



Law Society  
of Scotland

# Consultation Response

## Scotland and the UK Internal Market

February 2020



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Constitutional Law Sub-committee, Trade Policy Working Group and Competition Law Sub-committee welcome the opportunity to consider and respond to the Finance and Constitution Committee's call for views on Scotland and the UK Internal Market.<sup>1</sup> We have the following comments to put forward for consideration.

## Consultation questions

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### 1. What is the UK internal market?

There is no legal definition of the UK internal market.<sup>2</sup> Furthermore, the term "internal market" generally appears in with the specific context of the EU (and EEA). Nonetheless, one can recognise some components of an "internal market" within the UK that have parallels to those within the EU. For instance, in the UK there is a free trade area and a customs and currency union and such matters as the law on product standards, safety and liability have been reserved to the UK Parliament.

Until 31 January 2020 the UK was a member of the EU internal market. The market is internal to the extent that between the relevant countries, barriers to freedom of movement of goods, services, people and capital have been removed or reduced in the interests of trade and open competition. Nevertheless, distinct domestic laws remain, including in areas of direct and obvious relevance to commercial transactions. The external trade dynamic is different and is dictated by the EU's WTO obligations and free trade agreements

<sup>1</sup> <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/113987.aspx>

<sup>2</sup> We note that if a juridical basis for the concept of a UK internal market does exist, it would be in the mirroring provisions of the Acts of Union of 1706&1707 (Scotland and England) and 1800 (Great Britain and Ireland), however this does not provide for the kind of day-to-day regulatory landscape which we understood to be the focus of the UK Government's current Internal Market project.

with third countries. It is important to note that the internal market aspect of the EU is distinct from the customs union: Norway, Iceland and Liechtenstein are members of the former but not the latter.

It is beyond the scope of this paper to articulate all the principles of EU law which might assist in examining the concept of an internal market but the idea of “competence” is of direct relevance to exploration of the UKIM. The principle of conferral is articulated (alongside those of proportionality and subsidiarity) in Article 5 of the Treaty on European Union: this means that the EU can only take action in those areas where it has specifically been given competence to do so. There are three different types of competence<sup>3</sup> set out in the Treaty on the Functioning of the European Union (TFEU): exclusive competence (EU only); shared competence (countries can act if EU chooses not to or if there is a subsidiarity argument that suggests it is more appropriate for Member States to act); and supporting competences “to support, coordinate or supplement the actions of the Member States”.<sup>4</sup> There are also areas in which the EU can take steps to ensure policy coordination (eg economic policy and common foreign and security policy) at EU level. The interplay between competence and subsidiarity is intended to create a system whereby “umbrella” measures ensure sufficient internal coordination, while allowing flexibility for Member State discretion where uniformity is not essential.

This is distinct from the constitutional structure created by devolution within the UK where, in the sense of devolution to Scotland, in formal terms areas of law are either devolved or reserved, with no dual competence in the sense that it applies in the internal market, although there are some very limited and specific areas of shared competence under s.56 of the Scotland Act 1998.<sup>5</sup> In Scotland this is dictated by Schedule 5 of the Scotland Act 1998. That said, there may be a division within a particular area of law – for example consumer law as a whole is reserved but the responsibility for ensuring consumer advocacy and advice is devolved.

There are also areas, such as trade promotion, where initiatives may be UK wide (eg the GREAT Campaign<sup>6</sup>) or organised at a devolved level (eg Scotland is Now<sup>7</sup>). Nevertheless, it is important to note that section 28(7) of the Scotland Act provides that the Scottish Parliament’s powers to make laws “does not affect the power of the Parliament of the United Kingdom to make laws for Scotland. While section 28(8) also partly restates the legislative consent convention, this does not affect, as a matter of law, the power of the UK Parliament to legislate on devolved matters, even if the Scottish Parliament has not consented. The UK Parliament therefore remains sovereign to legislate even on devolved matters, but by convention it will not normally do so without the consent of the Scottish Parliament

<sup>3</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0020>

<sup>4</sup> Article 6 TFEU

<sup>5</sup> <http://www.legislation.gov.uk/ukpga/1998/46/section/56>

<sup>6</sup> <http://www.greatbritaincampaign.com/>

<sup>7</sup> <https://assets.scotlandisnow.com/pages/scotlands-story>

### *Internal market for legal services*

Legal services offer a good example of a sector where different rules apply in different jurisdictions but service providers are able to deliver to clients throughout the UK (and beyond), regardless of the jurisdiction in which they have originally qualified. Scottish solicitors therefore provide legal services to clients in England, Wales and Northern Ireland.

It is notable that the EU framework for legal services did not alter the dynamic between different parts of the UK and withdrawal therefore does not impact upon intra-UK arrangements, although it presents significant potential challenges in terms of trade with the EU/EEA.

The UK is a relatively open market for legal services, although there are different rules for solicitors and barristers/advocates qualified in different parts of the UK. Many Scottish solicitors work in England and Wales: while some may requalify (as a result of personal choice or firm requirements), many continue to work on the basis of their Scottish practising certificate. Similarly, solicitors qualified in England and Wales are registered with the Law Society of Scotland and foreign lawyers and practise here. Again, they may choose to requalify but depending on their area of practice, this will not be a necessity. At a firm level, many national firms and indeed international firms have offices across the UK, including in Scotland.

The Law Society of Scotland is both the representative body and regulator for Scottish solicitors and routinely cooperates with other regulators, including the SRA, Law Society of Northern Ireland and the FCA.

## **2. How will international treaties, including trade deals, impact on the UK internal market?**

Responsibility for negotiating and concluding international treaties, such as free trade agreements, is reserved to Westminster and falls within the competence of the UK Government. As with all other international obligations, implementation of and compliance with the terms of trade deals remains the formal responsibility of the UK Government from an international law perspective. It will often fall to the devolved Governments to put the rules agreed at international level into practice. This was confirmed by the Supreme Court in the Continuity Bill reference.<sup>8</sup>

We note that international relations including the regulation of international trade is reserved under the Scotland Act 1998, Schedule 5, paragraph 7(1) but that the observation and implementation of international

<sup>8</sup> *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland (Scotland)2018]* UKSC 64 – available here: <https://www.supremecourt.uk/cases/uksc-2018-0080.html>

obligations is not reserved. Westminster legislation will need to take into account the provisions of the Scotland Act and the role which the Scottish Ministers and Parliament have to play under the law.

Although the UK was represented by “the EU” at the WTO during its time as a Member State, it has also been a member in its own right since the WTO came into being in 1995. The impact of WTO rules on an internal UK market is therefore unlikely to be markedly different from the impact observed over the last 40 years. The UK will need to ensure that it continues to comply with its international obligations under the WTO treaties and ensure that any new frameworks accord with WTO rules.

For example, in our commentary<sup>9</sup> on the Agriculture Bill,<sup>10</sup> currently going through the Westminster Parliament, we have considered the implications of WTO compliance. We noted that on a practical level it is difficult to know in advance what level of domestic support the UK will be able to grant given issues over our ‘share’ of amber box support.<sup>11</sup> We have also stated that the power to make regulations to comply with the terms of negotiated settlements of WTO disputes should also be specifically included. Furthermore, we note that if measures in one jurisdiction of the UK internal market were to infringe WTO law, retaliatory measures taken by another WTO member might negatively impact sectors in other parts of the UK.

Finally, as we have referred to elsewhere,<sup>12</sup> the larger issue of how devolved authorities should be involved in trade negotiations more generally needs to be addressed in early course.

### **3. What are the priorities and challenges for Scottish businesses and organisations in operating within a UK internal market?**

Within the EU internal market Scottish businesses and organisations benefited from access to a broader customer and supplier base, with legislative proposals geared towards reducing barriers on an ongoing basis. In terms of legislation/regulation a broader range of business interests were represented across the market as a whole, feeding into policy discussions on how that market should be structured. There will be a different dynamic when only the UK’s interests need to be considered. Smaller industries specific to Scotland may face challenges within this new framework if the UK internal market is skewed towards larger industries concentrated in other parts of the UK. In other areas Scottish businesses and organisations will have the

<sup>9</sup> <https://www.lawscot.org.uk/media/368247/20-01-17-agriculture-bill-second-reading-briefing.pdf> - see comments on Part 6

<sup>10</sup> <https://services.parliament.uk/bills/2019-21/agriculture.html>

<sup>11</sup> 'Amber box' subsidies are all domestic support measures which are subject to caps under the WTO Agreement on Agriculture. They are generally those subsidies which are considered to distort trade most significantly, such as measures to support prices, or those directly related to production quantities. On the UK's departure from the EU, the EU's current overall limit on 'amber box' subsidies will have to be divided between the UK and the EU.'

<sup>12</sup> See for example our response to the International Trade Committee's inquiry into UK Trade Policy Transparency and Scrutiny <https://www.lawscot.org.uk/media/360663/22-06-18-con-tra-trade-policy-transparency-and-scrutiny.pdf> and our response to the Scottish Affairs Committee's inquiry into Scotland's priorities for future trade relations with the EU [https://www.lawscot.org.uk/media/360726/lss-response\\_tra\\_scotland-and-brexit-trade-and-foreign-investment-inquiry\\_july-18.pdf](https://www.lawscot.org.uk/media/360726/lss-response_tra_scotland-and-brexit-trade-and-foreign-investment-inquiry_july-18.pdf)

same priorities and challenges as those in other parts of the UK and there will therefore be no particular Scottish impact.

#### **4 What institutional structures will be required to administer and enforce the UK internal market?**

As we have discussed elsewhere, the Cabinet Office published in late 2017 a list of 111 points where EU law intersects with devolved matters in a Scottish context. This has been supplemented by the publication of the *UK Government's Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland* on 9 March 2018. 24 of the policy areas in question were identified as being subject to more detailed discussion to explore whether legislative common framework arrangements might be needed, in whole or in part. The Cabinet Office published in April 2019 a *Revised Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland*<sup>13</sup>. This revised analysis has reduced the number of policy areas where legislative common frameworks may be required to 21 although there are some further areas of outstanding contention. It includes, for example, a number of matters relating to the environment. It is important to consider this analysis in considering the structural aspects of the UK internal market.

We are considering these issues in greater detail in the wider context of EU withdrawal and devolution and would be happy to share our thinking with the committee in due course.

#### **5. What mechanisms should be available to challenge 'unfair' internal market practices?**

An internal market requires open competition achieved through a level playing field for businesses operating within it. The UK has a well-established competition regime which is regulated by the Competition and Markets Authority (CMA). The CMA also ensures that businesses do not act unfairly towards consumers, in tandem with sector-specific regulators such as the FCA and OFGEM. Challenges may be brought under the competition law regime, either by way of private enforcement action<sup>14</sup> or by the CMA through infringement proceedings.

The CMA is also due to take on responsibility for enforcing the UK State Aid regime, previously within the jurisdiction of the European Commission. In the EU internal market generally, where unfairness results from, eg dumping<sup>15</sup> or foreign subsidies, it may be possible to seek trade remedies under domestic law, international agreements or WTO rules. The UK's domestic state aid regime is yet to be established but will

<sup>13</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/792738/20190404-FrameworksAnalysis.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf)

<sup>14</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/520423/competition-law-redress-a-guide-to-taking-action-cma55.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/520423/competition-law-redress-a-guide-to-taking-action-cma55.pdf)

need to take account of devolved powers, with robust mechanisms to challenge inappropriate allocations of state aid. As under the EU regime, it should be possible for individual parties to instigate such challenges by way of complaint to the CMA but we also note that challenges may be taken in court by way of judicial review. These mechanisms should remain available under the new UK regime.

Where a remedy is sought under an international agreement or WTO rules, then the UK or EU itself was previously the relevant party in those proceedings. As this relates to international obligations, it is probably not of direct relevance to this inquiry, except to note that the UK domestic regime will need to be in line with the UK's international obligations.

The second potential issue is that of regulatory divergence. In certain circumstances it may be possible to challenge the decision of a rule-maker by way of judicial review. However, we note that this can be costly and only addresses the process, rather than the merits, of a decision.

We also note that there are also mechanisms within the intergovernmental machinery for resolving disputes, but these are very limited, not open to third parties and not legally binding.

## **6. What will be the impact of the UK internal market on devolved powers?**

See comments at question 4.

## **7. What should be the role of the Scottish Parliament in relation to scrutinising the UK internal market?**

The Scottish Parliament may play an important role in scrutinising the interplay between reserved and devolved matters, in particular the use of legislative consent motions, and continuing to exert oversight of intergovernmental relations.

The Scottish Parliament could also play a role in ensuring the proper functioning in the market – for example reviewing how well arrangements are functioning through gathering evidence on the impact of particular measures and suggesting improvements.

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