

The United Kingdom Internal Market Act 2020

About this report

The UK Internal Market Act will govern the trading relationship between the four parts of the UK. But concerns have been raised about its implications for the effectiveness of devolved policy making. This briefing paper explains what is in the Act and how it will work in practice.

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Summary

The UK Internal Market Act enshrined two market access principles (MAPs) in law. These relate to different aspects of government regulation of goods and services.

- **Mutual recognition.** If a good is compliant with the statutory rules relating to its sale in the part of the UK in which it was produced or imported into, then it will automatically be acceptable for sale in the other parts of the UK. And a service provider who is authorised to provide a service in one part of the UK is automatically authorised to provide that service in the other parts of the UK.
- **Non-discrimination.** Statutory rules about how a good must be sold, or how a service must be provided, that discriminate against goods or services from another part of the UK – directly or indirectly – do not apply.

There are certain modifications to these principles to accommodate the Northern Ireland protocol – for example, in the areas where Northern Ireland is required to apply EU law, all goods entering Northern Ireland from Great Britain must comply.

The Act sets out specific exclusions to the MAPs for provisions already in force, public services, and certain policy purposes. This list of exclusions can be amended by UK government ministers after they have sought the consent of the devolved administrations.

Regulations contravening the MAPs are 'not applied' or 'of no effect' and should not be enforced against goods and services coming from other parts of the UK. Businesses may be able to challenge the application of regulations in court if they believe they have been incorrectly applied. The Act also establishes an Office for the Internal Market (OIM), which can conduct reviews into the functioning of the internal market, advise governments on existing or proposed regulations and, from 2023, is required to publish reports on the functioning of the Act periodically. Intergovernmental mechanisms are also expected to play a role in the governance of the Act.

Under the UKIM Act, the devolved administrations will be able to regulate goods and service providers in their part of the UK, but these regulations will not necessarily be enforceable on goods or service providers from other parts of the UK. This may undermine their ability to successfully implement certain kinds of policies that fall within the scope of the Act, for example, a ban on single-use plastics. This may in turn inhibit policies being trialled in one administration and replicated in others, limiting the benefits of devolution as a policy lab.

The MAPs may also disincentivise governments from raising standards, as these would apply only to their own products, which could be undercut by goods imported from another part of the UK. Common framework agreements, through which the four governments intend to manage divergence in areas of returned EU law, could provide opportunities to collectively agree to raise standards, countering some of the concerns raised about the Act. The Act also makes clear that new exclusions to the MAPs can be added if consensus is reached through the common framework process.

The UKIM Act gives UK ministers broad powers to provide financial assistance to any part of the UK for the purposes of promoting economic development, providing infrastructure, supporting cultural and sporting activities, and supporting education and training activities and exchanges. In these instances, the UK government could spend money directly in devolved policy areas, which it is expected to do through the allocation of the UK Shared Prosperity Fund, which will replace EU structural funds.

The Act amends the devolution statutes to make the regulation of harmful or distortive subsidies a reserved matter (known as excepted matters in Northern Ireland). This gives the UK government the power to design and implement a UK-wide scheme for controlling public subsidies to replace the EU state aid regime.

Now the Act has passed, the UK government faces practical and political challenges in implementing it. It should work with the devolved administrations to ensure the long-term effective functioning of the UK internal market.

Introduction

The UK internal market refers to the trading relationship between businesses in England, Scotland, Wales and Northern Ireland. In July 2020 the UK government brought forward new proposals to manage its functioning after the end of the EU transition period on 31 December 2020. This was followed shortly after by a bill, introduced into the House of Commons in September. The UK government argued that the bill was necessary to prevent the emergence of new trade barriers given the potential for increased regulatory divergence between different parts of the UK after the framework provided by the EU single market fell away.¹

However, the constraints that these proposals would place on devolution drew strong criticism from the Scottish and Welsh governments, as well as parliamentary committees in the UK, Scottish and Welsh parliaments, and the House of Lords.² Both the Scottish and Welsh parliaments refused 'legislative consent' for the bill. Their consent would usually be required under the [Sewel Convention](#), which states that Westminster will "not normally" legislate on devolved matters without the consent of the devolved legislatures. The Northern Ireland assembly did not hold a formal legislative consent vote.

The UK parliament passed the legislation without consent and the United Kingdom Internal Market Act 2020 became law on 17 December 2020. The Act will govern the trading relationship between the four constituent parts of the UK. It will have significant implications for the governments, parliaments, regulators, courts and businesses in all parts of the UK.

The market access principles

Central to the new UKIM Act are the two market access principles (MAPs) that the Act enshrines in law – mutual recognition and non-discrimination. Different principles apply to different types of regulatory requirements and they also apply to goods and services in different ways (as summarised in Table 1).

Mutual recognition

For goods, mutual recognition applies to requirements relating to which goods can be sold on the UK market. This includes any rules banning the sale of certain goods, restrictions on how goods are produced, their content and how they are packaged or labelled.

Any goods lawfully sold in one part of the UK are automatically acceptable for sale in the others, as long as goods comply with any statutory rules or regulations in the part of the UK in which it was produced or into which it was imported. Any further requirements in the part of the UK in which it is sold do not apply. For example, a sweet made in Wales will be able to be sold in Scotland, even if the requirements for making sweets in Scotland are different to the requirements for making sweets in Wales.

For services, mutual recognition applies to authorisation requirements, that is what permissions are required from a regulator to supply a particular service. A service provider who is authorised to operate in one part of the UK is deemed to be authorised to provide that service in other parts of the UK, so additional local authorisation that might apply there is not required.

Non-discrimination

For goods, non-discrimination relates to how those goods are sold, including rules on who can sell which goods, how goods are transported, stored or displayed, and on what terms they might be sold. For services, non-discrimination applies to all regulatory requirements that, if not complied with, would prevent a service provider from doing business.

Any relevant statutory rules or regulations in one part of the UK that discriminate against goods or service providers coming from another part of the UK do not apply. This covers:

Direct discrimination – where a relevant requirement puts goods or services from other parts of the UK at a disadvantage to locally produced ones because it explicitly imposes additional conditions on them. If the Scottish government introduced a rule that meat from Wales (but not from elsewhere in the UK) must be transported frozen to be sold in Scotland, for example, this would make it harder for Welsh producers to sell their meat in Scotland, putting them at a disadvantage, and would therefore be direct discrimination.

Indirect discrimination – where a requirement has a discriminatory effect even if it is not explicitly phrased as such. For example, if the UK government introduced a requirement in England that prevented milk from travelling more than 20 miles before being sold, this could indirectly discriminate against milk produced in Scotland, Wales and Northern Ireland.³

For a statutory requirement to be considered indirectly discriminatory it:

- must apply to goods or service providers in a way that puts them at a disadvantage
- must have an 'adverse market effect', in that it does not also put some comparable local goods or service providers at a disadvantage at all or to the same extent
- cannot be considered a means of pursuing a legitimate aim, which is defined as: the protection of life or health of humans, animals or plants; public safety and security; and, in the case of services, efficient administration of justice. This list can be amended by UK ministers by secondary legislation, after they have sought the consent of devolved ministers.*

Not all regulation is within the scope of the MAPs.

What is excluded from the scope of the MAPs?

The Act carves out certain exclusions where the market access principles do not apply. These are different for each principle and for goods and services, as set out in Table 1. **Some exclusions relate to the types of requirements that are within scope of each principle.** These include:

Provisions already in force. For goods, all requirements already in force are excluded from the principle of non-discrimination, provided they are not "substantively changed". In the case of mutual recognition this exclusion is limited to existing requirements where there was "no corresponding requirement in force in each of the other three parts of the United Kingdom" – that is, it applies only to existing divergence. Excluded requirements will continue to apply to all goods whether locally produced, or incoming from another part of the UK, so for example, Scotland's ban on the sale of raw milk to consumers will continue to be enforceable against milk coming from the rest of the UK.

For services, the exemption applies only until a corresponding requirement has been changed in another part of the UK. So, if Scotland changed its rules on who could provide a certain service, the equivalent rules in the rest of the UK would be brought into scope. Many requirements related to services are in retained EU law, such as the Provision of Services Regulations 2009. If these are amended in one part of UK, the regulation will be brought into scope.

* If consent is not obtained within a month, the regulations may be made without consent.

Box 1 Implications of MAPs for the construction sector

The UK Internal Market white paper, where the UK government first set out its proposals for the Act, highlighted divergence between the four nations in the regulation of construction as a key risk to the UK internal market. It stated: "If England and Scotland diverged on their approach to building regulations or processes for obtaining construction permits, it would become significantly more difficult for construction firms to design and plan projects effectively across the UK."⁴ In response, Scottish architects have raised concerns about the potential for stronger Scottish building regulations to be watered down.⁵

Despite the UK government highlighting building regulations as a key area, many will be out of scope of the UKIM Act. The market access principles for goods apply only to regulatory requirements relating to which goods can be sold (in the case of mutual recognition) or the manner in which they are sold (in the case of non-discrimination). As most building regulations relate to how materials or goods are used, they are therefore out of scope of the MAPs for goods.

For example, in response to the Grenfell disaster, both the UK government for England and the Scottish government introduced new building regulations banning certain types of combustible materials. The Scottish regulations go further in several respects, outlining a more comprehensive series of measures designed to improve building safety.* As these regulations are outside the scope of the MAPs, English property developers operating in Scotland will need to comply with Scottish regulations if they are building there.

However, there are other ways in which the MAPs could apply to the construction industry. For example, if a developer requires permission from a regulator, to build a certain type of housing perhaps, this may count as an authorisation requirement and fall within the scope of the mutual recognition principle for services. This means that an authorisation obtained in one part of the UK would be valid in all other parts, although there are certain exclusions for social services relating to social housing. It should also be noted that authorisations granted by a local authority or issued in relation to a specific premises, place or piece of infrastructure are not subject to the mutual recognition principle.⁶

Rules that a property developer would be required to comply with to provide its services, for example, that a minimum number of first aiders be present on site, would fall within the scope of non-discrimination. Local regulations would not apply if they were deemed discriminatory – for example, a requirement that first aid trainers must have undergone training in Wales.

* For example, expanding the list of combustible materials banned and introducing mandatory sprinkler installation for certain buildings. Auld, C, 'Building construction regulations are not the same in England and Scotland: what you need to know', *Building*, 12 February 2019, retrieved 2 February 2021, www.building.co.uk/comment/building-construction-regulations-are-not-the-same-in-england-and-scotland-what-you-need-to-know/5097838.article

Table 1 **Application of market access principles**

	Applies to	Excluded requirements	Policy/sectoral exclusions
Mutual recognition: Goods	<p>Sale of goods requirements Includes rules or regulations that:</p> <ul style="list-style-type: none"> • prohibit the sale of goods, or have that effect • relate to the characteristics (e.g., content), presentation (e.g., labelling or packaging), production (e.g., rearing, keeping, slaughtering of animals), matters related to identifying or tracing animals • require checks, certification or documentation in relation to the sale • Any other requirements in relation to the sale of a good 	<ul style="list-style-type: none"> • A sale made for the purpose of performing a function of a public nature • Existing divergence that is not substantively changed 	<ul style="list-style-type: none"> • Legislation to prevent the spread of pests & disease • Legislation to reduce movement of unsafe foods and feed • Authorisation of certain chemicals • Certain regulations on fertilisers and pesticides • Taxation
Non-discrimination: Goods	<p>Manner of the sale requirements Includes rules or regulations on:</p> <ul style="list-style-type: none"> • circumstances or way in which goods are sold, transported, stored, handled or displayed • the inspection, assessment, registration, approval or authorisation of goods • conduct of businesses that sell certain goods 	<ul style="list-style-type: none"> • A sale made for the purpose of performing a function of a public nature • Provision already in force, that have not been 'substantively changed' 	<ul style="list-style-type: none"> • Legislation to prevent the spread of pests & disease • UK-wide legislation made by an act of parliament (indirect discrimination only) • Taxation

<p>Mutual recognition: Services</p>	<p>Authorisation requirements Rules or requirements for permission of a regulator before providing a service</p>	<p>Requirements that:</p> <ul style="list-style-type: none"> • are already in force, have not been substantively changed in that part of the UK and where a corresponding requirement has not been changed in another part of the UK • also apply to non-service providers (e.g., duties on employers) • Professional qualifications • Requirement to notify or register with a regulator • Requirement to prove that a service provider is authorised to provide services in another part of the UK 	<ul style="list-style-type: none"> • Audio-visual services • Debt collection services • Electronic communications • Financial services • Gambling services • Health care services • Legal services • Notarial services • Private security services • Services of temporary work agencies • Services provided by a person exercising functions of a public nature • Social services relating to social housing, childcare, adult social care • Transport services • Taxation
<p>Non-discrimination: Services</p>	<p>Regulatory requirements Rules or requirements that if not complied with would prevent a service provider from providing services.</p>	<p>Requirements that:</p> <ul style="list-style-type: none"> • are already in force, have not been substantively changed in that part of the UK & where a corresponding requirement has not been changed in another part of the UK • also apply to non-service providers (e.g., duties on employers) • Professional qualifications • Requirement to notify or register with a regulator • Requirement to prove that a service provider is authorised to provide services in another part of the UK 	<p>The same exclusions as above, except legal services, with the addition of:</p> <ul style="list-style-type: none"> • Postal services • Services connected to natural gas production • Services connected with electricity production and supply • Waste services • Water supply and sewerage

Public functions. In line with the exclusions for public services, sales that are made for the purpose of performing a public function are not within scope of the MAPs. These would include the supply of medication by the NHS through prescriptions or books loaned by public libraries for a non-commercial purpose. This exclusion would not, however, cover sales made by public bodies for a commercial purpose, for example, in museum gift shops.

The Act also sets out **specific policy areas or sectors to which the MAPs do not apply**. These lists – set out in schedules one and two of the bill – can be amended by secondary legislation by UK ministers. The UK government is required to “seek the consent” of ministers in the devolved administrations before making such changes. However, if consent is not obtained within a month, the regulations may be made without consent.

Goods. These exclusions are drawn much more narrowly than the exclusions from the EU principles that they replace, which contain broad exemption for public policy objectives. The UKIM Act sets out certain exclusions for threats to human, plant and animal health – provided the relevant authority can demonstrate that the legislation “can reasonably be justified as necessary in order to address” that threat. Certain chemical, fertiliser and pesticide regulations are also excluded from the mutual recognition principle. Indirect discrimination does not apply to any requirements enacted through UK-wide legislation.

Services. These exclusions are largely the same as the EU regulations they replace.* These include many public services such as health care, certain social services and transport services. In addition, legal services have been exempted from the mutual recognition principle to reflect the different legal systems within the UK.

Taxation. Taxation is excluded from the MAPs for both goods and services.

Common frameworks. A key criticism of the bill when it was introduced was that it could undermine another programme of work to manage the UK internal market that the four governments are undertaking collectively. The four governments are in the process of agreeing common frameworks to manage future divergence in areas where devolved competence and returned EU law intersect (for more information, see page 22).

The House of Lords raised concerns that the blanket application of the MAPs would have removed the discretion for the four governments to permit divergence even in cases where all parties deemed it acceptable. As a result, the bill was amended to make clear that ministers can amend the list of exclusions for goods and services to give effect to any by consensus reached through the common frameworks process.

* EU regulations had been enacted in the UK through the Provisions of Services Regulations 2009. These have been transposed into UK law.

Northern Ireland

Certain modifications are made to the MAPs to accommodate the Northern Ireland protocol. To avoid a hard border on the island of Ireland, the protocol requires Northern Ireland to apply EU law in certain areas such as customs and product requirements, including medicines, animal and plant health, food safety and farming standards.

Any goods entering Northern Ireland must comply with EU standards in these areas and so the MAPs cannot apply to all goods from Great Britain. Goods from England, Scotland or Wales will not automatically be acceptable for sale on the Northern Ireland market; compliance checks and paperwork will therefore be necessary in some areas.⁷

However, 'qualifying' Northern Ireland goods will be able to benefit from mutual recognition and non-discrimination in Scotland, Wales and England. On 4 December, in preparation for the end of the transition period, the UK government defined 'qualifying' goods in law as all goods in free circulation in Northern Ireland, as an interim measure.⁸ In the second half of 2021, the UK government proposes to establish a long-term regime for NI businesses to obtain 'qualifying status'.⁹

The Act also legislates for the UK government's commitment to "unfettered access" for Northern Ireland businesses to the UK internal market.* This prevents the UK government or devolved administrations from introducing any new checks or controls on 'qualifying' goods moving from Northern Ireland to Great Britain, except in a very narrow set of circumstances.

Recognition of professional qualifications

The Act ensures that professional qualifications obtained in one part of the UK are recognised in the rest of the UK and are treated in the same way.

There are some exceptions where the administrations will not have to recognise qualifications obtained in other parts of the UK, including where provisions are already in force, certain legal qualifications, school teaching and any ongoing professional requirements, such as development or training. Automatic recognition will also not apply if a process already exists that allows a UK resident to apply to have their existing professional qualifications or experience recognised by a regulatory body in another part of the UK.

* Controversial powers that would have given ministers powers to contravene the terms of the protocol were removed from the bill following agreement with the EU on key details of the protocol. See: Sargeant J, 'Joint Committee's Brexit agreement must mean better Northern Ireland protocol cooperation', Institute for Government, 10 December 2020, retrieved 2 February 2021, www.instituteforgovernment.org.uk/blog/joint-committee-brexit-northern-ireland-protocol

How will the market access principles be enforced?

Non-application

The UK Internal Market Act states that any regulatory requirements that contravene the market access principles shall have “no effect”. That is, while the rules will remain law – and would, where relevant, apply to locally produced goods and services – they cannot be enforced against goods or services brought in from another part of the UK. So, for example, if the Scottish government passed a law requiring all baubles sold in Scotland to be blue, that law would apply only to baubles produced in Scotland but not those brought into Scotland from elsewhere in the UK. Any agencies or bodies with a role in enforcing this law would be required not to enforce it against goods from other parts of the UK. The Act gives UK ministers powers to issue guidance to the public or specific groups of people, such as those with an enforcement function, on how the MAPs for goods will operate on a practical basis. Before doing so the minister must consult the devolved administrations.

The Act is what is known as a ‘protected enactment’. This means that the devolved legislatures cannot amend or modify the application of its provisions. This prevents the devolved administrations from disapplying the MAPs. The UK government will also be prevented from disapplying MAPs to secondary legislation passed at Westminster. But the principle of UK parliamentary sovereignty means that the UK parliament will be able to set aside these principles in future *primary* legislation and can amend, modify or repeal any part of the UKIM Act. The asymmetry of the UK constitutions means that it is not possible for the Act to apply to all legislatures to the same extent.

The role of the courts

Where there is a dispute about whether a requirement breaches one of the MAPs, and therefore whether it should be applied, the UK’s domestic courts will be the final arbiter. However, the Act does not make clear by whom and in what circumstances a regulation may be challenged.

There is no basis on which legislation can be challenged for inconsistency with the principles before it is passed. Businesses will be able to seek judicial review of regulations that they can argue have been enforced against them contrary to the Act. They may also use the UKIM Act as a defence if they are prosecuted for a breach of regulation. This will mean the UKIM will develop in a similar way to the EU’s single market, through challenges from businesses whose interests have been affected rather than proactive challenges to any regulation that might hypothetically breach the provisions of the Act.

There is a lack of clarity around how the courts will decide, in any particular case, whether a justification for enforcing a regulation is legitimate. In the case of mutual recognition, the role of the court is relatively straightforward, as any regulation within the scope of this principle that does not meet the narrow list of exemptions and conditions should not be applied. However, in the case of indirect discrimination, the complainant or defendant must prove both that the requirement has adverse market effects and that it is not a means of achieving a legitimate aim.

Office for the Internal Market

The Act establishes a body responsible for overseeing the functioning of the UK internal market. The Office for the Internal Market (OIM) will sit within the Competition and Markets Authority (CMA) and will consist of a chair and panel members appointed by UK government ministers. Ministers must “seek consent” of the devolved administrations before making an appointment, but if consent is not given within a month they may make an appointment without it. The OIM can establish task groups of at least three members of the OIM panel to look into specific issues. Any rules or requirements within scope of the market access principles are within the OIM’s remit, apart from provisions giving effect to the Northern Ireland protocol.

The OIM will have three functions: providing independent advice to all four administrations; monitoring the overall functioning of the UK internal market; and proactively gathering business, professional and consumer views to develop its evidence base. It will act as an advisory body, collecting evidence, conducting inquiries and producing reports that will feed into intergovernmental discussions and dispute resolution mechanisms. However, unlike the European Commission, it will not be able to challenge regulations in the courts itself or enforce changes to regulations.

The OIM can initiate its own reviews of the functioning of the internal market and can consider proposals from businesses, consumers, industry groups or other private actors. It also has several statutory functions. From 31 March 2023 it will be required to lay reports before the UK parliament and the devolved legislatures on:

- the functioning on the UK internal market (on an annual basis)
- the functioning of the market access principles and their interaction with common framework agreements (every five years).

The OIM can also provide advice or reports on specific regulatory provisions at the request of the UK government or devolved administrations (summarised in Table 2). Each government may request a report on a regulation that only it is responsible for, unless it considers that a regulatory provision introduced by another government is “detrimental to the effective operation of the internal market in the United Kingdom”. The bill does not specify on what basis a provision may be considered detrimental. The OIM can refuse to provide a report in response to any request but must outline its reasons for doing so.

Table 2 **Summary of regulatory provisions on which the OIM can advise**

OIM can provide advice/report on:	Proposed regulatory provision	Regulatory provision in force	Regulatory provision with 'detrimental effects'
Who can request advice/report?	Government proposing regulation (alone or jointly)	Government responsible for a regulation already made (alone or jointly)	Any government (alone or jointly)
What conditions should be satisfied before a request is made?	Must fall within the scope of the OIM and relevant competence of the government proposing the regulation	Government must consider whether there are any other persons or bodies qualified to provide a report	Government must consider whether there are any other persons or bodies qualified to provide a report
What should the advice/report consider?	Potential economic effects of the proposal on the effective operation of the UK internal market*	Impact of the provision on the "effective operation of the UK internal market"	The economic impact of the provision on the "effective operation of the UK internal market"
When should the report be shared with other governments?	Within 15 days of sharing with government(s) that requested it	When published	Report provided to all governments at the same time and laid before all legislatures within six months of that date
When should the report be published?	"As soon as reasonably practicable" after sharing with all governments	"As soon as reasonably practicable" after sharing with government(s) who requested it	After it has been laid before the legislatures

Intergovernmental mechanisms

The UK Internal Market white paper, in which the UK government first set out its proposals, envisioned a strong role for existing intergovernmental mechanisms in overseeing the functioning of the market access principles:

Governance arrangements will seek to build on the existing collaboration between the UK Government and devolved administrations, ensuring a strong basis for political decision-making, oversight, and dialogue in relation to the Internal Market.¹⁰

Intergovernmental working will take place through various forums and at both official and ministerial levels. The department responsible for leading the UK government's work on the UK internal market – the Department for Business, Energy and Industrial Strategy (BEIS) – has committed to holding annual ministerial meetings with the devolved administrations "to discuss the UK internal market system and consult them on exclusions and legitimate aims".¹¹

* This could include the indirect or cumulative effects of the proposal, distortion of competition or trade, impacts on prices, quality of goods and services or choice for consumers.

However, it remains unclear how these discussions will relate to other intergovernmental working, particularly what is happening in other departments on specific common frameworks. Individual common frameworks will establish their own dispute resolution mechanisms, which will involve officials in the relevant policy area. It is unclear if and how the content or outcomes of these discussions will feed into mechanisms to consider new exclusions to the MAPs.

Any intergovernmental disputes arising from common frameworks or the UKIM Act are expected to be escalated to the joint ministerial committee structures – the primary forums through which UK and devolved ministers and leaders meet – if they cannot be resolved at a lower level. In March 2018, the four governments commissioned a review of intergovernmental relations, the outcome of which has not been published but it is expected to include reform of existing machinery and a new dispute resolution procedure.¹²

What are the implications of the market access principles for devolution?

The market access principles in the UK Internal Market Act are intended to prevent the emergence of trade barriers within the UK. But they will also have consequences for policy making within the UK too – particularly in the case of the devolved administrations.

Policy effectiveness

Under the UKIM Act each government of the UK will retain the right to regulate goods and services in their part of the UK, but not all of that regulation will be enforceable against goods and service providers from other parts of the UK. This could undermine the ability of each administration to successfully implement some policy aims.

For example, if the Welsh government decided to introduce a law banning single-use plastics to reduce plastic waste, that would apply only to goods produced in Wales. Single-use plastic from elsewhere in the UK would continue to be permitted on the Welsh market, which would undermine the policy objective (see Box 2).

Box 2 **Ban on single-use-plastics**

The Welsh government intends to ban nine types of reusable plastics: straws, stirrers, cotton buds, balloon sticks, plates and cutlery, polystyrene food and drinks containers, and certain types of carrier bags.¹³ England has already introduced a similar ban, but this applies to only the first three items,¹⁴ which would leave the latter six items legal in England and not Wales.

The ban on these six items would apply only to plastics produced in Wales and would not be enforceable against plastic products sold in Wales if they were produced in England. So, the Welsh government would not be able to prevent, for example, plastic cutlery from being sold, consumed and disposed of in Wales. This could undermine its ability to achieve the objective of reducing plastic waste. The Welsh government has said: “A ban that could only apply to Welsh produced plastics would undermine the policy and render it ineffective.”¹⁵

Theoretically, English policy objectives could be undermined by Scottish, Welsh or Northern Irish goods that conformed to different regulations. But given England accounts for around 86% of the UK’s GDP,¹⁶ the market dominance of England means the risk of English goods undermining devolved regulations is much higher. While there are sectors in which devolved nations do dominate – Scottish salmon, for example – it is less likely that English regulations will be undermined by imports from the rest of the UK, as these will make up a much smaller proportion of total goods sold in England.

Legal experts such as Michael Dougan, Emily Lydgate and Kenneth Armstrong argue that as the exclusions to the MAPs in the UKIM Act are much narrower than the broad public policy exclusions from single market rules, the Act could place tighter constraints on devolved policy making than existed under the EU framework.^{17,18} Lydgate and Dougan highlight the lack of exclusions for environmental objectives for goods as a key concern.

Policy innovation

The principle of devolution allows each government to pursue different policies in their part of the UK, tailored to the needs of each population. In some circumstances, devolution can become a 'policy laboratory' in which the four governments, all grappling with similar problems, can learn from each other about what works best.* A commonly cited example is the 5p charge on plastic bags, which was first adopted in Wales and was then adopted across the whole UK when its effectiveness in reducing waste became clear.

Although the MAPs will not have implications for all devolved policy areas, the potential for them to inhibit the effectiveness of certain policies could prevent governments legislating in the first place. This could hamper opportunities for devolution to serve as an effective policy lab.

Although there are exclusions for certain regulations already in force, 'substantive changes' to these regulations will bring them back into scope of the MAPs. As the Wales Governance Centre notes, there is a risk that this creates a disincentive for the devolved administrations (DAs) to make major changes to regulation and will undermine possible future innovation and development of existing successful policies.¹⁹ In other words, the UKIM Act could create a "chilling effect" on DAs legislating in areas of their competence that would prevent fruitful divergence being tried and then adopted by other parts of the UK.

Market competition effects

The Welsh government argues that the UKIM Act will lead to a "race to the bottom", in which regulatory standards are lowered so as to maintain competitiveness across the UK.²⁰ Any new regulatory requirements imposed by each government of the UK could increase compliance costs. For example, higher animal welfare requirements could create new costs for farmers. But as regulations within scope of the MAPs will apply only to producers in that parts of the UK, goods entering from elsewhere in the UK may not incur the same costs, allowing them to undercut local products and putting local producers at a competitive disadvantage. This could disincentivise governments from raising regulatory standards or potentially incentivise them to lower standards in response to relaxation of regulations elsewhere.

* The Institute for Government also argues that this potential is currently going unrealised due to the lack of formal structures to help institutionalise it. Paun A, J Rutter and Nicholl A, *Devolution as a Policy Laboratory*, Carnegie UK Trust & Institute for Government, February 2016, retrieved 2 February 2021, www.instituteforgovernment.org.uk/publications/devolution-policy-laboratory

Deregulatory effects are not inevitable and may depend on the specific sector and market. For example, Kenneth Armstrong points out that where producers are concentrated in one part of the UK market the competition effects will not be as severe and producers can create a premium product, but where mass markets exist deregulatory pressures may be more acute.²¹

The “race to the bottom” effects may be mitigated by technical standards – these are voluntary codes or sets of instructions that are often used by producers to demonstrate their product is compliant with regulation. While a regulation may set a general requirement – say that buildings must be insulated – standards can provide detailed instructions for how to do this. Most standards are usually defined by private industry bodies at the European and international level – 90% of British standards are derived from international and European standard bodies.²² The UK will remain a member of international bodies and, in the short term at least, will also remain in European ones after Brexit. Therefore, producers across the UK are likely to share the same technical standards, even if some regulations may differ.

Interaction with trade deals

International trade is a reserved matter, which means the UK government has exclusive responsibility for negotiating and signing new trade deals. There are several mechanisms under the devolution statutes to ensure that the DAs comply with any international agreements. However, changes to regulatory standards are often a result of ‘side bargains’ in the margins of trade negotiations rather than being included in the text of a free trade agreement,²³ so it is not clear the UK government will be able to use these constitutional mechanisms in all cases. Where these changes are in devolved areas, the DAs have responsibility for implementing them – and may choose not to.

Under the UKIM Act, mutual recognition will apply to any good imported into the UK provided it complies with the relevant rules in the part of the UK in which it first arrives. For example, if the UK government agreed to permit the sale of chlorine-washed chicken in the UK market as part of a trade deal with the US, it could allow the product to be imported into England, following which it would automatically be allowed to be sold in any other part of the UK. Any ban on the product in Scotland or Wales would be of little effect, although products sold in Northern Ireland would still need to comply with EU law regardless of where they originate.

It should be noted that UK ministers have said that they would not sign up to this kind of trade deal and are committed to maintaining high agricultural standards.²⁴

Common framework agreements

Some of the potential effects of the MAPs could be mitigated if the four governments jointly agreed to raise standards. Under the EU framework, thousands of harmonising regulations provide minimum standards in many policy areas. Although there are no proposals for similar UK-wide policy constraints, common frameworks establish mechanisms for managing policy divergence.

In October 2017 the UK government and the devolved administrations* agreed to establish 'common frameworks' to enable the functioning of the UK internal market once the four governments were no longer collectively subject to EU law.²⁵ The most recent framework analysis, published in September 2020 by the UK government following consultation with the DAs, identified 154 policy areas where EU and devolved competencies intersect.²⁶ It put these in three categories:

- **Category 1:** 115 'no further action areas', where frameworks are not deemed necessary.
- **Category 2:** 22 non-legislative areas, where co-ordination is required but no binding legal framework is necessary. In some of these areas retained EU law will provide a consistent legal framework across the UK in the interim.
- **Category 3:** 18 legislative areas where regulatory consistency is deemed crucial and legislation may be required. Most of these relate to agricultural policies including agricultural support, food production and farming methods, and product composition and labelling.

The policy areas cover a range of areas from air quality, statistics and security to food composition and labelling and plant health. Many regulatory areas are not within scope of the MAPs, however there is significant overlap particularly in category 3 policy areas.

Figure 1 **Policy areas where EU competencies and devolved competencies intersect**



Source: Institute for Government analysis of *Frameworks Analysis 2020*, Cabinet Office, September 2020.

* As there was no functioning Northern Ireland executive at this time, senior officials attended the JMC(EN) where agreement was reached in the absence of ministers.

Common framework agreements are processes where proposed regulatory changes in the relevant policy area are considered and disputes are avoided or resolved. They set out a common approach to agree “common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition”.²⁷

Under the UKIM Act, new exclusions can be added to the MAPs to give effect to an agreement reached through common frameworks – which could permit the devolved administrations to enforce their regulations even on goods and services supplied from other parts of the UK. However, without such additions, the MAPs will continue to apply where relevant.

It remains unclear what the implications of the UKIM Act will be for the development of common frameworks. On the one hand, the common frameworks may mitigate some of the ‘race to the bottom’ effects created by the Act, providing an opportunity for the four parts of the UK to jointly agree to raise standards. Conversely, the Act may change the incentives for the four governments to agree a joint approach, as the default scenario will ensure their businesses are guaranteed access to each other’s markets – removing the risk of not reaching agreement.

There are questions about how the governance mechanisms in common frameworks will interact with those on the MAPs. Individual common frameworks will establish their own dispute resolution mechanisms, which will involve officials in the relevant policy area; it is unclear if and how the content or outcomes of these discussions will feed into mechanisms to consider new exclusions to the MAPs.

The UK government, working closely with the devolved administrations, will need to establish coherent structures through which regulatory divergence between the four governments will be managed, bringing together common frameworks, the MAPs, the Office for the Internal Market, and the Northern Ireland protocol.

Public functions

Many of the functions carried out by the devolved administrations, local government and other public bodies will not be covered by the MAPs. Public services are excluded, allowing each government to set the appropriate authorisation and regulatory requirements for these services and ensure they apply to service providers from all parts of the UK. Goods sold in pursuit of a public function are also out of scope of the principles.

The MAPs are not expected to affect public procurement; the UK government has brought forward separate proposals in this area.²⁸ Elements of procurement are devolved to Scotland, Wales and Northern Ireland, allowing each part of the UK to set its own policy objectives, although the four governments are expected to agree a non-legislative common framework in this area. Principles such as furthering the public good may drive public procurement decisions, aiding higher social, ethical, environmental and public safety standards in certain sectors or areas. Similarly, the devolved governments and UK government may attach certain conditions to grants or awards, which could also reward higher standards.

Financial powers

The UKIM Act gives UK ministers broad powers to spend money directly in the devolved nations in areas of devolved competence. The Act gives UK ministers financial powers to make payments to any person in the United Kingdom for the purposes of:

- promoting economic development
- providing infrastructure, including public utilities, transport facilities, health, education and sport facilities, courts or prisons and housing
- supporting cultural or sporting activities “that directly or indirectly benefit the United Kingdom or particular areas of the United Kingdom”
- supporting education and training activity exchanges within the UK and internationally.

This financial assistance may be provided through grants or loans and will be subject to certain conditions. In a press release accompanying the publication of the bill, the UK government said the powers were necessary to “enable the UK Government to provide financial assistance to Scotland, Wales, and Northern Ireland with new powers to spend taxpayers’ money previously administered by the EU”.²⁹

At the end of the Brexit transition period, the UK ceased to receive EU structural funds – a programme designed to promote economic development in member states. In 2017 the UK government announced that it would provide equivalent funding through the [UK Shared Prosperity Fund](#); despite promises to bring forward a consultation on how the scheme would work, this has not yet been forthcoming.

There has been significant concern in the devolved administrations over both the level and management of future funding. Under the EU scheme, regions are allocated funding based on relative need – regions with a per capita GDP below the EU average received proportionally more funding. As Figure 2 shows, this means that the different nations of the UK received different amounts. The UK government has not yet set out details of how relative levels of funding will be determined in the new UK Shared Prosperity Fund.³⁰

Figure 2 **Highest and lowest per capita recipients of EU structural funds 2014–2020 by area**



Source: Institute for Government analysis of 2016 government figures on ERDF & ESF allocations for the 2014–2020 cycle and 2014 OBR population data.

The devolved administrations have also raised concerns about how funds will be administered. Under the EU scheme, high-level priorities are jointly agreed by the EU and the 'managing authority' responsible for allocating funds. In England, managing authorities were individual government departments; in Scotland, Wales and Northern Ireland, the devolved administrations took on this role.

There has been concern within the devolved administrations that the UK government will seek to bypass them in distributing resources from the new UK Shared Prosperity Fund. Although there is still uncertainty around the details of how the scheme will operate, the assumption of the DAs appears to be correct. At the 2020 Spending Review, the Treasury clarified that the new shared prosperity fund "will operate UK-wide, using the new financial assistance powers in the UK Internal Market Bill. Investments and programmes will display common branding". It promised to set out further details and a UK-wide investment framework in the spring.³¹

Unlike other parts of the UKIM Act, there is no requirement for UK ministers to 'seek the consent' of the DAs before using the financial powers. In September the finance ministers from Scotland, Wales and Northern Ireland raised concerns that the powers in the UKIM Act could be used in a way that is inconsistent or contrary to the spending priorities of the DAs.³² For example, the secretary of state for Wales suggested that the new powers could be used to build an M4 relief road, despite an earlier decision by the Welsh government to drop the scheme, citing financial and environmental costs.³³

Regulation of harmful subsidies

The Act amends the devolution statutes to add the “regulation of the provision of subsidies which are or may be distortive or harmful by a public authority to persons supplying goods or services in the course of a business” to the list of reserved matters (or in the case of Northern Ireland, excepted matters).^{*} This allows the UK government to create a UK-wide subsidy control regime to replace the EU state aid controls, although under the terms of the Northern Ireland protocol, EU state aid law continues to apply to measures that affect trade in goods between Northern Ireland and the EU.

Subsidy control was an area of contested competence. The UK government believed that it was already reserved – and therefore the Act only puts this beyond legal doubt. However, the Scottish and Welsh governments argued that it fell within devolved competence and therefore they should have the power to design their own regimes or to participate in a UK-wide regime on a voluntary, rather than a mandatory, basis – as would be the Welsh government’s preference.³⁴

The Act itself does not provide any details of what a future UK subsidy regime will look like – and the UK is yet to publish proposals. However, the UK’s recent agreement with the EU – the Trade and Cooperation Agreement (TCA) – outlines its shape. The agreement sets out the principles on which the new system must be based – they are broadly similar to the EU’s system of state aid – but this still leaves the government a lot of latitude as to how the system should operate and which subsidies should be committed. The commitments in the TCA rule out only the most light-touch approaches. The key question for the internal market is how the subsidy control system will be enforced across the UK. The UK has agreed its system will feature an independent body that will play an “appropriate role”, but the TCA does not prescribe the precise function of this body nor its legal powers.

In a written statement on 9 September 2020, the then business secretary, Alok Sharma, said that the government would publish a consultation on whether to introduce a further framework for subsidy control, including possible legislation. The Act requires the UK government to share any draft response to the consultation with the devolved administrations, to “consider any representations duly made” in response and “determine whether to alter the report in light of that consideration”.³⁵

^{*} In Scotland and Wales matters are either reserved to the UK parliament or devolved to the Scottish and Welsh parliament. In Northern Ireland there are three categories of powers: excepted, which are matters for the UK parliament; reserved, which are matters for the UK parliament that could be transferred to the Northern Ireland assembly by secondary legislation; and devolved matters.

Next steps

Despite strong resistance in the devolved administrations and the House of Lords, passing the United Kingdom Internal Market Act 2020 was the easy part. Now the UK government, working closely with the DAs, will need to establish structures for managing the UK internal market and ensure they work in the long term. It is likely to face political as well as practical challenges, with the Scottish government still refusing to engage in this programme of work and the Welsh government having launched a legal challenge to the Act, which it argues gives UK ministers powers to change the devolution statutes.³⁶

Notwithstanding legal action, in the coming months, there will be several key challenges:

- **To establish trust in the Office for the Internal Market.** The CMA will need to set up a new office to perform the functions in the Act, with the appropriate expertise, resources and capacity. To be effective, the OIM will also need to be capable of commanding the confidence of all four governments of the UK.
- **To clarify how the market access principles will be enforced.** The governance arrangements for enforcing the UKIM Act remain unclear. Regulators will play an important role in enforcing the market access principles, determining how relevant regulations should be applied. The UK government will need to issue guidance on how this will work in practice.
- **To agree protocols around the use of powers to amend the framework.** The Act provides UK ministers with powers to amend the lists of exclusions and legitimate aims to the MAPs, after seeking the consent of the devolved administrations. The speed with which the UKIM proposals were devised and put into law suggests that its implications for all policy areas had not been fully explored. The UK government should be open to amending the Act where the governments agree divergence should be permitted, or where evidence suggests its provisions are not necessary. The four governments should agree protocols for how new exclusions from the MAPs will be proposed, considered, and decided – including how discussions through the common frameworks process will feed into the process.
- **To create a joined-up approach to the UK internal market.** The UK government, working closely with the devolved administrations, should establish coherent structures through which regulatory divergence between the four nations will be managed, bringing together common framework agreements, the MAPs, the OIM and the Northern Ireland protocol.

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- **To facilitate parliamentary scrutiny arrangements for the UK internal market.**
The UK parliament and devolved legislatures should consider how the functioning of the UK internal market can best be scrutinised and the UK government and devolved administrations should seek to facilitate this scrutiny. This should include scrutiny of proposed legislation that might fall foul of the MAPs, oversight of the functioning of the Act, and assessing the impact of regulatory divergence. Opportunities for inter-parliamentary working on matters of common interest should also be explored.
 - **To consider how the long-term implications for devolution will be assessed.**
The Act establishes mechanisms to assess the economic implications of the MAPs through the OIM but equivalent mechanisms to assess the impact on devolution do not exist. Any regime regulating an internal market must find an appropriate balance between the autonomy of democratically elected governments in each part of the UK to make their own regulatory choices and the desirability of avoiding trade barriers within the UK. The four governments must consider how evidence should be collected, assessed and feed into governance arrangements.
 - **To consult on the shared prosperity fund and future subsidy control regime.**
The fall-out from the UKIM Act has demonstrated the damage to intergovernmental relations that can be done, and the practical challenges created if the devolved governments are not adequately consulted on major proposals. With critical Scottish and Welsh parliamentary elections in sight, the UK government must not make the same mistake again and take a more collaborative approach to future funding and subsidy control regimes.

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Acknowledgements

We are incredibly grateful to those who provided useful comments and corrections on earlier drafts of this paper, including Maddy Thimont Jack, Gemma Tetlow, James Kane, Hannah White and Professor Kenneth Armstrong. Any outstanding errors remain the authors' alone. Thanks to David Edwards, Will Driscoll and Sam Macrory for their work in preparing this paper for publication.

We would also like to thank Community Housing Cymru, Scottish Federation of Housing Associations and Chartered Institute of Housing for their generous financial support for this paper.

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