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Forum on Brexit

UK Internal Market Bill – Briefing Paper – September 2020

This briefing is intended for third sector organisations to support understanding of the implications of the UK Internal Market Bill – a major piece of Brexit legislation. It has been written by Charles Whitmore, research associate with the Wales Governance Centre and Wales Council for Voluntary Action as a part of the Wales Civil Society Forum on Brexit. This is a partnership between the two institutions funded by the Legal Education Foundation to provide information on the law and policy of Brexit to civil society organisations in Wales.

Executive Summary

This legislation has an extremely wide scope and is an overreaction to a problem the scale of which is unlikely to emerge in the immediate aftermath of transition given that introducing significant barriers to internal trade would harm the devolved regions the most. Rushing legislation of this nature through the UK Parliament, in all probability against the wishes of the devolved nations, is unjustified at best.

Not only is there widespread agreement in academic circles that it represents a shocking disregard for the rule of law, but it cuts across devolution in very significant ways, with potential ramifications in areas previously covered by EU funding, housing, devolved environmental, food, consumer and public health standards and even the UK's international human rights treaty commitments.

- ⇒ The Bill has come under very heavy criticism, especially in Wales, Scotland and Northern Ireland.
- ⇒ It breaches the UK's International Commitments.
- ⇒ It directly reverses the devolution of state aid contrary to the UK Government commitments to respect the devolution settlements throughout the Brexit process
- ⇒ It gives the UK Government spending powers in areas of devolved competence which appear to be replacements for EU Funding
- ⇒ The Mutual Recognition and Non-Discrimination Principles are excessively broad with very few grounds for derogation which will put devolved standards and the ability for policy innovation under considerable strain
- ⇒ It fails to ensure that devolved interests are reflected and protected in its architecture as it provides little to no role for the devolved institutions in many key areas. Ordinarily Internal Market governance by mutual recognition requires institutions and processes involving all regions as equals to foster constructive discussion and trust. Yet this bill does nothing to address this underlying governance requirement which may ultimately further damage the already strained relationship with central government.

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1 - Context

When the UK exits the transition period after 31 December 2020 [competence in many policy areas](#) will be returning to the UK, including to the devolved nations.¹ This includes a number of areas like agriculture and food standards, where different local requirements could in theory make intra-UK trade more difficult because traders and services providers would need to adhere to different rules depending on where they were trading. For example if Wales introduced more stringent labelling requirements, goods produced in England would need to comply with English requirements when sold in England, and Welsh requirements when sold in Wales.

This situation is typically considered economically inefficient and arises in cases of regional integration like the EU and non-unitary states like Australia but was not previously an issue in the UK because a baseline of commonality was ensured by EU law. The problem is usually addressed by Internal Market laws and/or intergovernmental agreements which seek to balance the advantages of centralised common rules (economic efficiency and ease of trading), and the benefits of different local requirements (rules tailored to local preferences and needs, potential for upwards pressure on standards and policy innovation).

Following a [four week white paper consultation over the summer](#),² the UK Government introduced the UK Internal Market Bill on 9 September 2020.

For further analyses of the consultation and the concerns it rose, see:

- The Brexit Forum's [response to the consultation is available here](#)³
- Some of our initial commentary in [this newsletter](#)⁴
- [This blog](#) published on the Brexit Civil Society Alliance.⁵
- [This blog](#) by Matthew Dicks, director of the Chartered Institute of Housing Cymru.⁶

¹ See the 'Revised Framework Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland'. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf

² UK Government, Department for Business, Energy and Industrial Strategy, UK Internal Market White Paper Consultation. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901225/uk-internal-market-white-paper.pdf

³ Charles Whitmore, 'UK internal Market Consultation – A Response from the Wales Civil Society Forum on Brexit. Available at: <https://www.cardiff.ac.uk/news/view/2433668-uk-internal-market-proposals-pose-serious-threat-to-devolved-autonomy,-says-civil-society>

⁴ Wales Civil Society Forum on Brexit Newsletter, 04/08/2020 – Post-Brexit UK Internal Market Consultation. Available at: <https://mailchi.mp/ad4aff96dacb/dh25x6w5pk-4564074>

⁵ Charles Whitmore, 'The Next Brexit Related Constitutional Crisis? The UK Government Proposals on the post-Brexit UK Internal Market Represent a Serious Threat to Devolution. Available on the Brexit Civil Society Alliance website at: <https://www.brexitcivilsocietyalliance.org/blog-indexpage/the-next-brexit-related-constitutional-crisis>

⁶ Matt Dicks, 'Will Westminster Take Back Control?'. Available on the Welsh Housing Quarterly website at: <https://whq.org.uk/2020/08/20/will-westminster-take-back-control/>

- [This blog](#)⁷ and [consultation](#)⁸ response by the Human Rights Consortium.

Not only is there widespread agreement amongst experts that this bill violates international law by breaching the UK's commitments under the EU Withdrawal Agreement, the proposed bill also stems from the **fundamentally flawed view that**:

1. Policy differentiation at the local level is inherently incompatible with an integrated internal market.
2. Therefore, its governance mechanisms must prevent **all** barriers to trade.
3. And that the UK is even at risk of considerable market barriers emerging immediately at the end of transition and thus that that an astonishingly broad legislative intervention must be rushed through Parliament prior to 1 January 2021.

If implemented in its current form, the legislation risks seriously curbing devolved regulatory autonomy and the scope of legislative innovation in the devolved nations because it is not suited to the UK's constitutional and politico-legal setup. Traders in goods will be able to bypass devolved regulatory requirements in a huge range of areas as the mutual recognition duty is basically absolute (a feature present in no other major system of mutual recognition) and provides no room for the recognition of the social values that are typically present in such a process.

2 - What have the responses to the Bill been?

As with the White Paper the [UK Government failed to share the draft bill with the Welsh Government](#) when requested to do so by Jeremy Miles, Welsh Counsel General and Minister for European Transition. Following its publication, the Bill has understandably come under serious criticism and especially within Wales, Scotland and Northern Ireland.

2.1 Wales

In Wales, the Counsel General has criticised the UK Government's unilateral approach to the UK Internal Market, the harm it would cause Welsh businesses and the risk of lowering standards at the [JMC \(EU Negotiations\) meeting on 16 July 2020](#).⁹ The First Minister Mark Drakeford has also [commented](#):

This is an enormous power grab – undermining powers that have belonged to Wales, Scotland and Northern Ireland for over 20 years.

This Bill will do more to hasten the break-up of the Union than anything else since devolution began. We'll oppose it every step of the way.

Following publication of the Bill David Melding, Welsh Conservative MS for South Wales Central [resigned as shadow counsel general](#) over the Bill.

2.2 Scotland

⁷ Human Rights Consortium, 'Under the Radar: Key Concerns with Recent UK Govt Brexit Consultations. Available at: <http://www.humanrightsconsortium.org/under-the-radar/>

⁸ Human Rights Consortium – HRC Submission to the UK Internal Market Consultation. Available at: <http://www.humanrightsconsortium.org/wp-content/uploads/2020/08/UK-internal-market-consultation-HRC-Submission-August-2020-1.pdf>

⁹ Welsh Government, Cabinet Statement – Joint Ministerial Committee (EU Negotiations). Available at: <https://gov.wales/written-statement-joint-ministerial-committee-eu-negotiations-5>

Nicola Sturgeon, First Minister of Scotland [has called the Bill](#) ‘an abomination on almost every level’, highlighting that it breaks international law, makes the prospect of a hard border on the Island of Ireland more likely and that it is a ‘no holds barred full frontal assault of devolution’.

Michael Russel, Cabinet Secretary for the Constitution, Europe and External Affairs has also [written](#):

Far from supporting the devolved governments, the U.K. is doing everything it can to undermine and silence them. The Internal Market bill not only deliberately breaches international law it does the same to domestic law as expressed in the constitutional settlement.

The SNP have [tabled a cross-party amendment](#) rejecting the bill outright.

2.3 The European Union

Following publication of the Bill, the EU called for an emergency meeting of the UK/EU Joint Committee, the body which oversees the implementation of the Withdrawal Agreement. Afterwards the EU Commission [called on the UK to withdraw the Bill](#), noting that its passage would violate the Withdrawal Agreement [but the UK refused](#).

There has been a considerable amount of brinkmanship around the threat this Bill poses to the future relationship discussions, but at the time of writing, neither party seems minded to withdraw from the negotiations. The EU has however stated that it [can pursue legal action](#) before the European Court of Justice.

2.4 The UK Government

The consultation response was published on the same day as the Bill and [can be read here](#). As was predicted owing to the flawed design of the consultation itself, the response highlights that many contributions did not directly answer the questions.

In total 271 responses were received, of which 15 from charities. The majority came from industry and trade bodies. The response argues that the proposals are necessary, including for the third sector and were overwhelmingly supported by business, industry and trade groups. While the response does not make clear the geographical representation of the submissions, the response seems to support our prediction that the system would be welcomed (and in future dominated) by business interests at the England and UK level and indeed the response highlights that divergent views in the consultation mostly pertained to them being incompatible with devolution.

Following the slew of criticism the UK Government published its legal position, [which can be read here](#). It accepts that the UK Internal Market Bill breaches its international commitments but attempts to justify this by arguing that the situation the UK finds itself is exceptional and that as a dualist country, parliamentary sovereignty allows it to pass legislation contrary to its international commitments. As argued by [Professor Mark Elliot](#), this is not a valid legal argument – international treaty commitments remain binding regardless of domestic law which is only needed to render them enforceable domestically but has no effect on whether or not they are binding in international law.

At the time of writing the UK Government has just announced an amendment to the Bill which would give MP's a vote when invoking the Bill's provisions to breach international and domestic law. It should be noted that while this is a concession to some degree – voting to breach legal requirements is still a breach of the law and therefore remains highly problematic.

This rest of this briefing provides:

1. A visual overview of how the legislation works in its current form and
2. A summary analysis of the legislation and its main points of tension.

3 – How do the Principles in the Bill Work?

The overarching aim of the legislation is to ensure that different rules enacted at the devolved level do not impede intra-UK trade in goods and services. To achieve this, it introduces the principles of mutual recognition and non-discrimination which combined are referred to as the 'Market Access Commitment'.

The core of the bill is divided into three parts:

1. The first covers mutual recognition and non-discrimination for goods (see Figure 1)
2. The second does so for services (see Figure 2)
3. The third introduces mutual recognition for qualifications (see Figure 2)

While each part operates somewhat differently as depicted in figures 1, 2 and 3 – the general idea is that local rules which impede trade are disapplied either through mutual recognition or non-discrimination unless the rule in question is contained in an exclusion or can be justified. A significant problem however is that there are excessively narrow grounds to do this.

The use of mutual recognition and non-discrimination is a standard approach to regulating an internal market, however the mechanisms in the Bill are so poorly adapted to the UK's context that there are very considerable points of tension on every level of this Bill, especially from the perspective of devolution. These will be summarised in section 4 of this briefing.

Overview of the UK Internal Market Bill's Mutual Recognition and Non-Discrimination Principles

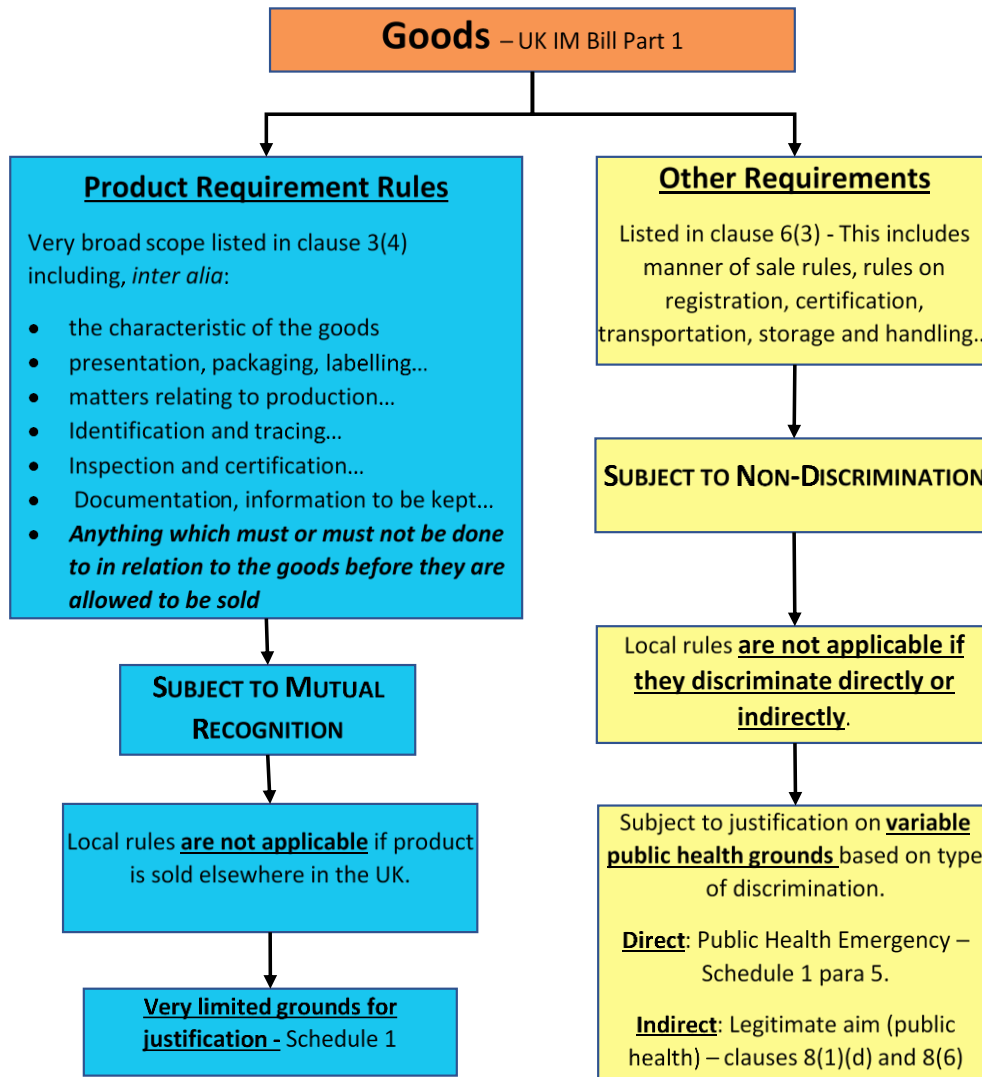


Figure 1 – UK Internal Market Bill – provisions on goods.

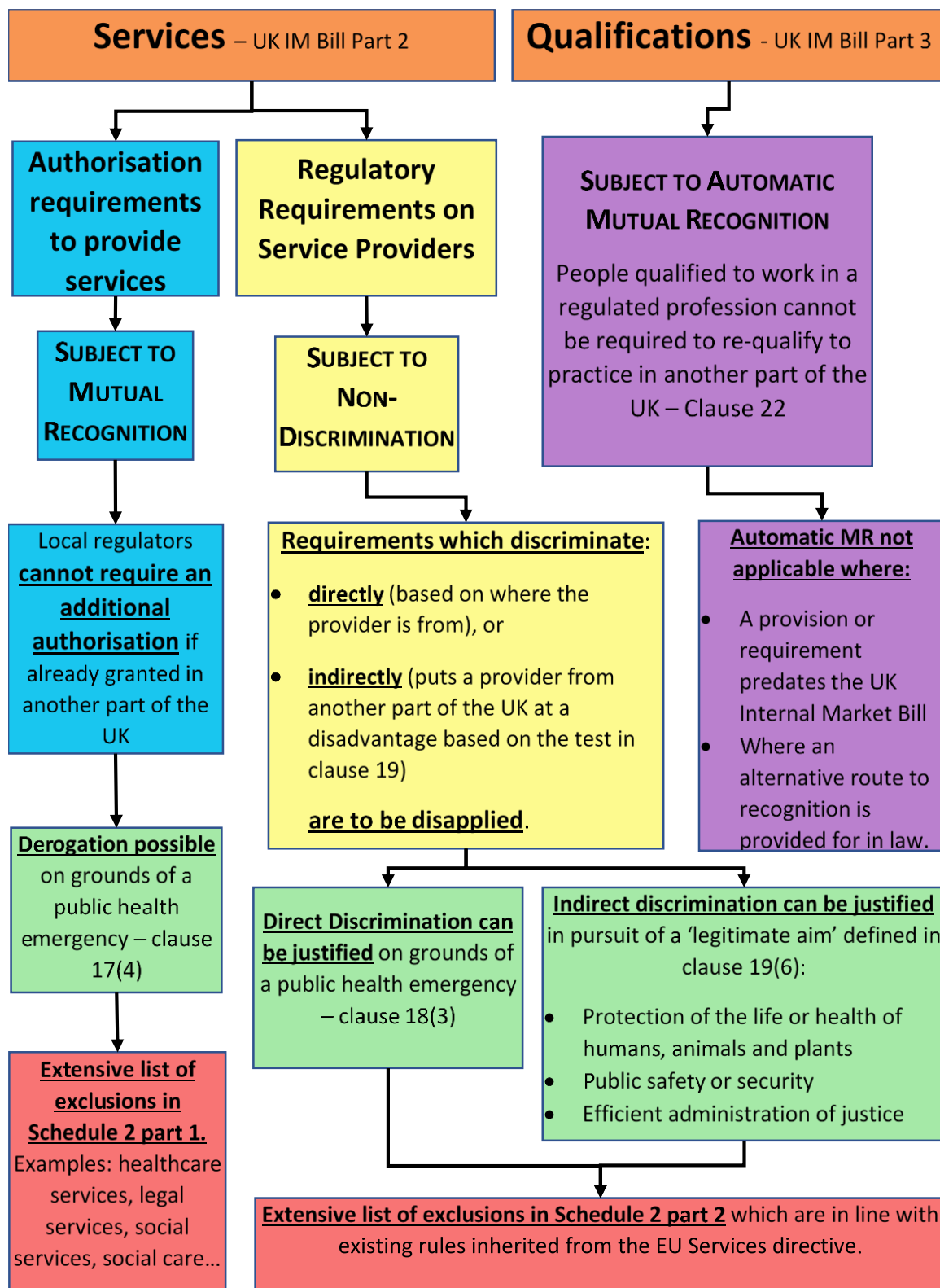


Figure 2 – UK Internal Market Bill – Provisions for services and qualifications

By way of example, the reasoning in the case of goods is illustrated below in Figure 3.

Market Access Commitment for Goods

Does a trader from England have to comply with a local requirement in Wales?

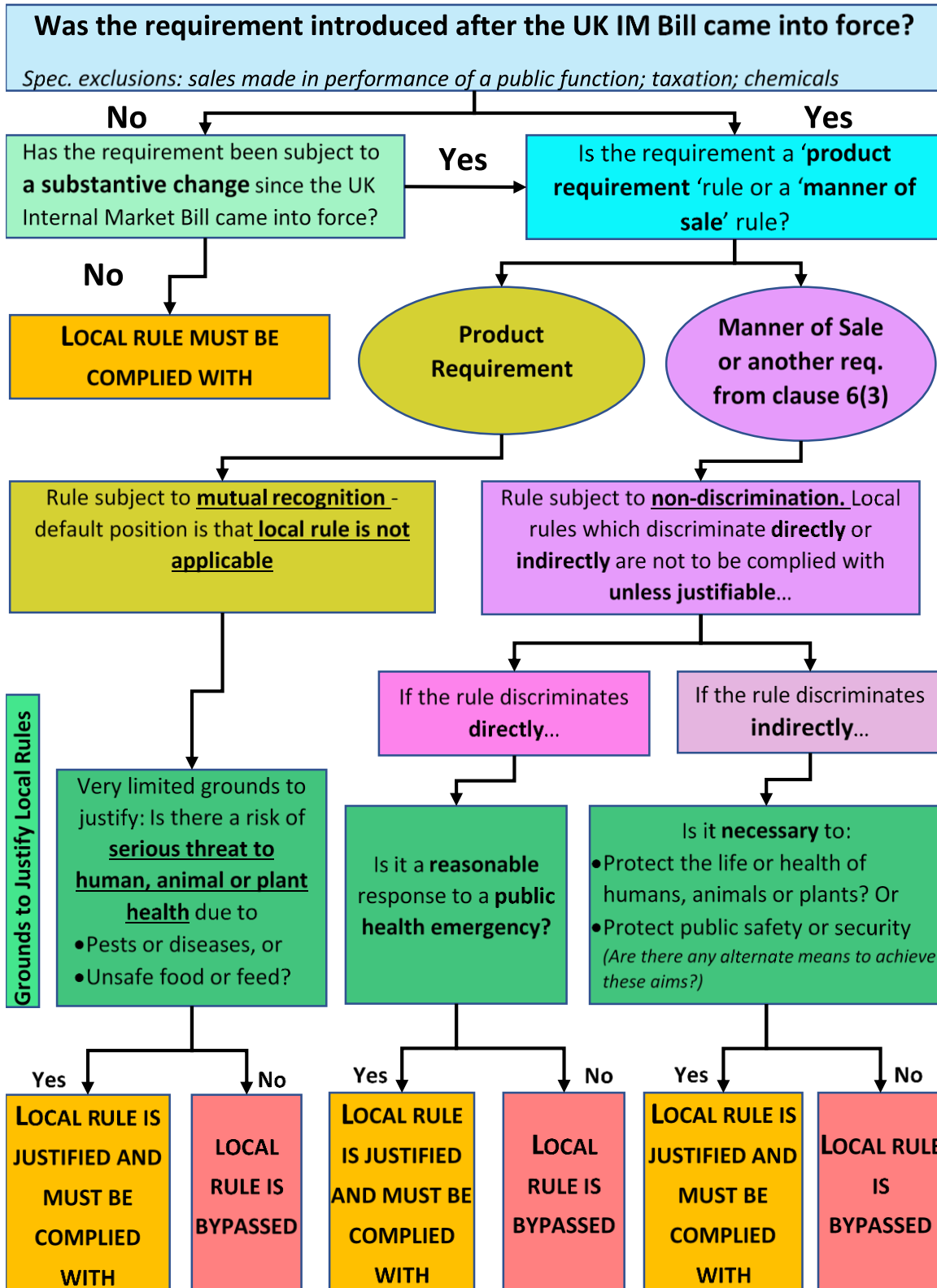


Figure 3 – UK Internal Market Bill – Breakdown of the reasoning for goods

4 – Analysis of the Main Points of Tension

4.1 The Bill breaches the UK's International Commitments

- ⇒ ***The most discussed issue the Bill raises concerns its disregard for the rule of Law as the UK Government has openly accepted that it violates the UK's international legal commitments.***
- ⇒ ***Not only does the Bill violate the UK's commitments under the Withdrawal Agreement, it attempts to create a category of regulations which are completely immune to scrutiny by setting aside domestic judicial review and all of the UK's international legal commitments.***

On 8 September 2020 Brandon Lewis MP, Secretary of State for Northern Ireland [stated before the House of Commons](#) that 'This [Bill] does break international law in a very specific and limited way'.

It does so because it expressly violates the terms of the Withdrawal Agreement between the UK and EU. This treaty was thought to have finally settled the issue of a border on the Island of Ireland.

The effect is that goods in Northern Ireland must comply with EU standards thus creating a border between Northern Ireland and the rest of the UK. The UK Government is now seeking to enshrine in law its promise that this would not be the case, even though this contradicts its commitments in the Withdrawal Agreement in several ways:

1. **Clause 42** of the UK Internal Market Bill enables ministers to put aside EU requirements (that the UK agreed to) on customs paperwork for goods going from NI to GB.
2. Article 10 of the Northern Ireland protocol of the Withdrawal Agreement makes parts of EU state aid law applicable to the UK where trade between NI and the EU is affected (to avoid distorting competition). **Clauses 43 and 44** of the UK IM Bill enables ministers to modify or completely disapply this commitment.

Clause 45 is particularly egregious in its disregard for international law:

3. It purports to make the above clauses have effect '**notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent.**'¹⁰

The effect of this is that regulations made by ministers under these clauses are to have legal effect even if they breach the law. The clause essentially directs UK courts to disregard international law by stating that:

*'regulations under section 42(1) or 43(1) are **not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic law**.'*¹¹

As pointed out by [Professor Mark Elliot in this blog post](#)¹² – the UK IM Bill goes even further by stating that regulations made under these provisions continue to have effect even if they breach law deriving from the Withdrawal Agreement (as opposed to just the Northern Ireland Protocol) and removes the ability of individuals to enforce the treaty before UK courts –

¹⁰ United Kingdom Internal Market Bill – Clause 45 (1).

¹¹ United Kingdom Internal Market Bill – Clause 45 (2) (a).

¹² Professor M. Elliot, 'The Internal Market Bill – A Perfect Constitutional Storm'. Available at: <https://publiclawforeveryone.com/2020/09/09/the-internal-market-bill-a-perfect-constitutional-storm/>

essentially it suspends direct effect for matters arising under clauses 42 and 43 (that is to say the ability for individuals to enforce treaty rights directly before UK courts).

Alarming, clause 45 (4) makes it clear that ‘**relevant international or domestic law**’ is understood to be much wider than the Withdrawal Agreement and includes any other international commitment – including the likes of the European Convention on Human Rights and the various UN Treaties to which the UK is a signatory. **The Bill thereby attempts to create a category of regulations which appear completely immune to all scrutiny – be it via international law or domestic judicial review.**

This sends a powerful message in connection with the UK’s ongoing commitment to international human rights conventions at a time when reliance on these provisions is likely to increase as a result of the UK leaving the EU’s legal order. It is also alarming to see the UK Government seeking to exclude its acts from the scrutiny of international human rights instruments when seen in the context of its commitments to update the Human Rights Act and make changes to judicial review.

While this Bill does indeed provide scope for bypassing human rights commitments in a specific way (in relation to the regulations emerging from clauses 42 and 43/44) – it sets a very dangerous precedent. Especially when the UK Government openly rejected [findings by UN Special Rapporteurs on issues like poverty and human rights](#)¹³ and has disregarded it being found to be in [violation of the United Nations Convention on the Rights of Disabled People](#).¹⁴

4.2 Removal of State Aid as a Devolved Competence

⇒ ***The Bill directly reverses the devolution of state aid contrary to the UK Government commitments to respect the devolution settlements throughout the Brexit process***

Whether State Aid is in fact a reserved or devolved competence has been subject to disagreement between the Welsh and UK Governments since the onset of the work around Common Frameworks. Indeed the Framework Analysis by the UK Government lists state aid as a reserved power.¹⁵ This was again [contested by the Welsh Government](#) when it responded to the White Paper consultation – rightly pointing out it is not listed in the Government of Wales Act 2006 and that if it were indeed a reserved power, there would be no need to legislate to that effect in this Bill.¹⁶

¹³ Statement on Visit to the United Kingdom, by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights. Available at:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23881>

¹⁴ J. Pring, ‘UN Confirms that the UK Government’s Treaty Violations Were Both Grave and Systematic’.

Available at: <https://www.disabilitynewsservice.com/un-confirms-that-uk-governments-treaty-violations-were-both-grave-and-systematic/>

¹⁵ See page 40 of the Framework Analysis available here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf

¹⁶ Correspondence from Jeremy Miles AS/MS, Counsel General and Minister for European Transition, 14 August 2020. Available at:

<https://business.senedd.wales/documents/s104683/Correspondence%20from%20the%20Counsel%20General%20and%20Minister%20for%20European%20Transition%20to%20the%20Chair%20and%20the%20Ch.pdf>

The White Paper consultation recognised that the existing devolution settlements do not contain a reservation of state aid,¹⁷ and thus Part 7 of this Bill constitutes a direct reversal of devolution in this area.

4.3 The UK Internal Market Bill and the Shared Prosperity Fund

⇒ ***The Bill gives the UK Government spending powers in areas of devolved competence which appear to be replacements for EU Funding***

The press release which accompanied the publication of the UK Internal Market Bill [states](#):

The proposals will allow the UK Government to meet its commitments to deliver replacements for EU programmes, such as a UK Shared Prosperity Fund, replacing bureaucratic EU structural funds and at a minimum match the size of those funds in each nation.

Clause 46 of the Bill goes on to provide powers for ministers to provide financial assistance in an array of areas that intersect with devolved competence, many of which have been subject to EU funding:

- Promoting economic development... in any area of the United Kingdom
- Providing infrastructure at any places in the UK, which is taken to include:
 - Water, electricity, gas, telecommunications, sewerage or other services
 - Railway facilities, roads or other transport facilities
 - Health, educational, cultural and sports facilities
 - Court or prison facilities, and
 - housing
- Supporting cultural activities, projects and events...
- Supporting activities, projects and events relating to sport
- Supporting international educational and training activities and exchanges
- Supporting educational and training activities and exchanges within the UK

In keeping with the overall lack of consideration given in the Bill to protect devolved interests, **there is no indication of a role for the devolved governments in the delivery of these funds**. It is further egregious that the very limited mention in the White Paper of spending powers was neither subject to a question in the consultation, nor was it indicated that these may be used to replace EU funding specifically.

Many third sector organisations have been awaiting a consultation specifically on the UK Shared Prosperity Fund. Indeed, Parliament under-secretary of State for Housing, Communities and Local Government, Jake Berry MP stated on 14 May 2019 that the consultation would be starting very soon.

¹⁷ See the UK Government Response to the UK Internal Market White Paper Consultation, para.173. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916154/ukim-consultation-government-response.pdf

This will further compound third sector concerns that the spending priorities of the UKSPF will focus on the industrial strategy and now UK Internal Market infrastructure as opposed to equality and cohesion-based projects and goals.

4.4 Mutual Recognition and Non – Discrimination

⇒ ***The Mutual Recognition and Non-Discrimination Principles are excessively broad with very few grounds for derogation which will put devolved standards and ability for policy innovation under considerable strain***

For an overview of how these principles work – see figures 1-3 earlier in this briefing.

Mutual recognition and non-discrimination are relatively standard policy tools in regulating internal markets in goods and services, but if poorly implemented, as is the case in this bill, they **can result in strong centralisation**.

We predicted in our [consultation response](#) that any system introduced in the case of the UK, risks its principles and mechanisms being interpreted and used mostly in favour of trade from England purely because of the economic and politico-legal imbalance between the regions. This means that any system should be built with this in mind and provide mechanisms to offset this imbalance and ensure that the interests of the devolved nations are respected.

We already started to see concern materialise in the UK Government response to the consultation. Not only is there a predictable quantitative preponderance of views from businesses and industry but the analysis of these consistently favours market access while **concerns expressed around devolution are either acknowledged and then ignored, or downplayed**.¹⁸ By way of further example clause 29 (8) (b) of the Bill which covers the Competition and Market Authority's role in monitoring the Internal Market, read in the wider context of the Bill seems geared towards viewing regulatory differences as inherently problematic for the purpose of its investigations.

Rather than address this imbalance, the Bill has opted for a completely opposite approach by severely restricting any grounds to justify devolved policy. These are limited to public health and either require an emergency defined as an 'extraordinary threat to human life' or a serious threat to public health involving very specifically pests, diseases, or unsafe food or feed. The most lenient threshold is that of **a legitimate public health or security aim** which is used to justify indirect discrimination. However this also involves an assessment of whether there are less restrictive means to achieve that objective and of the impact the local requirement has on market competition – both of which suggest yet again, a very difficult threshold to justify devolved policy choices.

The absence of other reasons to justify devolved policy, like on environmental and consumer protection grounds is significant and the central issue at play is that the **Bill only views potential harm as a valid reason to enforce local requirements, whereas it should enable the devolved regions to derogate where there is scope for improvement in the public interest**.

This resulting system means that it will be very difficult for the devolved governments to justify any local requirements and in most cases, goods will not need to comply with different, new, devolved rules.

¹⁸ See n.17, ps.12 and 19 for example.

The consequence of this is that:

- There will be very little incentive for new devolved requirements because not only will these be inapplicable to trade from outside Wales, but they would place local Welsh trade at a disadvantage - **thereby stifling both policy innovation and indirectly curbing the ability to make different social policy choices at the devolved level.**
- Furthermore, pre-existing requirements are initially protected – but if they are substantially updated they are brought within the scope of the Bill – **thereby further disincentivising innovation.**

There are also concerns that these rules could give rise to litigation by traders seeking to challenge regulatory requirements. This would again unduly favour trade from England to the detriment of Wales, Scotland and Northern Ireland's regulatory autonomy and potentially create a powerful motor for driving down their standards. Experience suggests that where possible, powerful business lobby will use their resources to challenge such rules (as seen when the Scottish Whisky Association challenges Scotland's minimum alcohol pricing). This is particularly concerning when taken in the context of other deregulatory measures that could create further opportunities for challenge (like the [proposals around changes to EU derived case law](#)) and post-Brexit trade deals.

Illustration: Chlorinated Chicken

Clause 2 (1) (a) also makes it clear that products imported into a region of the UK are also subject to mutual recognition. This would prevent the devolved regions from putting up local requirements preventing lower standard food products, like chlorinated chicken, from entering their markets. It would also prevent them from insisting that such products be subject to specific labelling requirements because these are also caught by mutual recognition. Hypothetically if local requirements were introduced to prevent this scenario from arising, we would expect the devolved governments to be able to argue on both of these points that their local requirements pursue a public interest objective. For example, this could be public health in relation to the standard of the food, and consumer protection by providing more information in the form of labelling if chlorinated chicken were to be sold. **However, this is completely absent from the legislation.** This problem remains even if a Common Framework sets a minimum standard because the market access principles will indirectly prevent the devolved parts of the UK from legislating above that minimum level.

The same overarching comment holds true for services but to a lesser extent as these are subject to significant exemptions which are, for now, in line with EU derived law. The Bill also:

1. has fewer grounds to justify differences
2. gives unilateral powers to the UK Government to change this list of exemptions moving forward and any updated local requirements are brought within scope...
3. **...so there is potential for a direction of travel with an increasing amount of areas caught by the Bill.**

4.5 Devolution, Intergovernmental Relations and Governance Structures

- ⇒ ***Not only does the Bill fail to ensure that devolved interests are reflected and protected in its architecture, but it provides little to no role for the devolved institutions in many key areas.***
- ⇒ ***To address this, Internal Market governance by mutual recognition requires institutions and processes involving all regions as equals to foster constructive discussion and trust.***
- ⇒ ***Yet this bill does nothing to address this underlying governance requirement which may ultimately further damage the already strained relationship with central government.***

As mentioned in previous sections, derogations are an essential aspect of this type of internal market governance. They ensure that the regions can maintain their own approach to social values, but they also ensure that intergovernmental dialogue take place. As such, mutual recognition functions by creating spaces for constructive discussions between administrations on what amounts to a justified requirement in pursuit of the public interest. The White Paper acknowledged this to some extent when it recognised the need to create:

opportunities for different levels of government – central, devolved, local – to collaborate and engage in constructive dialogue, including increased transparency between the UK Government and devolved administrations, early discussion and parity of participation.¹⁹

As a part of the UK internal market monitoring function, the White paper also recognised the need for ongoing stakeholder engagement. Yet there is no sight of this in the Bill or anything that suggests a direction of travel towards the creation of collaborative intergovernmental processes and institutions that would put the governments on the level of parity necessary to effectively govern an internal market by mutual recognition. Quite the opposite, the Bill points towards a far less developed system of intergovernmental relations than in comparable systems like Australia and Canada despite the UK's context requiring it even more:

- In terms of trust, contrary to previous commitments to respect the devolution settlements – it reverses the devolution of state aid.
- It recognises next to no role for the devolved institutions.
- Arguably some of the most central provisions of the Bill, the grounds for justification, can be changed unilaterally by the UK Government without involvement by the devolved institutions.
- The scope of the mutual recognition and non-discrimination duties can also be changed by ministers and this carries only a weak duty to consult with the devolved governments.

Lessons from other internal markets underpinned by mutual recognition show that formal systems of intergovernmental dialogue are an essential characteristic.²⁰ These need to place participating governments on a level of parity and details around a variety of intergovernmental functions should be agreed **prior to the legislation being passed**. These might include dispute avoidance and resolution, cataloguing and reporting complaints, pre and post legislative dialogue as well as reviewing and updating the operation of the internal market by co-decision. Any new bodies should

¹⁹ UK Internal Market White Paper Consultation document, para.110.

²⁰ See the Wales Civil Society Forum on Brexit's response to the consultation for further discussion of this. Available at: https://www.cardiff.ac.uk/data/assets/pdf_file/0004/2427925/Wales-Civil-Society-Forum-on-Brexit-WCVA-and-WGC-UK-Internal-Market-Consultation-Response.pdf

see details around their structure, membership and attendance, accountability, record keeping, impact measurements, meetings, mechanisms for collaboration discussed and studied beforehand as well.

The Bill addresses a very few of these points by providing new functions to the Competition and Markets Authority (CMA) to monitor and report on the market. In so doing it will report every 12 months on the operation of the Internal Market and every 5 years on the functioning of the mutual recognition and non-discrimination principles.

Overall, this is far too limited and does not address the underlying UK internal market governance needs. We might not expect all these details to be included in the legislation, **but this is problematic because they are not addressed elsewhere**. Most obviously there are notable governance gaps, for example around dispute avoidance and resolution. The UK Government indicated in the press release accompanying the Bill that this would take place [between Governments and legislatures](#) but this does not address the issue because the UK's existing system of intergovernmental relations is largely ineffective and the relationship between central and devolved governments is extremely strained as a result.

More generally:

- The function given to the CMA does not go far enough. The powers provided are often caveated so for example it can decline to provide reports when requested. When provided they are for information purposes only and do not always require a response.
- Nothing suggests these monitoring and information gathering processes will factor in the interests of the devolved nations, particularly when the system is constructed in such a way that businesses in England are bound to support it.
- The information gathering powers and abilities to impose penalties are in line with its existing functions, but questions may arise around the expansion of these to such a wide-ranging field as monitoring the UK Internal Market which goes somewhat further than its existing more specific roles.
- The wider stakeholder engagement function covered in the White Paper has not been reflected in the legislation.

The Government has stated that this new section of the CMA – the Office for the Internal Market, will **be operational by the end of 2021** and this further contradicts the UK Governments narrative that this legislation is urgent and necessary and must be rushed through before the end of transition.²¹ Indeed both Wales and Scotland believe that the Common Frameworks work is sufficient and that this Bill is not even needed at all. It is sensible that overarching approach to the UK Internal Market be ultimately developed, but that this does not need to be rushed through before the end of the transition period and must reflect a much better balance of competing interests than in this Bill.

²¹ Government response to the consultation on the UK Internal Market, p.20

5. Further resources

- Professor Mark Elliot - [The International Market Bill – A Constitutional Perfect Storm](#).
- Professor Kenneth Armstrong - [Can the UK Breach the Withdrawal Agreement and Get Away With It? – the United Kingdom Internal Market Bill](#).
- House of Commons Library - [Briefing paper – The UK Internal Market Bill](#)
- Professor Catherine Barnard - [The Internal Market Bill: When is EU Law not EU law](#)
- Professor Katy Hayward - [What Happened When the UK Internal Market Bill met the Northern Ireland / Ireland Protocol](#).
- Professor Dan Wincott - [The UK Internal Market Bill: Risks and Challenges](#)
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- Institute for Government – [Explainer on the UK Internal Market Bill](#).
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