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*United Kingdom Internal Market Bill:
Implications for Devolution*

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Briefing Paper

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United Kingdom Internal Market Bill: Implications for Devolution

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1. This briefing paper examines those provisions of the United Kingdom Internal Market Bill (“UKIM” / “the Bill”) specifically relating to internal UK trade; together with their potential impacts upon the devolution settlements in Scotland and Wales.

The Bill contains other important and controversial provisions: e.g. permitting the UK Government directly and deliberately to breach key provisions of the legally binding Withdrawal Agreement insofar as it relates to Northern Ireland; e.g. allowing the UK Government to dispense new public funding across the entire UK regardless of the existing devolution arrangements; e.g. concerning the reservation to the UK Parliament of powers relating to the control of public subsidies. However, those issues are not addressed in this briefing paper.

UKIM: Background and Context

2. The regulation of internal UK trade was not considered a significant issue or problem until the UK’s decision to leave the European Union (including the Customs Union and the Single Market). After all, when the UK first joined the European Economic Communities, there was no system of devolution allowing Scotland or Wales to engage in their own distinctive legislative activities. And when devolution did occur in the late 1990s, the application of common EU rules helped to structure not only the UK’s trade relations with other Member States but also the internal operation of the UK market itself.
3. However, the UK’s withdrawal from the EU now makes it important to decide how far regulatory differences across the constituent territories of the UK will impact upon internal trade in goods and services.

On the one hand, the problem is most certainly genuine: in any state where autonomous regulatory competences are allocated to different territories, the resultant legislative divergences are capable of creating barriers to trade and distortions of competition that need to be addressed and managed.

On the other hand, it is also true that the precise scale of this problem remains (for the time being) uncertain – not least given the novelty of the situation now facing the UK, in which the definition and functioning of the UKIM is only one of a number of relevant but open variables.

However, there are sound reasons to believe that the issue of UK regulatory divergence, and the consequent need for internal market management, will

indeed become a real and practical matter: after all, the UK Government has itself promised that Brexit will lead to a significant expansion in devolved competences; while the UK's rejection of any close future relationship with the EU means that there will be no coherent external reference point for the future evolution of internal UK trade.

4. Different theories of cross-border trade offer very different views about how far regulatory differences between constituent territories should be regarded as a "problem" that needs to be addressed. Moreover, trade law provides us with a "toolkit" of different principles that can be employed – in different combinations and to different degrees – in order to manage potential disruption to cross-border trade in goods or services. For example, harmonisation of laws is very effective at removing barriers to trade and distortions of competition, since it establishes common rules for the participating territories – though for that reason, it comes with considerable costs in terms of accommodating different preferences and respecting local democracy.
5. In the absence of harmonisation, two major principles provide alternative solutions to the problem of cross-border trade. First, non-discrimination between domestic and imported goods / services. Such discrimination may be direct (the application of a blatant criterion that places imports at a disadvantage, e.g. imports must bear a label that domestic goods need not); or indirect (the application of a prima facie neutral criterion that nevertheless places imports at a particular disadvantage in practice, e.g. service providers must speak a certain language, have a certain qualification or reside in a particular locality).

Non-discrimination is generally seen as a "baseline" requirement for cross-border trade: it eliminates blatant inequalities. But it does not tackle the core problem of cross-border trade, i.e. that the mere existence of different rules (even if neither directly nor indirectly discriminatory) has the effect of partitioning the market along territorial lines.

6. That is why the second major alternative to harmonisation, as provided by our trade law "tool box", is so important. Mutual recognition is the principle that, if good or service X is lawful in Territory A, then good or service X should also be capable of lawful provision in Territory B – even if the latter has different regulatory standards and still expects its own producers / providers to respect them.

Mutual recognition is an extremely effective tool for promoting cross-border trade: after all, it successfully addresses many (non-discriminatory) barriers to trade; and does so without the need for regulatory harmonisation. But mutual recognition is also a more controversial trade principle: it means that Territory B has to live with the practical consequences (in terms of freely imported goods and services) that result from other territories following different and indeed lower regulatory standards. In practice, cross-border trade based on mutual recognition might remove barriers to trade while exaggerating distortions of competition; as well as significantly limiting Territory B's ability to enforce its own economic and social preferences even within its own jurisdiction.

7. For that reason, many trade systems that rely on mutual recognition (including, most notably, the EU Single Market) also incorporate multiple safeguards into its application. In particular: the system needs to carefully define the scope of the rules / choices that should be amenable to mutual recognition *in principle* (e.g. excluding various public services). Moreover: the system needs to accommodate an appropriate range of justifications, so that Territory B can indeed insist upon enforcing its better / higher regulatory standards against incoming goods / services *in practice* (eg to protect public health, the environment, consumers and workers etc).
8. In addition, any given trade system needs to address a series of related questions, over and above which precise trade law principles it wishes to employ and adapt from the standard “toolkit”. That is particularly true when mutual recognition is involved: the duty of Territory B to accept the extra-territorial effects of choices made by Territory A, implies the need for a high level of mutual trust: e.g. that Territory A will not engage in unfair competition; or, e.g. that Territory A can be held to account for breaking the “rules of the game”.
9. So the EU system, for example: places heavy emphasis on “flanking” policies to prevent unfair competition based on social dumping through the lowering of labour / environmental / consumer standards etc; and also on the existence of independent and impartial decision-making and dispute resolution processes, so that each Member State has confidence in the rules being defined and then applied equally and fairly. For those reasons, the Member States are also comfortable with the Single Market rules having a strong system of legal enforceability: they can be invoked directly before the national courts, to challenge decisions that unlawfully breach the Single Market rules.
10. Finally, it is crucial that the principles of trade law chosen from our standard “toolbox” take into account the unique features of the specific internal market under consideration. The needs and preferences of the US are very different from those of Australia; while the situation of and challenges facing Canada are very different from those of and facing the EU.
11. In the context of the post-Brexit UKIM, the overriding and undeniable feature that needs to be recognised and addressed is, of course, the relative size of the English population and economy; as well as the political and constitutional dominance of the Westminster Parliament over other parts of UK. Principles that might work well in an internal market such as the EU will simply not operate in the same manner in the context of the UK.

For example: an extensive system of mutual recognition (wide scope of application, limited scope for derogations) means that – whatever the competences of the devolved institutions on paper – the ability of English goods and services freely to access the markets in Scotland or Wales will make it much more difficult in practice for the devolved institutions to adopt or enforce different / higher regulatory standards of their own. Such standards will effectively disadvantage domestic producers / suppliers; while the potential scale of English imports would, in many circumstances, simply

negate any prospect of Scotland or Wales delivering on their desired public interest objectives.

12. For those reasons, any UKIM “toolkit” should really incorporate proper and effective safeguards for the devolved institutions – enabling the latter to adopt different economic and social choices without the risk, not so much that London might directly and formally overrule them at will, as that the free market access of English goods or services might simply render autonomous devolved choices redundant in practice. Otherwise, there is a serious risk that the UKIM will not merely reflect but positively reinforce and indeed magnify the empirical and constitutional facts of English dominance within the UK.

The legal “toolkit” proposed under the UKIM Bill: Key market access principles

13. Yet that is precisely the internal market model that the UK Government has proposed under its UKIM Bill: strong principles of mutual recognition, applying across large sectors of the economy, with strictly limited opportunities for the devolved institutions to enforce their own divergent laws against English imports.
14. This briefing paper will not seek to explain or analyse all of the Bill’s provisions in detail. Instead, we will highlight the key features of the UKIM as proposed under the Bill; then offer a series of (hypothetical) examples to illustrate the UKIM’s potential operation – using the provisions on trade in goods as our primary reference point. The proposals relating to trade in services, as well as the mutual recognition of professional qualifications, will not be addressed as such – though many of the same issues / criticisms obviously also arise in relation to those provisions.
15. The principles applicable to trade in goods can be summarised as follows:
 - In the field of goods, the Bill proposes a system of UK market access based on the principles of mutual recognition (applicable to certain categories of rules) and non-discrimination (applicable to other categories of rules). The Bill contains specified restrictions on the scope of application of those market access principles, e.g. they only apply to sales / supplies of goods in the course of a business; do not apply to sales / supplies of goods made in the exercise of public functions; do not apply to powers of taxation; and are without prejudice to the specific regulatory regime applicable to chemicals.
 - The principles of mutual recognition and non-discrimination are largely prospective in effect: they would not apply to existing rules that would otherwise be caught by the Bill’s system of UK market access. However, the Bill would kick in, if and when any existing provisions are amended in a significant way; and will obviously apply to any new regulatory requirements introduced by the competent authorities. That creates a powerful disincentive to engage in legal reform or innovation, in response to changing economic or social challenges or preferences.

- For new or substantially amended rules, the main market access principle is mutual recognition. The latter will apply to all rules governing (what in EU law terms would effectively be known as) product requirements: regulatory standards affecting issues such as ingredients, composition, packaging and labelling. Here, the Bill offers only very limited opportunities for Scotland etc to insist upon applying its own standards to English etc imports: mutual recognition can be denied only to prevent the spread of pests / diseases / unsafe foodstuffs; and even then, only under strictly controlled conditions, e.g. the potential spread must pose a serious health threat, in respect of which the Scottish authorities have provided an adequate, evidence-based assessment, demonstrating also that the relevant measures can reasonably be considered necessary to address that threat. There is no wider system of justifications or derogations, e.g. even for general threats to public health; let alone issues such as environmental, consumer or employment protection.
- Besides the core principle of mutual recognition, the Bill also provides for the principle of non-discrimination to apply to another body of new / amended rules, i.e. not those governing product requirements per se; but instead (what in EU law terms would effectively be known as) selling arrangements such as advertising regulations, shop restrictions, licensing requirements, transportation and storage requirements etc. Here, if there is direct discrimination against other UK goods, it can only be justified on the grounds of a “public health emergency” posing an “extraordinary threat” to human health. If there is indirect discrimination against other UK goods, then it can be justified if the measures can reasonably be considered a necessary means to protect either human / animal / plant health or public safety / security – taking into account, e.g. the availability of alternative measures.
- Although the Bill says that only specific provisions should be directly legally enforceable (i.e. at the behest of an individual trader invoking the UKIM rules before the domestic courts), the proposals would indeed give direct legal effect to the principles of mutual recognition and non-discrimination, i.e. so as to render any offending Scottish etc restrictions inapplicable to / unenforceable against protected traders / providers.
- Moreover, large parts of the UKIM system are subject to amendment by the UK Government in the exercise of delegated powers conferred under the Bill.

In some situations, UK Government ministers are obliged to consult the devolved institutions before exercising their powers, e.g. when proposing to change the definition of rules which are subject to either the mutual recognition or the non-discrimination principle.

In other situations, the UK Government may alter the UKIM rules without any obligation even to consult the devolved institutions, e.g. when proposing to change the range of justifications available in respect of a refusal of mutual recognition, or in respect of direct or indirect discrimination.

Examples to illustrate potential operation of UKIM principles

16. The potential application of the Bill's core market access principles can usefully be illustrated through some (hypothetical) examples. These examples are intended merely to illustrate the scheme and operation of the Bill; they do not purport to reflect actual devolved competences or actual / planned legislation.

17. Example One: Scotland has rules on minimum alcohol pricing but now wants to introduce a higher minimum price or to change the basis for the calculation

- Since the UKIM rules are largely prospective and do not apply to existing rules regulating the sale of goods unless those rules are substantively amended, we would need to decide whether the change in price / basis of calculation amounts to a substantive amendment. But arguably, any change in the scope or intensity of an existing regulation would / should automatically be considered substantive.
- Assuming the amendments are indeed substantive, the new rules will become governed by the UKIM principles. That immediately raises an important question: are minimum price controls to be considered (in effect) a product requirement subject to full mutual recognition; or (in effect) a selling arrangement subject only to non-discrimination?

The Bill is not explicit on this. However, it would be entirely orthodox (in trade law terms) for minimum price controls to be characterised as a form of product requirement: to regulate the minimum price of a good is to determine one of its inherent characteristics, essential for that particular good to be placed lawfully on the market, in a manner directly akin to prescribing rules about its composition, packaging or labelling.

- Assuming a minimum price control would be classified (in effect) as a product requirement and therefore fully subject to the principle of mutual recognition: imported English alcohol would not have to comply with any new Scottish requirements.
- Once the mutual recognition obligation applies, there is virtually no scope for Scotland nevertheless to justify applying its new rules to English imports: mutual recognition can only be set aside on the basis of serious health threats arising from the internal movement of pests / diseases / unsafe foodstuffs.
- So the basic effect of the UKIM would be to act as a powerful disincentive for Scotland to change its existing rules on minimum alcohol pricing, since any new rules might end up applying only to domestic goods, not English imports – and given the nature of the UK economy, that would effectively destroy the functioning of Scotland's entire regulatory system.

18. Example Two: Scotland wants to introduce a ban on the sale of products packaged using single use, non-recyclable plastic

- Since this is a new regulatory requirement, it would immediately become subject to the market access commitments contained in the UKIM rules.
- This time, rules governing packaging would clearly be classified (in effect) as a product requirement and therefore fully subject to the principle of mutual recognition. So: imported English goods would not have to comply with the new Scottish requirements; and there is no relevant ground for Scotland to derogate from its mutual recognition obligation under the legislation.
- So the basic effect of the UKIM would be a powerful disincentive for Scotland to exercise a devolved competence to regulate packaging on environmental grounds, since any new rules would end up applying only to domestic goods, not English imports. Again, that would effectively render the entire regulatory objective and scheme inoperable.

19. Example Three: Scotland wants to introduce a requirement that fireworks may only be purchased over-the-counter from licensed premises with proof of age

- Since this is a new regulatory requirement, it would immediately become subject to the market access commitments contained in the UKIM rules. But since it is not (in effect) a product requirement, it will not be governed by the principle of mutual recognition.
- Instead, rules governing manner and place of sale (including a licensing requirement) would be governed by the principle of non-discrimination. The proposed rules do not directly discriminate against goods from England: on their face, they apply to all fireworks, regardless of origin. So the question is: might they instead indirectly discriminate against English imports?
- It is arguable that, by depriving English suppliers of their ability to sell goods to Scottish customers via the internet, the proposed Scottish rules place English goods at a particular disadvantage and have an adverse impact upon competition within the UKIM. However, the Bill calls for a complex economic analysis to verify those claims (see further below).
- Assuming that the Scottish restrictions do indirectly discriminate against English goods, Scotland would then have a limited opportunity to justify its rules: can they reasonably be considered a necessary means to protect human health or public safety?
- For those purposes, the Bill asks whether alternative options are available to protect health or safety. Traders might argue, e.g. that Scotland must also allow internet sales, where the online supplier is able to verify the customer's age using reliable technological means.

- This example illustrates how Scottish rules might well end up being legal and enforceable – but they must still be scrutinised according to the UKIM rules, including a complex assessment of their potential market effects and public interest goals.

Some key lessons to draw about the UKIM proposals

20. The fact that the Bill's principles are largely prospective but will apply to new rules as well as existing rules which are amended in any substantive way creates a significant disincentive to engage in legal reform or regulatory innovation.
21. Where the Bill does apply, its rules are based on a strong market dynamic: they have a wide scope of application, provide strict guarantees of market access capable of overriding / bypassing local regulatory choices, and offer only limited opportunities for exclusion or justification.
22. Even in the best of circumstances, the proposed UKIM rules would generate significant deregulatory pressures – making it much more difficult for one territory to choose / justify / enforce stricter levels of public regulation, in any situation where another territory follows more lax standards.
23. But in the particular context of the UK economy, the Bill's principles and resultant pressures will simply not operate in a neutral manner across the constituent territories. Taming England's relative size and power would challenge *any* internal market system. Instead, the Bill's planned regime would positively magnify England's inherent advantages yet further and risk rendering the exercise of many devolved powers redundant in practice. After all: English choices would be able to produce their full effects within Scotland and Wales, on a scale that could simply overwhelm the latter's own preferences.
24. Moreover, the Bill also needs to be viewed within its wider regulatory and constitutional context. Unlike the EU system: there are no guarantees that the UKIM will operate according to certain minimum common standards in fields such as health, environment, consumer and employment protection. Indeed, the Bill is explicit that a good marketed in England *even in the total absence* of any relevant public interest regulation, is still entitled to benefit from the principle of mutual recognition when it comes to sale or supply in Scotland.

And again unlike the EU system: there is no attempt to combine the new UKIM principles with reforms to the UK's overall governance structures, e.g. so as to create more independent and impartial fora for decision-making and dispute resolution between the constituent territories.

Conversely, the conferral of direct legal enforceability upon the core market access principles contained in the Bill can only serve to render its potential impacts and problems even more potent in practice – certainly compared to a system wherein the management of internal trade barriers might indeed be reserved to a system of inter-institutional dialogue and dispute resolution.

25. So on paper, devolution might continue to look the same. Indeed, it might even look more extensive (as the UK Government has repeatedly promised after Brexit). But in practice, the operation of the UKIM has real potential to limit the capacity of the devolved institutions to pursue different economic or social choices from those made in London.

Other issues arising from the UKIM Bill

26. Besides those “big picture” issues raised by the Bill for devolution, the UK Government’s UKIM proposals also raise a series of more technical – though still relevant and important – questions about the detailed operation of the core market access principles.
27. For example: the definition of indirect discrimination is not the same as that generally used elsewhere in the EU or UK legal system. Rather than employing a relatively mechanical legal test (is the rule likely to affect more imports than domestic goods, and does it place imports at a relative disadvantage compared to domestic goods?), the Bill’s definition of indirect discrimination incorporates a surprising and complex economic assessment of the relevant markets and their competitive conditions. That sort of test is especially burdensome, when one considers that it must be used by the courts to decide whether or not any given rule is or is not indirectly discriminatory – and therefore whether or not that rule should be legally enforceable or unenforceable against any given trader.
28. Similar problems of excessive complexity and uncertainty apply also in relation to the Bill’s proposed exclusions from the principle of mutual recognition: individual traders would be able to call upon the courts to evaluate, e.g. whether the potential movement of a pest / disease from England would pose a serious health threat in Scotland, whether the Scottish authorities have provided an adequate, evidence-based assessment for their actions, and whether the relevant measures can reasonably be considered necessary to address the relevant threat.
29. In any case, the Bill would also benefit from clarification of certain provisions. We mentioned above the failure explicitly to categorise minimum price controls as either (in effect) product requirements subject to full mutual recognition or (in effect) selling arrangements subject only to non-discrimination. And there will surely be other situations in which the courts will be called upon to decide where / how to classify a particular type of regulatory requirement.

And yet even such guidance as is offered by the Bill might make it difficult to extract a coherent and persuasive “trade theory” that will help to understand and apply the UKIM’s core distinctions and provisions. For example, provisions concerning the inspection, assessment, registration, certification, approval or authorisation of goods appear to be listed simultaneously as falling within the scope of (in effect) product requirements subject to full mutual recognition and (in effect) selling arrangements subject only to non-discrimination – yet they cannot be covered by both rules, since the Bill

explicitly seeks to distinguish and separate the two categories, giving mutual recognition priority over non-discrimination in the process. So what can be the statutory intention here?

How might the Bill be improved?

30. It is arguable that the underlying problems affecting the UKIM Bill lie in its apparent starting assumption: that regulatory differences capable of creating any barrier to trade are inherently objectionable and must be suppressed in practice. By contrast, this briefing paper has argued that the real problem with the UKIM is not the ability of Scotland or Wales to do certain things differently; the real problem is the sheer empirical fact that, without proper constraints and processes, a strong UKIM system will magnify England's existing economic and constitutional dominance yet further – and do so to the clear cost of the existing devolution settlements.
31. Even as it stands, the proposed system could be improved in several ways. For example: the legislation could include a much wider system of derogations and justifications, allowing an individual territory to refuse mutual recognition where its local regulations are justified for the protection of a much broader range of public interest objectives – including the twin grounds of environmental and consumer protection, that occupy such a central role in the management of trade within other internal markets such as the EU Single Market.
32. Going further, one might propose that the unique characteristics of the UKIM are best reflected in avoiding a system of direct legal enforceability at the behest of individual traders / providers; in favour of an effective system of pre-legislative dialogue between the competent authorities from across the UK – allowing potential internal trade problems to be identified and resolved even before they arise; while insisting that any potential barriers which are eventually enacted in law must then be accepted as a fact of economic and regulatory life by all relevant traders and providers.
33. Ideally, there would also be an agreed definition of the minimum “flanking policies” required to prevent principles such as mutual recognition from morphing into a tool for unfair trade practices and harmful social dumping. The existing constitutional fundamentals of the UK might (as ever) make it difficult to enforce such agreed minimum standards in the face of a Westminster Parliament determined to legislate otherwise and regardless of the consent of Scotland or Wales. But a common definition of minimum regulatory standards could still provide the basis for decision-making and dispute resolution within a system of pre-legislative inter-institutional dialogue.

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