# UK Internal Market Consultation

## A RESPONSE FROM THE WALES CIVIL SOCIETY FORUM ON BREXIT PROJECT

## Foreword

*This PDF version of the response has been submitted by email to UKinternalmarket@beis.gov.uk in addition to the response on the survey site to preserve referencing which is incompatible with the online form.*

1. This consultation response has been written by Charles Whitmore, research associate with the Wales Governance Centre (WGC) and Wales Council for Voluntary Action (WCVA) as a part of the Wales Civil Society Forum on Brexit project (the Forum). The Forum is a partnership between WCVA and Cardiff University's WGC funded by The Legal Education Foundation to support the voluntary sector in Wales with information and academic expertise on the implications of the UK's withdrawal from the European Union.

2. WCVA is the national membership organisation for the voluntary sector in Wales. Its vision is for a future where the third sector and volunteering thrive across Wales, improving wellbeing for all. Our purpose is to enable voluntary organisations to make a bigger difference together.

3. The WGC is a research unit sponsored and supported in the School of Law and Politics, Cardiff University. It undertakes innovative research into all aspects of the law, politics, government and political economy of Wales, as well the wider UK and European contexts of territorial governance.

4. We are pleased to have the opportunity to participate in the consultation on the future Governance of the UK Internal Market. WCVA works with third sector organisations across wide range of areas. While this consultation is of most direct relevance to environmental groups and social enterprises, there are several cross-cutting issues relevant to the wider sector owing to the significance of the UK internal market for economic prosperity, wider community wellbeing and profound connection to the post-Brexit constitutional setup of the country.

5. As such our response will focus on ensuring that the internal market governance structures are as open, transparent, respectful of devolution and supportive of participative democracy as possible. We feel that third sector organisations and other stakeholders in the devolved nations

should be able to feed into and shape these structures on an ongoing basis. The third sector has a unique relationship with the Welsh Parliament and Government through participative mechanisms like the Third Sector Partnership Scheme, which provide a vehicle to input into the formulation of social values and legislation. We believe there is a clear risk that these mechanisms could be undermined by the proposed use of mutual recognition (MR) because future local requirements shaped by the sector may not be applicable to goods and service originating from outside of Wales. However this could be mitigated by creating appropriate democratic intergovernmental structures.

6. We will also focus on highlighting the need for the proposals to sufficiently recognise the importance of preserving devolved regulatory autonomy and thus the ability of devolved institutions to pursue innovative social policy in partnership with the sector.

7. We welcome the UK Government's recognition of the need to ensure a functioning UK Internal Market after the transition period but have serious reservations about the proposals. We believe there are important lessons to learn from how Australia, the EU, and Canada have regulated their own internal markets in addressing these concerns and so we will draw on examples from all three.

8. It is essential however to note that the choices involved in regulating internal markets stem from unique histories, as well constitutional and politico-legal setups. In this regard the UK is unique in:

8.1 Having no overarching written constitutional internal market provisions.
8.2 The asymmetry of its devolution settlements and the ensuing division of powers between the state and sub-state levels.
8.3 In having a central government that acts for both for the Union and a sub-state constituent which is also disproportionately large in economic and population terms.
8.4 The complexities of managing an internal market in the context of the Northern Ireland Protocol.

9. The starting point at which the UK is developing internal market frameworks is also different as it is starting from a position of very high internal market homogeneity and very few barriers. By contrast Australia's traction stemmed from considerable prevailing internal market barriers and Canada's appetite for reform came from barriers frustrating international trade agreements.

10. This suggests that the UK's situation may be particularly well suited to a system which emphasises **internal market governance as an ongoing process** and should therefore focus on developing **formal overarching intergovernmental machinery for co-decision and monitoring** instead of (or at least in addition to) such a broad overarching legal framework. This is particularly relevant if a system of mutual recognition is to be used owing to its **characteristic reliance on trust and collaboration** to function effectively.

11. We acknowledge that MR does not ***technically*** constrain devolved competence. Indeed it is often held up, as it is in the white paper, as a 'low cost decentralised means of internal market governance'. **However, this is an oversimplification, in practice MR**:

11.1 Makes significant inroads into the regulatory autonomy of the constituent members of an internal market.[1] The degree to which this occurs is proportional to how strong, or how automatic the duty is in practice,[2] but ultimately it encroaches on members' ability to decide their own tolerance to risk and overarching social policy objectives. Many voluntary organisations in Wales support the introduction (or removal) of a particular standard as a way of improving the quality of life for the people or communities they serve and will be understandably concerned about the inability to deliver this for them.

11.2 By its very nature, MR fortifies the importance of the 'home' territory's rules in cross border activity and downplays the importance of the host state. It is clear why this would be problematic given the representative economic weight of England in the UK's landscape.

11.3 It is administratively burdensome and **requires formal intergovernmental support for monitoring, reporting, enforcing, dispute resolution and awareness raising**. In the case of the EU these functions were largely centralised and discharged by the EU Commission, but administrative cooperation, the SOLVIT system and the Product Contact Points have seen their role and importance increased as recently as April 2020.[3] Australia explicitly opted to avoid replicating the role of the EU Commission owing to the cost involved[4] and instead established an elaborate multi-tiered system of intergovernmental machinery in the form of the Council of Australian Governments (COAG), the COAG Ministerial Councils, Senior Officials Groups and later the Cross-Jurisdictional Review Forum (CJRF). These ensured that these functions were exercised in a collaborative intergovernmental fashion usually on the basis of consensus. This also had the virtue of ensuring that ongoing discussions were taking place in a formal setting to evaluate the need for common frameworks and minimum standards where barriers were persisting despite MR.

11.4 Usually operates alongside a system **shared minimum standards**.

11.5 Is very rarely 'automatic' or 'absolute' as seems to be put forward in these proposals. Instead it is managed by a system of derogations / justifications to allow sub-state entities to derogate from the obligation and pursue diverging policy aims. Careful thought must be put into this aspect of the framework as it is **necessary to ensure that it does not infringe on sub-state territories' ability to innovate and engage in 'races to the top'**.

[1] A. Hinarejos, 'Free Movement, Federalism and Institutional Choice: A Canada-EU Comparison', p.540.
[2] M. Mostl, 'Preconditions and Limits of Mutual Recognition', 2010 (47) CMLRev, p.414;
[3] See the latest iteration of the Mutual Recognition Regulation, in particular paragraph 7: Regulation (EU) 2019/515 of 19 March 2019 on the Mutual Recognition of goods lawfully marketed in another Member State and repealing regulation (EC) No 764/2008, OJ L 91/1.
[4] G. Sturgess, 'An overview of mutual recognition', in P. Carroll (ed), *Rationalisation of Occupations and Markets: A Seminar Presented by the Royal Institute of Public Administration Australia,* (Queensland Division, 1993), p. 17

**Summary of Key Points and Recommendations:**

- Overall, **it seems doubtful that as *proposed, a* system of MR is appropriate for the UK internal market**. If one is used then it should be conceptualised as an ongoing, participative project as opposed to a framework that must be comprehensively enshrined in legislation before the end of the transition period. It further seems unlikely given the high level of market homogeneity in the UK that there will be an immediate surge of internal market barriers after transition. It is therefore not likely to be essential to have this framework in place before the end of transition and more time should be used develop it. We further recommend that the following be born in mind.

- Greater consideration needs to be given to the **balance between the frictionless trade objective and impact on devolved regulatory autonomy**. For example how will potential conflicts between the internal market objective and policy developed under the Wellbeing of Future Generations (Wales) Act objectives be managed?

- **The suggested MR duty is too absolute**. Useful examples of how MR operates in practice can be found in the EU, where MR is better termed 'managed mutual recognition' and Australia, which manages it with a comprehensive system of intergovernmental structures and an innovative system of derogations. It is also common for MR to run alongside common minimum standards.

- It follows that **the lack of detail in the proposals for a system of derogation / justification is unorthodox and problematic**. This is necessary to preserve the regulatory autonomy and social, environmental and rights values of the devolved regions, as well as to prevent 'racing to the bottom' and facilitate policy innovation. A process to agree minimum standards in policy areas where barriers are found to be emerging may also be helpful and could build on work already started with the Common Frameworks.

- Voluntary sector organisations will be especially concerned about the very limited proposal for derogations. It is through this **mechanism that social values are given representation and effect**. While this consultation did not provide sufficient time for us to consult our sector more widely, we believe organisations are likely to view this as essential as the sector typically works closely with the Welsh Government and Parliament on innovative legislation in this area (e.g. – Wellbeing of Future Generations (Wales) Act, current reviews into Human Rights…).

- There are further concerned that an **inability to derogate from the MR duty will undermine mechanisms for participative democracy used in Wales** (like the Third Sector Partnership Scheme) by allowing trade to bypass local requirements even where these serve justified social policy goals.

- **There is little information in the proposals on how dispute avoidance and resolution would be handled**. A sole reliance on civil litigation has been shown to be problematic in the EU. The economic imbalance between regions in the UK may compound this issue. Reviews of MR in

Australia also emphasised this and gave a significant dispute resolution role to intergovernmental bodies. Canada ruled out relying on litigation in its internal market governance in favour of a bespoke dispute resolution and avoidance system. We are concerned that an opaque dispute-resolution mechanism will mean that the voluntary sector is unable to contribute to its workings.

- **Fundamentally reformed intergovernmental structures and ways of working are highly helpful in effectively implementing MR**. We therefore recommend that this be viewed as constitutional opportunity to drive forward improved intergovernmental collaboration and sector engagement in the long term by developing new institutions, processes and best practices in these areas.

- **Trust is fundamental in the use of MR and thus these structures should rely on consensus building and co-decision, both in their shaping and mode of operation**. Any system should not be imposed on the devolved nations.

- A **multi-level system of intergovernmental working ensuring parity between governments**, would be helpful in exercising, not only the two monitoring and engagement functions discussed in the paper, but also **in many functions that are not or are insufficiently considered including: dispute resolution and avoidance, awareness raising, receiving, cataloguing and reporting publicly on complaints and emerging barriers**.

# Question responses

## 1. Do you agree that the government should seek to mitigate against both 'direct' and 'indirect' discrimination in areas which affect the provision of goods and services? Could you provide examples of indirect discrimination that would affect the functioning of the internal market?

1.1 In principle yes as most internal markets actively address both direct and indirect discrimination. However, several fundamental choices are not clear in the paper which makes the proposals difficult to support. A significant question arises in connection with whether and how it will be possible to derogate from the non-discrimination duty and justify measures. For example participants in The Forum have pointed out that as presented in these proposals, the non-discrimination principle may challenge work currently being undertaken by the Welsh Government on procurement policy and the foundational economy to support local communities.

1.2 These are important choices which need careful consideration and intergovernmental agreement **before legislation**.

1.3 The various internal market projects discussed below by way of example started from a point of considerable market disparity. In this context, Australia and the EU addressed indirect discrimination in a broad fashion with **heavy reliance on adjudication to incrementally define what constituted an unacceptable indirect form of market discrimination**.

1.4 In EU law indirect discrimination was initially addressed through the concept of indistinctly applicable measures, though the Court of Justice later **integrated this into its wider MR formula which it also incrementally limited the scope of**. Indirect discrimination is also tackled in legislation in Australia (Mutual Recognition Act 1992) and in Canada's intergovernmental Agreement on Internal Trade 1995, which has since been replaced (due to its ineffectiveness) by the Canadian Free Trade Agreement 2017 (CFTA).

1.5 There are potentially a huge variety of indirect barriers to trade. This therefore lends itself to a broad principle around which the courts develop a body of case law. The issue with this approach is that **it introduces legal uncertainty, especially for small and medium sized traders, who inherently prefer to avoid litigation**. Evidence suggests these will instead comply with dual requirements or shy away from cross-border activity altogether.[5]

1.6 Directive 70/50/EEC of 22 December 1969 provides some examples of potential indirect discrimination, and these typically relate to product requirements (rules relating to designation, size and weight, but also presentation, labelling and packaging). EU law has also identified rules relating to advertising and sales promotion as potentially indirectly discriminatory, including bans on product sales.

1.7 To cite another example, Canada has experienced issues with transport restrictions in the form of provincial requirements for poultry to be sent only to only local processing plants.[6] Canada's approach **provides a cautionary lesson and therefore should inform development of the UK's governance structures** as it has taken several waves of reform to address inefficiencies. These have focused on the dispute resolution system, the definition of scope by using a negative list (the AIT used a positive list approach by exhaustively listing those areas covered by the internal market provisions), the system of derogations which had to be better defined as it was found to be too broad and the introduction of MR alongside non-discrimination.[7]

1.8 Australia's Mutual Recognition Act 1992 also sought to prohibit indirectly discriminatory measures by including an intentionally broad catch all statement in section 10(e) - that mutual recognition applies to '*any other requirement relating to sale that would prevent or restrict, or would have the effect of preventing or restricting, the sale of the goods in the second State*'.

1.9 The intentional vagueness of this provision aimed to provide room for the courts to tackle unforeseeable indirect barriers to trade and build up a body of case law on the topic.[8] However it was recognised that **this would introduce significant legal uncertainty for stakeholders**, and so an **extra-judicial administrative and intergovernmental process was used to directly support both regulators and wider stakeholders with the operationalisation of MR. This mitigated the risks of the system being overly reliant on litigation**, a common criticism of the EU's

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[5] Productivity Commission, "Evaluation of the Mutual Recognition Schemes", October 2003, p.99

[6] W. Dymond, M. Moreau, "Canada", found in, G. Anderson ed), *Internal Markets and Multi-Level Governance: The Experience of the European Union, Australia, Canada, Switzerland, and the United-States,* (Oxford University Press, 2012), p.80

[7] For further commentary on this and what led to the need to reform Canada's Agreement on Internal Trade see for example: R. Hansen, H. Heavin, "What's New in the New West Partnership Trade Agreement – the NWPTA and the Agreement on Internal Trade Compared", 2010 73 Sask. L. Rev. 197.

[8] R. Wilkins, 'Mutual recognition: The first eight months', in T. Thomas and C. Saunders (eds), *The Australian Mutual Recognition Schemes: A New Approach to an Old Problem*, (University of Melbourne, 1995), p.5.

implementation of MR both by the EU Commission,[9] and in academic circles.[10] In Australia's case this was a relatively successful feature, but the Productivity Commission in its 2015 report on MR found that the system should have gone further as the lack of a non-judicial appeals process ultimately remained problematic.[11]

1.10 A further crucial point when addressing the remit of a non-discrimination duty is what **scope and mechanisms there will be for derogating**. These usually involve varying combinations of exceptions and open ended lists of overriding reasons for justification in areas like human rights, consumer protection, environmental standards and public health as well as more substantive tests like proportionality, necessity and subsidiarity. Voluntary sector organisations will support some of these derogations as a means to improving the quality of life of the people or communities which they serve.

1.11 The EU and Canada use a substantive balancing test involving proportionality and necessity which essentially demands that measures be no more restrictive than is absolutely necessary to achieve a legitimate objective (like environmental protection). The UK Internal Market proposals only very briefly mention any scope for justifying measures where this is '**necessary for public plant or animal health emergencies' and** there is no consideration of what this substantive test will involve**, who will perform it and how the interests of the devolved nations will be considered**. There is a risk that any balancing act may unduly favour the internal market objective over the identity and social values of the devolved nations if the system is not culturally fluent in devolution, **<u>especially if as seems to be the case in these proposals, the system inherently and incorrectly in our view, sees differentiation as problematic</u>**.

1.12 Within the system of derogation, how difficult or easy it is to justify a measure under it will play an important role in striking a balance between preserving the regulatory autonomy of the devolved nations and the objective of frictionless trade. The EU's threshold was notoriously difficult to achieve which made the MR framework relatively intrusive into state autonomy. Whereas Canada's system was particularly easy due to its extensive list of derogations and this ultimately undermined the effectiveness of the entire system.

1.13 Given the UK's context and the status quo, the question of the likelihood of unjustified divergence in the devolved nations creating undue market barriers is relevant to this point and in deciding whether a broad system of MR and non-discrimination enshrined in legislation is appropriate at this time. The high level of commonality from which the UK is starting and the commitments in connection with Northern Ireland and continued alignment with EU standards cast doubt on this. **An absolute and very far reaching legal framework established from the outset may be an overreaction which risks curtailing the regulatory autonomy of the devolved nations for, in practice, hardly any positive effect. It would be preferable to create and mandate new intergovernmental bodies to monitor and consult further on potential market barriers before enshrining such a broad principle in UK legislation.**

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[9] EU Commission, Report from the Commission to the Council, the European Parliament and the Economic and Social Committee – Second Biennial Report on the Application of the Principle of Mutual Recognition in the Single Market, Brussels, 23.7.2002 COM(2002) 419 final;

[10] J.H.H. Weiler, 'Mutual Recognition, Functional Equivalence and Harmonisazation in the Evolution of the European Common Market and the WTO', found in, Fiorella Kostoris Padoa Schioppa, *The Principle of Mutual Recognition in the European Integration Process*, (Palgrave MacMillan, 2005), pp.49.

[11] Productivity Commission, "Research Report – Mutual Recognition Schemes", January 2009, p.22

1.14 As explained in previous paragraphs, any broad prohibition on indirect discrimination is likely to require judicial intervention, particularly if the UK's intergovernmental machinery is not massively improved and involved in these proposals. This may prove problematic in the case of the UK given the disproportionate weight of England since the system will inherently be used more by English traders to challenge devolved policy / higher standards. Even if supporting intergovernmental machinery is put in place, experience from Australia suggests that differing levels of policy capacity between UK Government and the devolved administration may hinder the parity and representativeness of the relationship.

## 2. What areas do you think should be covered by non-discrimination but not mutual recognition?

2.1 In answering this question we will first consider the potential overarching scope of MR, again looking at some foreign systems, before considering what we believe to be are some essential, fundamental questions.

**Broad Scope of the Mutual Recognition Duty**

2.2 Typically one would expect all areas that are excluded from the scope of MR to be subject to the non-discrimination principle. However, it is essential to recognise that both the MR and non-discrimination duties **should not be absolute and that system of exceptions and justifiable derogations that recognises the need to preserve devolved regulatory autonomy should be implemented for both**.

2.3 **It is highly incoherent and unclear from these proposals how devolution will be protected.** For example, the White Paper commits to respecting the devolution settlements and transferring powers to the devolved nations, but the case study on page 82 highlights a variety of regulatory areas that are devolved as being problematic for policy divergence. Furthermore, State Aid is not expressly reserved in the Wales Act 2017 and thus legislating to this effect would be a direct reversal of devolution. The very fact that the suggested Internal Market Bill would need to legislate to this effect suggests that it is in fact not reserved.

2.4 By way of further example, Minimum Alcohol Pricing (for which both Scotland and Wales have legislated) would have technically still been possible were MR of this sort already implemented. However, it would probably have been unfeasible in practice as it would be unenforceable against traders from England. At the very minimum a derogation on grounds of public health would be necessary, though this raises further unaddressed questions around a substantive necessity test and who performs it.

2.5 In terms of scope, MR usually operates as an overarching principle from which broad and/or specific categories of goods and rules are excluded. For example, rules governing the circumstances in which goods are marketed and sold constitute common exclusions. We welcome that the white paper recognises this, however we think there is **merit in rethinking the assumption that these should be decided solely at the outset in legislation and would not be expected to change**. We think this is necessary given the profound constitutional ramifications of these proposals and the very short timeframe to consult and introduce the legislation that has been provided. Evidence suggests legislating will ultimately be helpful due to the legal certainty it brings, but this should be done alongside the **establishment of intergovernmental institutions and processes by which to**

**tailor the governance of the UK internal market as on ongoing process with regular formal reviews**. There are precedents for such an approach in terms of both reviews and bodies. See for example the EU Biennial reports on MR, Australia's five, and now ten yearly Productivity Commission Reports on MR and Canada's successive reforms to the AIT and replacement by the CFTA. In terms of institutions, the Australian Cross-Jurisdictional Review Forum (CJRF) provides an example of an intergovernmental body established to further facilitate inter-jurisdictional collaboration and coordination around MR.

2.6 In the case of the EU, the scope of MR broadly covers areas which have not yet been subject to common standards. A similar approach to areas which are subject to reserved powers and common frameworks in the UK would seem sensible. The Court of Justice has further found it necessary to introduce limitations over time, the most significant of which involved 'selling arrangements' (rules governing the circumstances in which goods are marketed and sold like advertising rules). This category was therefore removed from MR and left to the non-discrimination test. This forms part of a longer trend by which the ECJ has needed to affirm **the non-absolute character of MR by refining and expanding possible derogations**.

2.7 A similar limitation of scope exists in the Australian Mutual Recognition Act which provides that MR does not apply to rules '*that regulate the manner of the sale of goods in the second State or the manner in which sellers conduct or are required to conduct their business in the second State, so long as those laws apply equally to goods produced in or imported into the second State*'.[12] Australia further excluded rules on transportation, storage, handling and inspection of goods.

2.8 Generally speaking those areas that function best under MR are **those that are unlikely to require complex analyses to determine whether derogations are appropriate**. So for example the EU Commission noted in its first biennial report, that MR was found most difficult for complex products which raise safety concerns as this requires technical and scientific analyses.[13] Similarly, Australia found MR challenging in the context of services due to their implementation of a **functional equivalence test** – which was has been found to be administratively burdensome in both Australia and the EU.

**Is the suggested MR system and its scope appropriate for the UK Internal Market?**

2.9 **Overall and especially as proposed we do not think so**. We believe it is first necessary to consider some overarching fundamental question which should be open to stakeholder input at an early stage:

- Firstly, whether a system of MR as it is proposed is even appropriate to the context of the UK Internal Market. As will be explained in the rest of this answer, there **is considerable reason to think that the white paper proposals are not suitable.**

- Secondly if a MR system is to be used, how will free trade and regulatory autonomy be balanced? The proposals seem to place frictionless trade as the sole objective and **do not consider it against the value of devolved regulatory autonomy**.

2.10 There are several reasons why the proposed system of MR may be problematic in the case of the UK.

[12] Mutual Recognition Act 1992, Article 11(2).
[13] EU Commission, 'First Report on the Application of the Principle of Mutual Recognition In Product and Services Markets', Brussels, 13.07.1999 SEC(1999) 1106, p.10.

2.10.1 The disproportionate economic weight of England and UK Government's role in acting for the Union and England may imbalance many features common to MR systems. Given the volume of trade going to and from England, traders in the devolved nations would be at a competitive disadvantage if only they were subject to higher devolved standards. This imbalance has ramifications for the volume and nature of the litigation that may arise (as this will be inherently geared towards challenging devolved regulation), as well as potentially for the balance of influence within institutions like the independent body suggested in these proposals.

2.10.2 This imbalance also means that the 'risk of racing to the bottom,' which is a studied potential consequence of MR,[14] is greater. **In the absence of both common minimum standards and a system of derogations**, this will place more pressure on the devolved regulators to match standards set by UK Government than one would expect to see in an internal market governed mostly by MR.

2.10.3 In the same vein as derogating from the non-discrimination duty, the lack of available derogations from MR in the proposals is problematic as no clear way is presented that would enable the devolved nations to protect their identity and cultural and rights values.

*2.10.4* **The MR duty put forward in the proposals is too strong.** Absolute or automatic MR is not usually used in the field of goods (it is occasionally in the field of services) and is instead managed with a system of derogations / exceptions. If MR is ultimately used, third sector organisations will expect to see a mechanism put in place to ensure that devolved regulatory autonomy is safeguarded on grounds of, *inter alia*, environmental standards, animal welfare, public health and safety, consumer protection, protection of children and human rights. Research on the EU system for example has found that the treaty-based derogations (Article 36 TFEU), and open-ended lists of case law based derogations (mandatory requirements) are closely linked to regional identity.[15] Since devolution first occurred, appetite for a distinctly Welsh approach to social policy has only increased and this needs to be recognised in this system. For example, the Wellbeing of Future Generations (Wales) Act 2015, the design of which engaged the third sector extensively, underpins much of Welsh policy. It is not clear in these proposals how potential conflicts between the objectives of this legislation and those of the internal market proposals would be addressed without derogations or proportionality, necessity and subsidiarity tests.

*2.10.5* We believe that the body of derogations should not be exclusively determined in the legislation. Both the EU and Australia combine the use of specific lists and more open-ended derogations that can be adapted over time.[16] The EU has done this through case law which

[14] F. Abraham, 'Building Blocks of the Single Market. The Case of Mutual Recognition, Home Country Control and Essential Requirements', 1991(4) Tijdschrift voor Economie en Management, p.407.
[15] C. Janssens, *The Principle of Mutual Recognition in EU Law*, (OUP, 2013), p.47
[16] In the case of Australia an exhaustive exclusions list is used alongside a detailed process to enable the sub-state levels to generate new, temporary exceptions where these fulfil an overriding purpose. In the case of the EU there are treaty-based exceptions that can be invoked in Article 36 TFEU including: public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.

has seen derogations on grounds of, *inter alia*, cultural expression,[17] fundamental rights[18] and regional socio-economic characteristics[19] introduced.

*2.10.6* If the Government continues with plans to implement a MR system, **we recommend that intergovernmental bodies be established and used as contact points working with stakeholders as a mechanism to further identify derogations on an ongoing basis.** There is precedent for this approach in Australia which uses a system of 'temporary derogations' built to synergise with their reliance on intergovernmental co-decision.[20] This enables traders and regulators to notify the relevant intergovernmental body (COAG Ministerial Councils) of a specific barrier to MR (in the case of traders), or of their intention to derogate from MR on the basis of for example, health, safety or environmental grounds (in the case of an authority). This exemption can only last up to 12 months during which the ministerial council must **make a substantive decision on whether to enforce MR, pursue common minimum standards / frameworks or accept a permanent derogation**.[21] This ensures an intergovernmental and co-owned approach is used in overseeing the internal market, identifying barriers as they emerge and co-deciding on an approach to manage them in the long-term. It is conceivable that work already done in the UK on common frameworks could be built upon and integrated into such an approach.

2.10.7 The implied reliance on the courts as the sole central driver of compliance and enforcement has been shown to be flawed in several MR systems. Reviews in Australia, Canada and the EU evidenced that small and medium traders especially will prefer to comply with dual burdens rather than expend resources and expose themselves to the cost and uncertainty of litigation. Meanwhile those who have the resources tend to use MR to challenge any rule the effect of which is to limit their commercial freedom. This latter point was highlighted in the seminal *Keck* case law.[22] Should this latter trend develop under the proposed system, the absence of appropriate justification grounds and supporting intergovernmental structures risks putting significant downward pressure on devolved regulatory autonomy.

- The current institutions for UK Intergovernmental relations will likely not support effective market governance through MR. These have been proven essential in deploying MR and should operate on the basis of consensus and co-decision and undertake the following

[17] Case 60/80 *Cinéthèque SA and others v Fédération nationale des cinémas français*, [1985] ECR 2605.
[18] Case 112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, [2003] ECR I-5659.*
[19] Case 145/88, *Torfaen Borough Council v B & Q plc*, [1989] ECR 3851.
[20] Australia's system also enshrined some derogations in legislation. Significant permanent exceptions included the way sellers are required to conduct their business. This includes for instance laws regulating the circumstances in which a good may or may not be sold, franchise or business licence requirements and contractual aspects of the sale. Their second most noteworthy exception relates to laws on transportation, handling and storage of goods. A third category of derogations includes requirements relating to inspections, so long as those inspections are non-discriminatory and that they pertain to health and safety requirements, or minimising environmental pollution. The legislation includes an extensive list of further rules which are excluded from the scope of MR including, *inter alia*, those relating to quarantines and protecting animal species.
[21] See: Cross-Jurisdictional Review Forum, "A User's Guide to the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA)" 2006; Productivity Commission, "Research Report – Mutual Recognition Schemes", September 2015
[22] *Joined* Cases C-267 and 268/91 *Criminal Proceedings against Keck and Mithouard* ([1993] ECR I-6097)] para.14.

functions: monitoring, pre and post-legislative impact assessment with intergovernmental machinery to follow-up that allows for stakeholder engagement on parity across the UK regions, enforcement, derogation, reform, dispute resolution and avoidance, and to act as contact points to work with stakeholders resolving issues and raising awareness.

## 3. What would be the most effective way of implementing the two functions outlined above? Should particular aspects be delivered through existing vehicles or through bespoke arrangements?

*3.1* Given the pre-existing need for significant reform of the UK's intergovernmental structures, we think that **deciding how to govern the UK Internal Market should be an opportunity to develop new bespoke intergovernmental systems**. These will be necessary to both monitor the UK Internal Market and engage with stakeholders. This should be in addition to the new independent body suggested in the proposals which would focus more on the generation of expert data and reports akin to the role of Australia's Productivity Commission.

3.2 Again there are lessons to learn from the Australian example, where market governance structures were developed with a strong desire for low costs, few administrative burdens and a high degree of decentralisation (there was an express desire to avoid replicating the EU Commission), by relying on some pre-existing structures like COAG.[23] Mutual recognition was chosen to leave as many regulatory decisions in the hands of the states as possible, highlighting the importance of subsidiarity, but **it was nevertheless recognised that a very robust system of intergovernmental co-decision and cooperation was required. As the UK lacks an effective system for formal intergovernmental relations, this will need to be established alongside the Market Access Commitment.**

3.3 Australia's system also illustrates the **usefulness of parallelising both monitoring and engagement functions across intergovernmental bodies and independent research structures**.

- In terms of monitoring and data gathering, the former is better placed to receive, gather and process information pertaining to internal market complaints and any emerging barriers.
- For the engagement function, intergovernmental structures tend to work directly with traders, ensuring that there is common understanding and overarching awareness of MR. While, the independent research body can engage more widely for the purposes of generating information and reports.
- **On a cautionary note, raising awareness of MR and the shift in thinking it entails amongst both regulators and stakeholders should not be underestimated in its importance**. This has been evidenced by the extensive history of review and reform in this area by both the EU and Australia.[24]

[23] It should be noted that while Australia's decentralised approach to market governance through mutual recognition has been largely successful, the use of multiple pre-existing intergovernmental bodies has created a somewhat complex system of governance. This has led to lapses in oversight, enforcement difficulties and accountability problems. In one instance, when one of the states relinquished provision of the secretariat of the Cross Jurisdictional Review Forum, it didn't meet for four years. This diffuse accountability was further evidenced by another intergovernmental organisation, The Senior Officials Meeting, failing to hold the CJRF accountable for this lapse.

[24] For Australia see: Productivity Commission, 'Evaluation of the Mutual Recognition Schemes – Research Report', October 2003, XIV, XVII, XXVIII and ps. 26, 70; Productivity Commission 'Review of the Mutual Recognition Schemes - Productivity Commission Research Report', January 2009, XVIII, XXIV, XXV, XXXVI, XL

3.4 **Crucially, these structures must be designed collaboratively between the devolved and central government and then operate on a basis of parity and co-decision**. The use of features like rotating chairs and operating by consensus should be considered. Academic commentary and experience from Australia shows that a sense of joint ownership of the system is essential in building trust and momentum and thus the intergovernmental character of the system was considered in detail from the outset.

3.5 The engagement function envisioned in the proposals should be broader than businesses and consumers and include all relevant stakeholders as Internal Market governance cuts across a broad range of policy relevant to social and cultural values.

3.6 In conclusion, the UK's existing framework for intergovernmental cooperation is inappropriate for multi-level internal market governance through MR, and we think there are important lessons to be learned from the experience of Australia in this regard.

## 4. How should the Government best ensure that these functions are carried out independently, ensure the smooth functioning of the Internal Market and are fully representative of the interests of businesses and consumers across the whole of the UK?

4.1 To ensure that the two functions discussed in the white paper are carried out independently and representatively**, all proposals and institutions created under this system must be done in full collaboration between the devolved and central governments**. This must be done in a true spirit of co-decision and not be imposed on the devolved regions and nations as is the risk with the current proposals, timeframe and political context. We believe there is some merit in having effective intergovernmental bodies participate in monitoring the UK internal market (working with stakeholders, receiving and processing complaints, managing the derogation system, dispute resolution and avoidance both between administrations and with traders) and engaging with stakeholders (as information contact points, awareness raising activities).

4.2 It will be of particular importance to ensure that the independent body, and any other institutions developed in these proposals **are culturally fluent in devolution**. The independence of the suggested body should be guaranteed in legislation. We believe it is also advisable to provide it with its own staff, budgetary allocation and that it should operate at arm's length from the governments. Its advice, information and analysis should be published, and its processes provide ample opportunity for public input.

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and ps. 104-106, 255; Productivity Commission, 'Mutual Recognition Schemes – Productivity Commission Research Report', September 2015, ps. 207, 213, 220-223. For the EU see: European Commission, .n13, p.26; European Commission, see n.9, p. 9 and 50; EU Commission, 'Interpretative Communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition', 2003 C265/02; or more recently see: European Commission, 'Upgrading the Single Market: more opportunities for people and business' COM(2015) 550 final, ps.18-19. This resulted in an update to the EU's MR Regulation (Regulation 764/2008) which included a focus on increasing awareness and only came into force as recently as 19 April 2020 with Regulation 2019/515.

4.3 Furthermore, new intergovernmental bodies at the premier, ministerial and official level will need to operate in such a fashion as to ensure parity and transparency. Written instructions should be agreed by all governments on their structure, membership, attendance, accountability, record keeping, impact measurements, frequency of meetings and review processes. If monitoring of the internal market reveals particularly challenging sectors, it may be necessary to review the structure with an emphasis on bodies with sectoral expertise. Both Australia's COAG, Ministerial Councils and Senior Officials Groups,[25] as well as Canada's Ministerial Committee[26] on Internal Trade provide potential examples of intergovernmental internal market governance.

4.4 Studies have reported that lower tiers of intergovernmental machinery used to ensure that issues are progressed, to oversee implementation of plans and deal with technical issues are particularly important in forging and ensuring ongoing working relationships between sub-state regions and central government in times of political tension.[27]

4.5 Ensuring the smooth functioning of the internal market will also require ensuring that there is joint ownership of the various bodies, principles and processes. This has been shown to be particularly important in negotiating and implementing international trade agreements, and especially where the sub-state regions bear responsibility for implementing these commitments. Australia established an adjunct to COAG called the Treaties Council in 1996 at the ministerial level, precisely to enable state governments to feed into the process of negotiation of international agreements. Given the weakness of the UK's current intergovernmental setup and the significance of upcoming negotiations, using any new internal market structures to simultaneously support joint ownership across the UK regions of these negotiations would likely be beneficial.

[25] At the summit of Australia's intergovernmental structures is the Council of Australian Governments (COAG) whose members include the Prime Minister, who also acts as chair, as well as state First Ministers. It was initially mandated to negotiate and promote economic reform and in particular, a national single market. It operates by **consensus** and its decisions take the form of intergovernmental agreements which can lead to local and national legislation. It has a secretariat which is based in and funded by the Prime Minister's department. It provides general support in chairing COAG and acts as a point of contact for Ministerial Councils which form the next tier of intergovernmental institutions and whose existence and operation are called the COAG Council System. They are comprised of the ministers of the Commonwealth and each state with the relevant subject responsibility. They have regulatory decision-making powers and use a variety of voting systems but are encouraged to use **consensus** as much as possible. These councils are responsible for pursuing and monitoring the implementation of policy and they research and formulate new policy for consideration by COAG. The lowest tier of this tripartite structure is occupied by Senior Officials Groups which are staffed by the heads of the first ministers' support departments. They support the Ministerial Councils' operations by developing and progressing issues for upcoming council meetings, oversee implementation plans and outcomes and deal with items of a procedural and technical nature.

[26] The Ministerial Committee on Internal Trade was established under the Canadian Agreement on Internal Trade. It was mandated to supervise the implementation of the AIT, assist in the resolution of disputes pertaining to the AIT, approve the annual operating budget for its secretariat and consider any other matter that may affect the agreement. It was to be comprised of cabinet level ministers from each of the province and federal governments, had an **annually rotating chair**, was required to meet annually or when necessary at the request of two or more of the signatories of the AIT, was funded 50% by the federal government and 50% by the provinces and operated on the basis of **consensus**.

[27] C. Walsh, "Australia" found in, G. Anderson (ed), *Internal Markets and Multi-Level Governance: The Experience of the European Union, Australia, Canada, Switzerland, and the United-States,* (Oxford University Press, 2012), p.44.

4.6 **In addition to monitoring and engagement, there are important functions which need more consideration than is provided for in the White Paper**. These include dispute resolution and avoidance, awareness raising, enforcement and derogation management.

4.7 Dispute management is usually addressed with varying degrees of reliance on civil litigation, bespoke systems akin to arbitration and intergovernmental mechanisms. Some reliance on litigation is often necessary, particularly when duties are broad and/or require complex substantive tests.

- Overly heavy (like in the EU) or almost exclusive (like in the US) reliance on litigation presents several problems which are likely to be challenging in the context of the UK's highly asymmetrical economy. It tends towards a lack of transparency and can lead to overarching legal uncertainty and inefficiency, as traders cannot plan their business based on potentially being successful in court. This is reflected in the most recent reforms of MR in the EU where the traditionally heavy reliance on the ECJ for Internal Market governance, has shifted towards an emphasis on MR through administrative cooperation and non-judicial problem solving.[28]

- Another option is to construct entirely new bespoke dispute resolution systems. Canada's framework provides an example of such a system designed explicitly to limit the role of courts in both government - government and individual - government internal market disputes. In the first instance it encourages dispute avoidance though dialogue. If this fails, the agreement provides for resolution by a three-member panel comprised of representatives from the intergovernmental body that oversees the internal market, the Committee on Internal Trade. Owing to the entirely voluntary nature of the process, this was initially deemed unsuccessful, but successive reforms strengthening the process by allowing increasingly large and binding fines, are considered to have improved it.[29]

- The third type of mechanism, and Australia's system is the most characteristic example of this is dispute avoidance and resolution through intergovernmental channels (though there is also room for litigation).

4.8 There very few details in the proposals on how dispute avoidance and management will be handled be it for individual / government or government / government conflicts. For example, how will potential conflicts be managed and resolved between the frictionless trade objective and Welsh policy developed in light of the Wellbeing of Future Generations (Wales) Act?

4.9 **We believe that this is best managed through intergovernmental relations, though reliance on purely existing mechanisms will likely be insufficient**. Instead this function must be built onto a reformed system of intergovernmental relations with scope for both individuals and regulators to engage directly with those bodies. This would facilitate ongoing monitoring of the UK internal

[28] See: European Parliament, 'Revision of Mutual Recognition Regulation / 2017 – Upgrading the Internal Market Strategy'. Available at: https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file-revision-of-mutual-recognition-regulation (last accessed 08 August 2020).
[29] See W. Dymond, M. Moreau, see n.6 pages 70 and 76; For a wider discussion of these flaws, see: R. Knox, "Improving how the Agreement on Internal Trade Currently Works", 2002 2 Asper Rev. Int'l Bus. & Trade L. 275;

market and further create a space for co-decision in areas where the internal market may need further intervention (such as with more common frameworks) and crucially, meaningful discussion around what amounts to justified derogation.

4.10 We would be concerned that voluntary organisations and other significant elements of civic society in Wales will find any dispute mechanism distant and difficult to influence. As a result, we are deeply concerned that a clear and robust process for providing evidence for dispute resolution is not covered in these proposals. A process which is heavily reliant on the courts is also likely to be unaffordable for many voluntary sector organisations.

4.11 We believe that basing the day to day operation of MR in a new transparent system of intergovernmental relations, engaging widely with stakeholders can also effectively and representatively discharge enforcement, awareness raising and derogation management functions. Again there are precedents for this, for example with Australia's CJRF which was setup with two specialist units with expertise in goods and services and was formed to inform the public and regulators of the MR frameworks. Its role has been gradually cemented and expanded and comprises officials from central agencies in each state. Members act as a point of contact on MR for their state and are mandated to promote its application. The institution's role includes: assisting with inter-jurisdictional collaboration and coordination; overseeing ministerial declarations of equivalence; receiving, sharing and recording details of areas that are not covered by MR and receiving and sharing information on non-compliance with MR.

4.12 We also recommend that regulatory impact assessments be conducted within the intergovernmental architecture both pre and post legislation to determine whether market distortions are expected and if so how are they justified and/or will be managed.

4.13 Finally and most crucially the entire internal market project must be jointly owned by Scotland, Wales, Northern Ireland and England. Given the inherent nature of MR and its **potential to indirectly limit regulatory autonomy**, and the role of the devolved nations in ensuring the smooth functioning of the internal market and implementation of future trade agreements, it is essential that the system be truly co-designed and co-owned.

4.14 There are fundamental tensions and assumptions which diverge significantly from views in the devolved nations at the heart of these proposals around the value of different approaches to policy and the choice to even use MR. The accompanying intergovernmental structures need to be discussed collaboratively and by consensus prior to enacting the system.

4.15 The proposals, as set out in this White Paper, have not had the level of engagement necessary to secure the trust and collaboration that even the most thought out systems of MR need to be effective and respectful of regulatory autonomy. As such we believe they are unlikely to receive popular assent or indeed legislative consent across the UK.