put in place and how will disputes between the four governments of the UK be resolved?
- Will individuals and citizens have any new rights of redress for barriers to trade within the UK internal market?
- How will the legislation and the UK internal market take account of changes to the UK economy over time and could this lead to any new restrictions on devolved competence?

- Will the devolved governments be given an enhanced role in international trade negotiations given the importance the White Paper places on the effects of internal market barriers on trade negotiations?
- What are the terms of the review of spending powers outlined in the White Paper? What enhanced spending powers is the UK Government seeking and will this have any impact on the current powers of the devolved governments?

Section 6 of this paper provides illustrative examples of how the proposals in the White Paper could affect devolved legislation and powers, and the questions that need to be answered before a complete analysis of the changes the proposals may bring can be made. They cover areas such as social care, regulation of private landlords and the labelling of bottled water.

This paper also considers the proposals to introduce a new reservation of subsidy control, and the economic modelling that underpins the UK Government's White Paper.

2. UK Government rationale for a UK internal market

2.1. Why a UK internal market is needed

The White Paper argues that the UK's internal market has been enshrined in 'British law' for over three centuries and has been "a source of unhindered and open trade across the United Kingdom" since the Acts of Union formally united England, Wales and Scotland in 1707.

The White Paper notes that the UK's membership of the then-European Economic Community in 1973 saw European law take on a more direct role in providing the legislative underpinning of [the UK's] economy. The White Paper outlines that:

European directives and regulations, along with relevant judgments from the Court of Justice, replaced British law and took on an integral role in the legislative underpinning of the Internal Market.

Following the UK's withdrawal from the EU on 31 January 2020, the UK entered a transition period whereby it continues to be subject to EU rules and remains a member of the single market and customs union, in accordance with the Withdrawal Agreement. At the end of the transition period, the UK will no longer be collectively bound by EU law.

The White Paper states that as the UK leaves the transition period, and leaves the EU's legal order, it will need to legislate in order to maintain and "guarantee the continued seamless functioning of the UK internal market".

The EU's Single Market

In order to fully understand the proposals contained within the White Paper it is important to consider the rules of the EU Single Market that have been in operation in the UK via its previous membership of the EU. A more detailed summary of how the EU's Single Market operates is provided in Annex 1 of this paper.

The **objective of the EU's sSingle Market** is to ensure the free movement of goods, services, people and capital within and between the EU's Member States, whilst minimising or eliminating any barriers to trade and movement, and maintaining high levels of environment and consumer protection. The EU's Single Market, in its simplest form, takes two basic approaches to reduce

regulatory barriers between territories. These are the harmonisation of standards across the Member States of the EU and, where harmonisation doesn't apply, the mutual recognition and non-discrimination of goods and services. These concepts are explained further in section 3 of this paper.

It is governed by a set of fundamental principles enshrined in the Treaty of the Functioning of the EU that have developed and changed over time. It has a complex governance structure and both the European Commission and the European Court of Justice play a significant role in its operation and oversight.

2.2. Objectives for the UK imarket

The White Paper states that the UK Government's main objective in respect of a UK internal market is to "guarantee the economic interests of business, consumers and workers, working with the grain of the UK's constitution to support devolved decision making".

It sets out three overarching objectives:

- To secure continued economic opportunities across the UK;
- To continue to increase competitiveness and enable citizens across the UK to be in an environment that is the best place in the world to do business; and
- To continue to support the general welfare, prosperity and economic security of all UK citizens.

The White Paper outlines three further 'supporting aims' and two 'design rules' to support its overarching objectives.

The three **supporting aims** are:

- maintain frictionless trade between all parts of the UK;
- maintain fair competition and prevent discrimination, and;
- continue to protect business, consumers and civil society by engaging them in the development of the market.

The two **design rules** are to:

- foster collaboration and dialogue, and;
- build trust and ensure openness.

Trade

The White Paper argues that ensuring the UK remains a coherent and integrated economy is key to fostering opportunities provided through international trade. It asserts that such an approach will make the whole UK more attractive to foreign investment and build confidence in the UK's present and future trading partners.

It states that the absence of an up-to-date, coherent market structure could lead to economic barriers blocking or inhibiting trade in goods which may significantly and detrimentally impact services. Conversely, the White Paper suggests that an easily explained system for managing the UK internal market "supports the ongoing attractiveness of a country for foreign direct investment".

3. The White Paper's proposals for a UK internal market

The White Paper outlines the UK Government's proposals for legislation to enshrine in law a new Market Access Commitment for the UK internal market based around the two principles of mutual recognition and non-discrimination.

3.1. Mutual recognition

Mutual recognition in this context will mean that a good or service that meets the regulatory requirements in one part of the UK would be accepted in another part of the UK without the need for it to be subject to any further compliance requirements. Mutual recognition will cover goods, professional qualifications and services. This would mean that:

- goods produced in England to English standards set by the UK Government would be accepted for sale in Wales without the need to meet any additional or different Welsh standards;
- compliance with qualifications required to access a profession in one territory could be used to demonstrate compliance towards the access of that profession in another territory; and
- existing provision for mutual recognition of services would be 'explicitly brought' within the new UK Internal Market system.

3.2. Non-discrimination

The proposals relating to non-discrimination will mean that a government in one part of the UK will not be able to discriminate against a person, good or service on the basis of geography or residence. For example, the Welsh Government could not set higher standards for producers based in England, Northern Ireland and Scotland than it does for producers in Wales. This example would be a form of direct discrimination.

The UK Government is also considering legislating for indirect discrimination, where a producer from one country is treated unfavourably compared to a local operator due to the nature of the regulation in place, rather than it having been specifically targeted to prevent them from trading. The example provided in the White Paper was if the Welsh Government introduced a requirement that milk in Wales could only travel a certain distance which would, in effect, mean most milk from the rest of the UK could not be sold in Wales.

3.3. What is the scope of the Market Access Commitment?

The White Paper suggests that the Market Access Commitment will cover the whole of the UK economy and include goods and services. This would be broader than the current coverage of the EU's Single Market which is incomplete in some areas, particularly services. The White Paper states:

Even in areas where specific powers are not returning, the absence of EU rules could make it easier for new barriers to arise.

The White Paper states that mutual recognition and non-discrimination will operate together. For goods, mutual recognition will become the default presumption and the role of non-discrimination will be to 'supplement' mutual recognition.

The White Paper does state that some areas will be excluded from the Market Access Commitment but the scope of exclusions remains unclear. The White Paper states that exclusions will include all reserved areas, spending and taxation, social policies with little internal market impacts, and pre-existing differences. It is unclear if this includes devolved taxes. However the paper also notes that non-discrimination could still apply in some of these areas.

The White Paper also notes that any exclusions will need to be agreed at the outset and "will not generally be expected to change".

In relation to the principle of non-discrimination the White Paper outlines that it would not apply in some emergency situations such as a plant, animal, or public health emergency. For example the Welsh Government could exclude livestock from England in the event of a foot and mouth outbreak and vice versa.

In relation to reserved policy areas, the White Paper states that this exclusion will apply to the extent that they are reserved/excepted in the different devolution settlements in Wales, Northern Ireland and Scotland.

The White Paper outlines that the scope of the Market Access Commitment will apply not only to primary legislation on relevant issues but to all regulations, including regulations made by all other bodies with regulation making powers such as regulators of service providers.

3.4. How will the UK internal market be governed?

Intergovernmental Relations

The White Paper does not provide much detail on what governance and institutional mechanisms will be established to oversee the internal market in the UK. The White Paper states that inter-governmental mechanisms for dispute resolution will be improved to ensure that they can address potential disagreements on the operation of the internal market. As set out above, design rule 1 for the development of the internal market says it should encourage good intergovernmental relations and cooperation including increased transparency between the UK Government and devolved governments.

The White Paper does not set out how intergovernmental mechanisms will be improved or how they will deliver increased transparency. It does not provide any details on how disputes will be resolved and who will be responsible for their resolution. It does not set out a timeline for when such improvements would be made or the mechanism for how such improvements would be delivered, for example if they would be included within a new memorandum of understanding between governments or enshrined in the legislation in some way.

The White Paper says that the evolution and overall shape of the UK's internal market will be overseen by the UK Parliament but doesn't mention a role for the devolved legislatures in this. A relationship between the devolved legislatures and an independent expert committee is mentioned as one of the options for the way in which independent functions in the internal market could work.

Independent functions

The White Paper outlines the UK Government's intention to establish a new body or expert committee to take on two independent functions in relation to the 'internal market'.

It will be responsible for: monitoring and advising on the health and evolution of the 'internal market', providing independent expert advice on this subject, and gathering the views of businesses and stakeholders on the functioning of the internal market. However, the White Paper is clear that it will not fully replicate the functions of the European Commission in relation to the EU's Single Market, nor will it make third-party determinations that directly overturn the actions of elected governments.

In relation to the first independent function of overseeing the health of the internal market; the White Paper states that the independent body would be tasked with providing expert advice on the impact of a proposal on the internal market. It will also be able to provide advice to the UK's legislatures as well as the governments. These assessments will cover not only local effects but also cross-UK supply chain effects.

Under the rules governing the EU's Single Market, Member States are required to notify the Commission and each other when taking relevant measures in non-harmonised sectors. It's not clear in the White Paper whether governments in the UK would be required to notify the independent body or each other or whether analyses would be provided on request. It is also not clear whether one government or legislature could request independent analyses of proposals by another government or legislature within the UK.

In relation to the independent function of stakeholder engagement, the body would be responsible for listening to enquiries from citizens and businesses about the function of the market or a proposal, and will be tasked with gathering evidence of 'harmful regulatory divergence'. The White Paper does not specify what the term harmful would mean.

3.5. How it relates to Common Frameworks

To avoid significant policy differentiation in the UK after the Brexit transition period ends, the UK and devolved governments have agreed that **UK-wide common frameworks are needed to ensure consistency and co-ordination** across certain policy areas previously covered by EU law. The latest developments in relation to the programme and the relationship of the frameworks to these proposals and international agreements are explored in our recent **Senedd Research paper** on the issue.

The White Paper explains that the Common Frameworks Programme "will create an intergovernmental policy development and decision-making process, and provide high levels of regulatory alignment in specific policy areas along with the roles and responsibilities of each administration".

However, the White Paper argues that Common Frameworks "on their own cannot guarantee the integrity of the entire internal market". As they tend to be sector-specific, the White Paper says that "they do not address the totality of economic regulation or the cumulative effects of divergence, i.e. the consequences of regulatory difference in one sector that affects other sectors".

It is unclear whether divergence enacted in any of the four UK territories and permitted by Common Frameworks could subsequently be caught by the Market Access Commitment. As noted above, under EU law, when harmonisation has occurred, the principle of mutual recognition would not be applicable.

4. Subsidy control

Part 4 of the White Paper relates to 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 paper proposes to create a single, UK-wide subsidy regime that will ensure 'a uniform approach on the rules that will govern the way public authorities, including local authorities, support businesses'.

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. The White Paper states that although the UK Government is of the view that state aid is currently reserved, it will make this explicit by bringing forward legislation that will introduce new reservations or exceptions on subsidy control into the devolution settlements. The White Paper does however state that the devolved administrations will remain responsible for spending decisions on subsidies.

The paper goes on to say that:

The UK as a whole has an interest in ensuring that there is legal certainty, and that the UK Internal Market can continue to function without barriers. Given this, the future subsidy control mechanisms should be the responsibility of the UK Parliament to determine.

The White Paper states that the UK Government will set out its policy for the UK-wide subsidy control regime separately in due course and that it would work with the devolved administrations to seek agreement on the shape of that policy.

5. Initial analysis of the proposals

This section identifies some of the key issues and questions that arise from the White Paper that may have implications for Wales. As the White Paper doesn't include draft clauses or provide detailed information on how all aspects of the proposals will operate, it's not possible to reach definitive conclusions about its potential impacts. Rather, this section provides an initial analysis of some of the key questions raised..

Illustrative examples of how these issues might affect specific policy areas and legislation in Wales are set out at the end of this chapter.

5.1. Regulatory standards

The White Paper states that the UK Government is committed to maintaining high standards within the UK internal market when the UK leaves the EU and in some cases setting higher standards. The White Paper says:

Under the Government's proposed approach, the devolved administrations would retain the right to legislate in devolved policy areas that they currently enjoy.

[..]

The Government is committed to ensuring that this power of innovation does not lead to any worry about the possible lowering of standards [...]

The White Paper says that the UK Government will do this by continuing to work with devolved governments on the Common Frameworks programme and by upholding their commitment to the 'highest possible standards'. However, the White Paper does not clarify whether the Market Access Commitment would include any mechanism to ensure high standards are upheld. This matters because of the effect of enshrining in law the mutual recognition and non-discrimination principles.

By enshrining in law a principle of mutual recognition, goods produced to the standards set in one part of the UK will automatically be entitled to be sold in other parts of the UK. Therefore, whilst Wales could opt to introduce higher standards on food quality than elsewhere in the UK, these would only apply to Welsh producers. Producers from elsewhere in the UK would only be required to meet the standards in force in their respective nation. They could voluntarily opt to meet the higher standards if, for example, there was consumer demand for this, but would not be required to. The practical impact of this could mean that producers in Wales would

be at a comparative disadvantage compared to producers elsewhere in the UK.

Commentators, **such as Professor Nicola McEwan** and others have argued that given the relative size and dominance of the market in England relative to the rest of the UK, under a principle of absolute mutual recognition there would be an economic imperative for companies to produce to the standards set for England by the UK Government - be they lower or higher.

Therefore while the devolved governments may not face any new legislative constraints, there would be a practical policy impact of placing their producers or service providers at a comparative disadvantage - even on justifiable social or environmental policy grounds, compared to elsewhere in the UK.

5.2. Scope of the Market Access Commitment

As set out in section 3 of this paper, the UK Government is proposing that the Market Access Commitment will apply to all goods and services. This implies that the reach of the internal market provision would be broader than those currently subject to the rules of the EU's Single Market. For example, the White Paper provides the example of building regulations as a barrier to trade. Building regulations have been devolved to Wales since 2011. Differences exist in the way building regulations are applied across the UK and the inclusion of this example in the White Paper implies that whilst devolved legislatures could opt to continue to legislate differently in these areas in future, construction companies from different parts of the UK would not be required to observe them.

This would be a significant change from the situation in operation in the UK under the EU's Single Market.

Given the potential for the scope of the Market Access Commitment, the definition of the exclusions that will apply will be important to assess any impacts.

5.3. Exclusions and reservations

The principle of mutual recognition is rarely implemented in its absolute form in other examples of internal markets. This is also true of the principle of non-discrimination.

Under the EU's Single Market, Member States are able to introduce stricter regulations or standards in contradiction to the principle of mutual recognition on clear grounds of public interest such as public health, environmental standards or consumer protection. In his **evidence** to the Scottish Parliament's Finance and

Constitution Committee, Professor Michael Dougan states that Member States in the EU are provided with a wide range of regulatory choices without being in contravention of the rules of the Single Market.

It is not clear from the White Paper what, if any, of these types of exclusions will be permitted under the proposed legislation.

As set out in some of the examples below, the White Paper states that exclusions will include 'pre-existing differences' but it does not clarify how these differences will be defined. This could be important in terms of leaving devolved governments open to challenge on legislation already in place. The White Paper also states that social policies with minimal impact on the internal market would be excluded but doesn't provide further detail on how this would be defined or provide illustrative examples of how this exclusion would work.

5.4. Constraints on and changes to the current devolution settlement

The White Paper implies that in relation to the operation of the internal market, the devolved legislatures will retain the right to legislate in areas that are currently devolved. The UK Government states that it will legislate to make subsidy control a specific reservation and it does not explicitly rule out any further changes to the devolved settlements either now or in future as the internal market evolves.

In her evidence to the Scottish Parliament's Finance and Constitution Committee, **Professor Aileen McHarg** outlines that a legislative approach to the internal market could include legislating to provide a consistent set of constraints across the devolved institutions, or a veto power for a UK Secretary of State. Professor McHarg points out that such an approach could be problematic as, due to the sovereignty of the UK Parliament, it would not be possible to bind the UK Parliament and Government in respect of England in the same way that it could bind the devolved legislatures.

It is also unclear whether the devolved institutions or the UK Parliament and Government could be subject to new assessment requirements when passing legislation in relation to its potential impact on the internal market. For example, the Government of Wales Act 2006 was revised in 2017 to require a Member introducing a new Bill to the Senedd to complete a justice impact assessment.

The White Paper doesn't clarify whether a similar assessment could be required.

5.5. Governance and rights

The examples of internal markets included within the White Paper and the EU's Single Market itself have different, but clear governance and oversight structures attached to them. These mechanisms include provisions on monitoring and oversight of the operation of the market, compliance mechanisms, dispute avoidance and dispute resolution mechanisms, redress mechanisms and stakeholder engagement mechanisms.

Proposals on how some of these functions will be delivered are included within the White Paper and some key design principles are also set out. However, the White Paper does not outline the details of all these mechanisms.

For example, while the White Paper states that intergovernmental dispute resolution mechanisms will need to be improved; it does not state how this will be done and how parity between the four governments within these mechanisms would be delivered. The White Paper suggests this will be done via existing mechanisms but does not explicitly state whether these mechanisms could be underpinned by legislation in some way. The UK and devolved governments have been conducting a review of intergovernmental relations but the Welsh Government has **informed** the Senedd's Legislation, Justice and Constitution Committee that this work has been delayed. A new timetable for this work has not yet been announced.

In his evidence to the Scottish Parliament's Finance and Constitution Committee, Professor Michael Dougan points out that a key question to consider will be who owns the UK Internal Market. That is, will it be a mainly inter-governmental structure or will individuals have concrete legal rights enforceable through the courts. The White Paper implies that the Market Access Commitment will give individuals citizens and businesses a 'guarantee' to be able to trade unhindered but does not specify whether this will create any rights or mechanisms for redress beyond those which already exist through the judicial review process which can be expensive for individuals and businesses.

5.6. Trade

The White Paper states that legislating for a UK internal market will enable the UK to negotiate trade deals with third party countries more easily and make the UK more attractive to foreign direct investment. Examples of internal markets with sub-state governments operating within countries elsewhere are provided within the paper..

As the White Paper itself says, it is important to note that some of the examples provided are of Federal States, and whilst many of them have taken actions to seek to ensure that international trade agreements signed by the federal government can be fully implemented within their territories, most of the sub-state territories and governments maintain a high degree of regulatory autonomy when deciding how or if they will implement international trade agreements. In addition, the examples illustrate that it is common place for trade agreements negotiated between two national governments to include carve-outs for specific territories..

The UK Government has not yet set out in detail what role devolved governments will play in international trade negotiations. Dr Emily Lydgate and Chloe Anthony in their [paper](#) on the internal market suggest, given the potential impacts of trade agreements on devolved areas and the internal market, it is important that consideration is given to providing devolved governments with a stronger role in trade negotiations.

5.7. Dynamism

Given that the economies of the UK will not remain static, it may be important to consider how legislation on the internal market will take account of this and any future changes and innovations. The EU's single market has been highly dynamic and been subject to a process of continued review and change.

The White Paper states:

Given these measures are intended to preserve the integrity of the UK Internal Market on an on ongoing basis, the Government will look to build on precedent to ensure the continuity of the most effective mechanisms to deliver that objective.

Furthermore, in relation to the independent functions that a body will be required to carry out, it states:

The functioning of the UK Internal Market architecture itself will also need to be reviewed at intervals to make sure legislation is still serving developments in the market and whether legal principles are being adhered to and utilised effectively by stakeholders.

The White Paper doesn't set out the details of any mechanisms that might be put in place to reflect changes in the economy or regulatory landscape nor how any changes made to the architecture would be agreed and implemented between the governments of the UK.

In the EU's Single Market the European Commission has the right to propose new

legislation it believes is necessary but, as identified by Professor Michael Keating in his **response** to the White Paper, this legislation is subject to the limits of the subsidiarity and proportionality principles which both national and sub-state governments and legislatures can use to challenge new legislative proposals.

5.8. Future UK-EU Relationship

The paper doesn't clarify how any agreement reached between the UK and EU on a future relationship will in any way impact upon the proposals contained in the White Paper. For example any agreement on state aid or level playing field commitments.

The White Paper does provide some detail on how the proposals for a UK internal market will operate with the Northern Ireland Protocol. The Paper states that it operates in those areas not governed by the Protocol and that the UK Government will introduce separate legislation to guarantee unfettered access for Northern Irish goods into Great Britain. The White Paper states that the Protocol 'is not codified as a permanent solution' and that should the consent of Northern Ireland for the Protocol be withdrawn, the requirements of the UK internal market would apply.

5.9. Spending powers

The White Paper says that the UK Government will review the spending powers it requires in relation to the operation of the internal market. It states:

The UK Government will seek to clarify the use of spending powers to support and promote the functioning of the Internal Market. This will provide certainty and transparency to help channel private and public investment.

It does not set out what the scope of this review of spending powers will be, when it may be announced and whether it will require any new legislative powers, changes to the current or future devolution settlements.

5.10. Examples of potential impacts on devolved policy areas

It is unclear from the White Paper which devolved laws would be captured by the internal market.

In particular, it is unclear whether current devolved Welsh law that diverges from law in the rest of the United Kingdom would be subject to the internal market. Paragraph 23 of the White Paper says (emphasis added):

Certain social policy measures with little Internal Market impacts, and **pre-existing differences** and policies, will also be excluded.

It is unclear if this means that existing devolved Welsh law that is already different to law in the rest of the United Kingdom will be captured by the internal market. How will “pre-existing differences” be defined, and how much divergence is needed for something to be different are not addressed within the White Paper. What the “certain social policy measures” that will be excluded is also not illustrated

Below are examples of a range of devolved Welsh laws that have the ability to impact on intra-UK trade in goods and services. It is currently unclear whether they would be subject to the internal market or whether they would be excluded.

5.10.a Social Care example

Part 4 of the Regulation and Inspection of Social Care (Wales) Act 2016 gives Social Care Wales discretion as to which professional qualifications to accept as being sufficient to allow persons to be registered as social workers in Wales, social care managers in Wales and social care workers in Wales.

Are social care services captured by the White Paper? Or is this an example of a pre-existing difference that will be excluded?

If England’s social care rules allow a person to provide social care services in England with fewer qualification than those allowed by Social Care Wales, would the principle of mutual recognition of professional qualifications apply? If so, what impact would that have on aspiring and current social care professionals as to where they complete their qualifications, and how will it affect the intended policy objective of Social Care Wales to upskill the workforce working in the sector in Wales?

With regard to recognition of professional qualifications, the White Paper is unclear. Paragraph 133(b) on page 46 says (emphasis added):

Professional qualifications – mutual recognition of professional qualifications means that compliance with regulation required to access a profession in one territory can be used to **demonstrate** compliance towards the access of that profession in another territory. Where access requirements in the other territory differ, a process will be implemented to enable professionals to **demonstrate** compliance. In addition, other profession-specific regulatory requirements needed to practise the profession will be included as part of this process.

If the White Paper is intended to capture social care services, it is unclear whether “demonstrate” means that:

- a social care worker who can practise social care in England would automatically be allowed to practise social care in Wales, or;
- the ability to practise social care in England would provide evidence of suitability to practise in Wales, while leaving the final decision to Social Care Wales.

5.10.b Registration of Private Landlords example

Part 1 of the Housing (Wales) Act 2014 requires private landlords in Wales to be registered in accordance with the scheme set out in that Act.

It is not clear as to whether private landlord registration would be captured by the White Paper proposals.

If Northern Ireland has a different scheme for authorising private landlords in Northern Ireland, would the principles of mutual recognition and non-discrimination apply? Would a person who carries on business as a private landlord in Northern Ireland be permitted to carry on business as a private landlord in Wales by satisfying the Northern Ireland rules, but not the Wales rules?

The scheme set out in the Housing (Wales) Act 2014 already complies with the Provision of Services Regulations 2009. This means that the current Wales scheme must not be discriminatory and must be justifiable in the public interest.

Paragraph 133(c) on page 46 of the White Paper says that the Provision of Services Regulations 2009 rules “will be explicitly brought within the Internal Market system”. However, it is unclear how this will interact with the broader principles of mutual recognition and non-discrimination.

5.10.c Microbeads example

Each of the four governments in the United Kingdom has made regulations that prohibit the use of microbeads in rinse-off personal care products such as bath products, exfoliators and dental products.

Rinse-off personal care products appear to be goods captured by the White Paper proposals. Therefore, if one of the governments made regulations that lifted the prohibition in respect of such goods, the principles of non-discrimination and mutual recognition would apply.

Would this mean that goods containing microbeads could be placed on the market in Wales, despite the prohibition on the use of microbeads set out in The Environmental Protection (Microbeads) (Wales) Regulations 2018?

While the White Paper repeats many times that high standards will be maintained, there is no explanation as to how, or whether the internal market will ensure that the highest standards adopted by any of the UK nations will be maintained across the rest of the UK. For example, will the internal market have minimum standards relating to the use of microbeads plastics in goods? What if one part of the UK completely deregulates this area? Will such matters be dealt with by common frameworks? And what international obligations might arise so as to override domestic law in this area?

5.10.d Building Regulations example

Paragraph 17 of the White Paper's Executive Summary says that divergent approaches to building regulations would be a barrier to the construction industry in the United Kingdom.

Therefore, while building regulations are clearly intended to be captured by the internal market, it is unclear to what extent any "pre-existing differences" will be excluded.

Will the existing Wales building regulations be excluded? Will the internal market apply only to future changes to building regulations?

This returns to the question at the beginning of this section: how will "pre-existing differences" be excluded from the internal market?

The inclusion of building regulations is also a clear example that the UK internal market is intended to cover goods and services that were not previously regulated under EU law.

5.10.e Bottled Water Labelling example

The Natural Mineral Water, Spring Water and Bottled Drinking Water (Wales) Regulations 2015 set out specific requirements for bottled water that is labelled as "spring water". For example, the water must be bottled at the spring source and specific steps must be taken to avoid contamination of the water.

Bottled water appears to be captured by the White Paper. Therefore, if England rules set different standards for bottled spring water, the principles of non-

discrimination and mutual recognition would apply. This would mean that bottled spring water that complies with the Wales rules could be sold in Wales as spring water, and bottled spring water that complies with different England rules could also be sold in Wales as spring water.

Does this cause confusion for consumers who want to buy spring water? Is this an issue that arises in all the above examples?

6. The economic impact of different regulation in each of the UK nations

6.1. Impact of trade barriers between the UK nations on Gross Domestic Product

The White Paper includes analysis of the economic impact of the proposals, as well as the effects of potential barriers to trade within the UK. It states that the emergence of regulatory barriers would lead to economic risks for each of the UK nations, given the high degree of integration between them. The UK Government's statement on GDP reduction is based on analysis which modelled the effect on UK GDP if trade costs increased to the levels between German states. **The White Paper states that any percentage reduction in Welsh Gross Domestic Product (GDP) resulting from barriers to trade between the UK nations is likely to be more than 5 times as large as the reduction to UK GDP, resulting in a reduction in Welsh GDP of £1.2 billion.** The UK Government states that, while local and international consumption of goods would offset some of the negative impact on trade between the different parts of the UK if trade barriers increased, it would be insufficient to offset this fully. It considers that the devolved nations would see a larger decrease in GDP than England, as trade between England and the devolved nations would fall, but the impact on England would be largely offset by increased trade between English regions.

However, the Analytical Annex to the White Paper (pages 90-91) states that the figures are “purely illustrative”, and should not be taken as any indication of the likely GDP impact of policy divergence by the four parts of the UK after the end of the transition period. The analytical annex notes that:

While these are significant and economically large impacts, this is not a prediction of the future of the UK. Firstly, devolution in Germany is fundamentally different to that of the UK and as the result the states have different policy levers at their disposal. In addition, trade costs can be affected by many factors outside of policy makers control, as explained in the previous section. As a result, these figures should not be taken as any indication of the likely GDP impact of policy divergence by the four parts of the UK after the end of the transition period.

It is not clear from the White Paper why Germany was used as the basis for the UK Government's modelling, or whether examples based on other countries would have delivered different results.

6.2. Trade by Welsh firms

There is no official source of data on trade within the UK. The Welsh Government **states** that data for Wales' international trade come from "modelled estimates based on apportioned employment numbers from the UK, rather than direct data collections".

The UK Government's White Paper has used analysis from the **EUREGIO database** developed by academics in the Netherlands and the European Commission, which uses international trade flows as a basis for modelling these at a regional level across EU Member States. **This analysis uses data from 2010 to set out the percentage of sales and purchases for each UK nation that were made within that nation; within the rest of the UK; within EU Member States; and across the rest of the world.** This data shows that in 2010:

- 64 per cent of final goods and services produced in Wales were sold within Wales, while 27 per cent were sold in other parts of the UK, and 9 per cent of goods were sold outside the UK.
- The percentage of goods and services produced in Wales that were sold in other parts of the UK was considerably higher than that of the other UK nations. The figures for exports from Scotland and Northern Ireland that went to the rest of the UK were also considerably higher than that for England.
- 62 per cent of final goods and services consumed in Wales were from Wales, while 25 per cent were from other parts of the UK, and 13 per cent of goods were from outside the UK.
- The percentage of goods and services consumed in Wales that were produced in other parts of the UK was considerably higher than that of the other UK nations. The figures for Scotland and Northern Ireland show that the percentage of goods and services consumed in these nations from the rest of the UK were also considerably higher than England.
- In addition, the dataset shows that there are similar patterns for supply chain flows of intermediate goods and services. 51 per cent of intermediate goods and services produced in Wales were consumed in Wales, 27 per cent in other parts of the UK, and 22 per cent outside the UK.
- 45 per cent of intermediate goods and services consumed in Wales were produced in Wales, 41 per cent in other parts of the UK, and 14 per cent outside the UK.

On the same day as the White Paper was published, the Welsh Government published the Trade Survey for Wales, which provides survey data for 2018, although this is based on a sample of around 1,000 businesses. Scotland and Northern Ireland have also published data for 2018, based on surveys which use similar methodologies. The Welsh Government survey looks at sales and purchases by Welsh businesses, and is therefore different to the EUREGIO dataset which looks at goods and services produced by Wales, and goods and services consumed in Wales.

The survey data produced by the Welsh Government shows the following headline conclusions:

- 50 per cent of sales from Welsh businesses went to customers in Wales, 30 per cent to customers in the rest of the UK, and 20 per cent to customers outside the UK.
- 87 per cent of businesses in Wales had sales to customers in Wales, 48 per cent to customers in the rest of the UK, 17 per cent to customers in the EU and 12 per cent to customers in the rest of the world.
- 20 per cent of purchases by Welsh businesses were from Wales, compared to 51 per cent from the rest of the UK, and 18 per cent from outside the UK. In addition, 12 per cent of purchases were unallocated by region.
- 81 per cent of businesses in Wales made purchases from Wales, 67 per cent from the rest of the UK, 22 per cent from the EU and 10 per cent from the rest of the world.

7. Responses and reactions from governments and legislatures

7.1. Welsh Government

Prior to the publication of the White Paper, the Welsh Government's Counsel General and Minister for European Transition, Jeremy Miles MS, **wrote** to UK Government Ministers on 7 July 2020. The letter notes that while Welsh Government officials have worked closely with UK Government counterparts on the implications of Brexit for the UK internal market, UK Government officials had disengaged from this programme of joint work and failed to share promised drafts of a Green Paper with the Welsh Government.

Following the publication of the White Paper, the Welsh Government's Counsel General **wrote again** to the UK Secretary of State for Business, Energy and Industrial Strategy, Rt.Hon Alok Sharma MP, on 14 August 2020. The letter includes a detailed analysis of the White Paper by the Welsh Government and 15 questions to which the Welsh Government is seeking answers.

In his letter the Counsel General states that Welsh Government's initial view is that the White Paper is 'fundamentally flawed and misleading'. He argues that the approach taken in the White Paper could 'accelerate the break-up of the Union'. The letter states that the Welsh Government is not opposed to legislation being brought forward to govern the UK Internal Market if it is proven necessary and is done on a collaborative basis, but believes the legislation as proposed by the White Paper is not needed. It states that the proposals in the White Paper would 'emasculate the current rights of the devolved institutions' and provide them with less freedom to diverge than they have enjoyed under the EU.

Other key points included in the Welsh Government's analysis include that:

- the assertion in the White Paper that the proposals 'will give' devolved institutions more powers is misleading;
- the 'evidence used to support the White Paper's proposals is flawed in many ways' including that:
 - the risk of harm to the UK economy of not introducing the Bill is overstated;
 - examples included in the paper are hypothetical and not based on sectors of the UK economy where there is already divergence;

- the interpretation of economic modelling and analysis is 'deeply concerning', and
- the examples of how internal markets operate in other countries across the world are not appropriate comparisons to the UK;
- the proposals as drafted would make it 'inevitable' that the legislation will limit the Senedd's competence to regulate goods on the market in Wales and the paper lacks detail on the impact of the Senedd's ability to regulate for services and qualifications;
- the model for the UK internal market proposed by the White Paper is different in several key ways to the operation of the EU Single Market, including that the rules of the single market are agreed by EU Member States and not imposed by one party;
- the White Paper lacks detail on the proposed exemption for existing regulatory divergence and it is unclear whether, if a devolved institution made amendments to existing regulation, that would bring the regulation within the scope of the internal market proposals;
- the White Paper does not include proposals to ensure the maintenance of high baseline standards across the UK;
- the section on governance in the White Paper is 'light on detail' and suggests a role for the UK Parliament in having oversight of the UK internal market but not for the devolved legislatures, which the Welsh Government considers 'wholly unacceptable', and
- there is insufficient information on how the proposals contained in the White Paper will interact with the Protocol on Northern Ireland/Ireland.

The letter asks for further information on a future UK subsidy regime, including its governance, and asks why the UK Government is seeking to introduce new reservations on subsidy control given that the White Paper states it wishes to work on the new regime in agreement with the devolved institutions.

7.2. Scottish Government

The Scottish Government's Cabinet Secretary for Constitution, Europe and External Affairs, Michael Russel MSP, **wrote** to Michael Gove MP on 3 July 2020. In his letter he stated that the Scottish Government 'could not, and would not, accept any such plans' to legislate for the UK Internal Market.

The Scottish Government set out its initial assessment of the White Paper **in a letter** to the Scottish Parliament's Finance and Constitution Committee on 11

August 2020. The assessment states that 'the Scottish Government does not support these proposals and will oppose them if...legislation is brought forward at Westminster'.

The assessment sets out the Scottish Government's view that regulatory divergence in the UK can be managed through the common frameworks programme being developed jointly by the four governments of the UK and that this programme of work could be accelerated with political will if deemed necessary. The assessment states that the White Paper's proposals 'would confuse at best and negate at worst' the common frameworks programme.

The assessment goes on to outline the Scottish Government's view that the proposals contained in the White Paper, including that:

- the proposals are fundamentally inconsistent with devolution and would impose new constraints on the devolved legislatures. It states that the White Paper presents regulatory differences in devolved areas 'as a problem'. It agrees with the Welsh Government's view that the assertion that there will be an increase of powers of the devolved institution is misleading;
- the proposals for a UK internal market set out in the White Paper are fundamentally different to the way in which the EU Single Market currently operates and proposals in the White Paper would provide the Scottish Government and Scottish Parliament with less freedom to diverge than is currently the case under EU law, agreeing with the Welsh Government;;
- the proposals are unnecessary because of systems already in place and because of the common frameworks programme. It also outlines the same argument made by the Welsh Government that there is already divergence in the UK in many of the areas listed as examples in the paper;
- the proposals would allow the lowering of standards regardless of the views of the Scottish Government and Parliament. The assessment states that there is little detail on what the exclusions to the principles of mutual recognition and non-discrimination would be and how they would work in practice;
- the proposals do not provide business certainty and would be damaging to businesses and consumers in Scotland and in other parts of the UK; and
- outlining a similar view to the Welsh Government on the evidence used in the White Paper to underpin the proposals.

7.3. UK Government response

The UK Government is yet to respond publicly to the analysis put forward by the Welsh and Scottish Governments. The Chancellor of the Duchy of Lancaster **did reply** on 14 July to the letter sent by the Welsh Government's Counsel General on 7 July in which he stated:

A strong and cohesive UK internal market has always been central to the effective functioning of devolution. The proposals that the Government will set out shortly in our White Paper are intended to work with the grain of the devolution settlements.

7.4. Response of the UK legislatures

7.4.a Senedd Cymru

The Senedd's External Affairs and Additional Legislation (EAAL) Committee and the Legislation, Constitution and Justice (LJC) Committee have issued responses to the proposals set out in the White Paper. Both have criticised the length of the consultation period and the fact that the consultation took place during the summer recess period.

In its **letter**, the EAAL Committee states that it is unable to offer a conclusive view on the White Paper without further information from the UK Government. The letter contains 18 questions that the Committee is seeking responses to and includes eight case studies of how the proposals might affect areas of devolved legislation. The letter states that, whilst the Committee acknowledges the need for intra-UK cooperation in some policy areas post-Brexit, this must be done on the basis of agreement between all and not imposed by either the UK Government or Parliament 'against the will of the other governments and legislatures'.

In its **letter**, the LJC Committee sets out that it considers the timeframe for the consideration of the White Paper's proposals 'wholly inadequate' and states that due to a lack of detail on how the proposals will work in practice, the White Paper offers 'little scope for meaningful engagement by the devolved legislatures'. The Committee states that the Bill should have been central to the UK Government's thinking and not 'rushed through' at the end of the transition period.

It sets out its view that a draft bill should be published for consultation prior to being introduced to the UK Parliament. The letter sets out 11 principles that as a minimum any legislation should include. It also includes a list of questions that the

Committee would have liked to have asked the UK Government had it had the opportunity to do so before the consultation window closed. The letter states that:

Given the lack of detailed and relevant information, we are yet to conclude whether a UK Bill of the kind proposed in the White Paper is needed.

Among the principles listed in the letter are that any Bill should:

- not seek to re-centralise power, either directly or indirectly, by allowing the UK Government and the UK Parliament to dominate policy areas that are devolved;
- include provisions agreed by all parties setting out an independent governance structure that ensures parity between all governments of the UK and a robust dispute resolution mechanism;
- provide the devolved governments and legislatures with the same freedoms to protect their citizens and economies in key areas of public health, consumer and environmental standards that they previously enjoyed under the EU's single market;
- enshrine within it the key constitutional principles of subsidiarity and proportionality, which have governed the operation of the internal market through the UK's membership of the EU; and
- not be imposed on the devolved countries of the United Kingdom without their consent.

7.4.b Scottish Parliament

The Scottish Parliament's Finance and Constitution Committee **wrote** to the Secretary of State for Business, Energy and Industrial Strategy on 13 August 2020, setting out its initial views on the proposals. It drew on **evidence it had taken previously** on the UK Internal Market and **briefings from its Adviser**, Professor Kenneth Armstrong.

The Committee's letter endorses the view set out by the Senedd's LJC Committee that the timeframe for consultation was inadequate and left little scope for meaningful engagement. The Committee states that 'there is an onus on all four governments and legislatures across the UK to work constructively together to seek a solution to this complex and challenging issue'.

The Committee concludes that while it recognises the economic benefits of no trading barriers for business within the UK this needs to be balanced against the societal benefits of effective regulation of market activity.

It states that any proposals must:

- take account of the existing constitutional arrangements in the UK;
- not be imposed, and
- as a minimum be based on inclusive dialogue with devolved parliaments and governments.

The letter goes on to raise a number of questions and issues on key elements on the White Paper and how it might work in practice. In relation to the governance of the internal market, the letter states that in the absence of governance arrangements based on parity of esteem between the four governments of the UK in areas which are devolved, 'it is very difficult to envisage how the proposals in the white paper can work while respecting the devolution settlement'.

7.4.c House of Commons

The House of Commons Public Administration and Constitutional Affairs Committee (PACAC) **wrote** to the Secretary of State for Business, Energy and Industrial Strategy and the Chancellor for the Duchy of Lancaster on 10 August 2020. The Committee expresses concern about the timing and length of the consultation and states that the 'one month consultation period is not proportionate to the importance of the issues dealt with'. It states that the Government needs to ensure an appropriate amount of time for the Bill to be considered by House of Commons Committees.

The Committee states that the White Paper's proposals 'will effectively create new reservations in areas of devolved competence'. It states that it is important that this is openly acknowledged, considered and debated as the Bill makes its passage through the UK Parliament.

It asks the Government to indicate whether it intends to override the Sewel Convention if consent is not given by the devolved legislatures. It states that in light of the White Paper's proposals on governance the UK Government cannot 'continue to delay on the review and reform of intergovernmental relations'. It states that the review and any accompanying draft reform proposals should be published as a matter of urgency.

7.4.d House of Lords

The House of Lords Select Committee on the Constitution wrote to Lord Callanan, Minister from the Department for Business, Energy and Industrial Strategy, on 29 July 2020. In its letter the Committee states that it is 'not convinced about the need to legislate for the UK internal market' and that it is 'unsure precisely what problems the White Paper is seeking to solve'.

The Committee expresses concern about the limited time available for consultation and considers that there is a need for wider consultation and reflection to 'maximise consensus between the four nations of the UK'. The Committee states that it is concerned that the white paper 'attempts to deal with economic matters without engaging with the political and constitutional issues'.

Annex 1: The EU's Single Market

The functioning of the UK's 'internal market' is currently governed by the rules, principles and institutional processes of the EU's Single Market. The requirement to meet the rules of the EU's Single Market will come to an end at the end of the transition period although some EU law will be retained via the EU (Withdrawal) Act 2018 and the EU (Withdrawal Agreement) Act 2020. Any commitments on level playing field provisions agreed between the UK and the EU as part of a future relationship agreement could also have an impact.

The **objective of the EU's Single Market** is to ensure the free movement of goods, services, people and capital within and between the EU's Member States, whilst minimising or eliminating any barriers to trade and movement, and maintaining high levels of environment and consumer protection. The EU's single market is dynamic and both its rules and its scope have evolved significantly since it was first conceived.

7.5. Harmonised and Non-Harmonised sectors

The EU's Single Market, like most other internal markets, takes in its simplest form, two basic approaches to reduce regulatory barriers between territories. These are the harmonisation of standards and, where harmonisation doesn't apply, the mutual recognition and non-discrimination of goods and services.

The harmonisation approach seeks to legislate for minimum common standards across all the territories of the internal market so that the same regulations are in force everywhere. Examples of harmonised goods in the EU's single market include medical devices, electronic equipment and chemicals. The **European Commission states** that in the majority of sectors, EU legislation to harmonise standards is limited to essential health, safety, and environmental protection requirements whilst some sectors have more specific technical standards.

In non-harmonised sectors (i.e. where common regulatory standards don't exist), the EU seeks to reduce barriers to trade through the adoption of two key principles; mutual recognition and non-discrimination. These key principles or common rules are underpinned in the Treaty of the Functioning of the European Union (TFEU) - Articles 26, 34-36 on goods in particular and the relevant chapters and articles on services - and have been elaborated upon and developed through subsequent legislation on the free movement of goods and services and the case law of the European Court of Justice.

The mutual recognition principle states that goods produced in accordance with the standards and technical specifications in one territory should be accepted for lawful sale in another territory without being subject to any further technical standards or requirements. For example, in its most basic form in the EU context; a good produced in Germany should be able to be freely and lawfully sold in France without having to meet any additional requirements. There are exceptions to this whereby a Member State may impose additional requirements on goods from another Member State, or withdraw it from sale entirely, if there is a legitimate public interest ground, such as a risk to public health, consumer safety, or the environment. This is discussed further in section 3.

The non-discrimination principle states that a Member State should not discriminate against goods or services based on their geographic origin or place of residence, and that any technical standards or rules they put in place should apply equally to companies or citizens from all Member States. For example, in the EU context; Germany would not be able to set higher production standards for companies from other Member States selling goods in Germany, compared to that required of its own domestic companies.

7.6. Scope of the single market

The EU's Single Market covers goods, services, capital and people but is far from complete, particularly in relation to the provision of services. The single market is dynamic and the European Commission through its role in monitoring EU law and proposing new legislation, has sought to ensure through various reforms that new and emerging barriers to trade within the single market are reduced.

However, the objective of removing barriers to trade is not absolute and the operation of the EU's Single Market is constrained by key constitutional and treaty principles. These provide Member States with the ability to limit in certain cases both the harmonisation of standards and the mutual recognition and non-discrimination of goods.

In relation to the harmonisation of standards, the EU's legislative proposals are required to abide by the two key principles of proportionality and subsidiarity. In practice, this means that proposals should not be any broader than strictly required to address an issue (proportionate) and that action should not be taken at an EU level if it can be effectively taken at a national, regional and local level (subsidiarity). Member States, individuals, national and sub-state parliaments can challenge legal proposals on both of these grounds. Even where harmonised standards are agreed and introduced, in the majority of cases these maintain basic

standards and Member States are usually given a choice on whether they wish to go further than the minimum standards set. When common standards are introduced through EU Directives, Member States are also given the freedom to decide how to meet those objectives within their territory.

In relation to mutual recognition and non-discrimination, the TFEU provides that Member States can introduce exceptions to mutual recognition or to discriminate against a good in certain specific circumstances including for proportional public policy interest grounds in relation to environmental protection, consumer protection, animal and plant health and public protection.

For example, the Scottish Whisky Association (SWA) unsuccessfully challenged the Scottish Government's legislation on a minimum price for alcohol which was aimed at addressing the health and social consequences arising from the consumption of cheap alcohol. The SWA claimed that minimum unit pricing was contrary to EU law, would not be effective in tackling alcohol misuse, and would penalise responsible drinkers. The Scottish Government accepted that the measure would affect the market but asserted that it was possible to justify this on public health grounds. The **UK Supreme Court** agreed and ruled that the Act did not breach EU law and that minimum pricing was "a proportionate means of achieving a legitimate aim".

7.7. Governance of the single market

There is a complex web of institutions that oversee the governance and regulation of the single market, from the European Commission and European Court of Justice down to national regulatory bodies and courts.

The European Commission has the main oversight function in relation to the operation of the EU single market. In addition to keeping under review the overall effectiveness of the market and proposing new legislative proposals related to its operation, it can bring infringement proceedings against Member States it believes are not following the rules of the market. Through the Single Market Forum, it gathers evidence from stakeholders on the effective operation of the Single Market.

The European Court of Justice also has a key role, as the ultimate arbitrator of EU law, in interpreting the relevant TFEU articles and legislation. It has been a key factor in the evolution of the Single Market.