



Law Society
of Scotland

Law Society Scotland

Response to the Constitution, Europe, External
Affairs and Culture Committee Inquiry into the UK
Internal Market

September 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Constitutional Law and Human Rights Sub-committee welcomes the opportunity to consider and respond to the Government consultation: Constitution, Europe, External Affairs and Culture Committee Inquiry into the UK Internal Market. The Sub-committee has the following comments to put forward for consideration.

General Comments

1. How devolution is being impacted by the new constitutional arrangements arising from the UK internal market.

We commented on aspects of the UK Internal Market bill when it was passing through Parliament that where it impacted on the legislative or executive competences of the Devolved Legislatures or Administrations it would engage the Legislative Consent Convention in relation to the legislative competence of the Scottish Parliament and executive competence of Scottish Ministers. Section 28(8) of the Scotland Act 1998 which recognises “that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament” will apply. The Scottish Government lodged a legislative consent memorandum relating to the bill in the Scottish Parliament on 28 September 2020. This was debated on 7 October and the Scottish Parliament withheld consent to the bill. None the less the bill was passed without any amendments being made to take account of the position adopted by the Scottish Parliament.

Reforms of the governance of the UK may impact on matters which relate to the legislative competence of the Scottish Parliament and the executive competence of Scottish Ministers and have a similar impact in Wales and Northern Ireland. Accordingly, when considering the governance of the UK and potential changes it is important to respect the devolved institutions and the legislative and legal systems which operate across the UK. This would include consultation and engagement between the UK Government and the devolved administrations. In practice, this should mean that only in the most exceptional circumstances should the UK Parliament legislate on matters within the legislative competence of the Scottish Parliament without its consent and this should be especially so when it comes to making changes in the governance of the UK which impact upon the devolution settlement. Despite the passing of some Brexit legislation without such consent, there should be no inference drawn that the Sewel Convention has in any way been diluted.

The following paragraphs set out verbatim or in summary form the market access principles in Parts 1 and

2 of the Act but do not explain how devolution is impacted by them. It is suggested that we should do that in order to provide a meaningful response to the question and to explain why the Scottish and Welsh Governments take such exception to those principles. It may be that all we can provide at this stage are hypothetical examples of how devolution might be affected and the uncertainty that they create. For example, to what extent is the SP's power to legislate with respect to devolved matters undermined or rendered ineffective by those principles. Have we seen the arguments put forward in the Welsh case?]

The UK Internal Market Act (UKIMA) has been gradually brought into force by two statutory instruments:

- a. The United Kingdom Internal Market Act 2020 (Commencement No. 1) Regulations 2020 (SI 2020/1621) which commenced on IP Completion Day – 31 December 2020 Parts 1 (UK Market Access: goods), 2 (UK Market Access: services) and 3 (UK Market Access: professional qualifications and regulation), sections 30 (10), 32 and 37, 46-48 (Northern Ireland Protocol) and Schedules 1 (Exclusions from the Market Access Principles), 2 (Services Exclusions) and 3 Constitution etc of the Office for the Internal Market panel), and
- b. The United Kingdom Internal Market Act 2020 (Commencement No. 2) Regulations 2021 (SI 2021/706) which commenced on 14 June 2021 sections 41-43 (CMA Information Gathering powers). At the moment the entire act has not been commenced.

The following paragraphs set out verbatim or in summary form the market access principles in Parts 1 and 2 of UKIMA.

The provisions of the Act which relate to the Market Access Principles applying to goods namely the mutual recognition principle and the non-discrimination principle are contained in sections 2 and 5

The mutual recognition principle, set out in section 2 of UKIMA, provides:

“The mutual recognition principle for goods

(1) The mutual recognition principle for goods is the principle that goods which—

(a) have been produced in, or imported into, one part of the United Kingdom ("the originating part"), and

(b) can be sold there without contravening any relevant requirements that would apply to their sale,

should be able to be sold in any other part of the United Kingdom, free from any relevant requirements that would otherwise apply to the sale.

(2) Where goods are to be sold in a particular way in the other part of the United Kingdom, the condition in subsection (1)(b) has effect as if the reference to "their sale" were a reference to their sale in that particular way. So, for example, if goods are to be sold by auction, the condition is met if

(and only if) they can be sold by auction in the originating part without contravening any applicable relevant requirements there.

(3) Where the principle applies in relation to a sale of goods in a part of the United Kingdom because the conditions in subsection (1)(a) and (b) are met, any relevant requirements there do not apply in relation to the sale.”

Section 3 defines “relevant requirements” for the purpose of section 2 and provides:

(1) This section defines "relevant requirement" for the purposes of the mutual recognition principle for goods as it applies in relation to a particular sale of goods in a part of the United Kingdom.

(2) A statutory requirement in the part of the United Kingdom concerned which—

(a) prohibits the sale of the goods or, in the case of an obligation or condition, results in their sale being prohibited if it is not complied with, and

(b) is within the scope of the mutual recognition principle,

is a relevant requirement in relation to the sale unless excluded from being a relevant requirement by any provision of this Part.

(3) A statutory requirement is within the scope of the mutual recognition principle if it relates to any one or more of the following—

(a) characteristics of the goods themselves (such as their nature, composition, age, quality or performance);

(b) any matter connected with the presentation of the goods (such as the name or description applied to them or their packaging, labelling, lot- marking or date-stamping);

(c) any matter connected with the production of the goods or anything from which they are made or is involved in their production, including the place at which, or the circumstances in which, production or any step in production took place; ...

(g) anything not falling within paragraphs (a) to (f) which must (or must not) be done to, or in relation to, the goods before they are allowed to be sold.”

Section 4 of UKIMA excludes pre-existing statutory requirements from the operation of the mutual recognition and non-discrimination principles.

Section 5 states the non-discrimination principle for goods, namely that the sale of goods in one part of the United Kingdom should not be affected by “relevant requirements” which directly or indirectly discriminate against goods that have a relevant connection with another part of the United Kingdom.

Our Comment

Sections 2, 3, 4 and 5 provide cumulatively that goods which sold in one part of the UK (where they originate from or are imported to) are automatically accepted across all other parts of the UK, regardless of the rules there. The Act does not prevent the Scottish Parliament from exercising its legislative powers but provides that the relevant requirements or statutory provisions are of no effect when applied to goods or service providers entering Scotland where these goods or service providers had met statutory regulations in another part of the UK. It is argued by some, including the Scottish Government, that this undermines devolution. We had raised the question in our briefing on the bill as to whether “no effect” is the same as “is not law” in the Scotland Act 1998 section 29.

In the House of Lords Committee Stage, Baroness McIntosh put forward Amendment 26 which probed the meaning of Clause 5(3), regarding the effect of a statutory requirement under Clause 6. Lady McIntosh said: “It appears that Clause 5(3) would render a statutory provision in devolved legislation “of no effect”. This lacks clarity. Am I right in thinking that the statutory requirement is valid? Is it valid but cannot be enforced? Is it voidable? It is also not clear regarding the application, if any, of Clause 5(3) if the statutory provision is in an Act of Parliament that applies to England only. I would be grateful if the Minister would take this opportunity to clarify this.

The amendment applies the statutory language that exists in Section 29 of the Scotland Act 1998 to Clause 5(3) in an effort to bring clarity to the point. Section 29(1) provides:

“An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.”

It is not the intention of this amendment to amend the Scotland Act 1998 but rather to say that that Act provides, in my view, much clearer language than the Bill. These statutory provisions could be challenged by private parties and will presumably also be a basis for challenging devolved legislation. Assuming the inability to modify the Bill under Clause 51, it will in all cases prohibit legislation that is contrary to its principles. Presumably that is the intention, but it is not the clearest way that that outcome could have been achieved, so I am grateful for this opportunity to seek clarification” Official Report 28 October 2020, Column 236

Lord Callanan, the Government Minister responded:

Amendment 26, tabled by my noble friend Lady McIntosh, seeks an explanation of the meaning of Clause 5(3), which I am happy to give. Clause 5(3) will operate so that any future requirements that fall within the scope of the non-discrimination principle will be of no effect to the extent that they are discriminatory. For the benefit of the lawyers, this does not mean that the requirement is to be treated as if it never had any legal effect. Rather, it allows the continued operation of the requirement, except to the extent that it has discriminatory effects. This aims to ensure that businesses can continue in their trade and goods can continue to be sold, despite protectionist measures that might treat goods from one part of the UK more favourably than goods from another. As the Bill deals with trade across the whole of the United Kingdom,

the intention is that this will apply to all legislation: secondary legislation, primary legislation passed by devolved legislatures and legislation passed by the UK Parliament.

We believe that this does not require further elaboration in the Bill and is clear that only changes to existing legislation that affect the outcome are in scope. The amendment in question could cause confusion as there may be amendments that are considered “significant”, but do not change the outcome or effect of legislation. Fundamentally, however, the drafting in this clause will allow businesses to continue following the same regulations as they have been accustomed to, as our desire is not to disrupt their operations. That flexibility is important, because we want this provision to catch legislation only to the extent that it produces discriminatory effects. If something is not law, it cannot have any effect. As I said, we want to create a presumption that future Acts of Parliament are subject to this rule, which the current drafting allows”. Official Report 28 October 2020, Column 252

Professor Nicola MacEwan provides a hypothetical example of the impact on devolution in The Centre on Constitutional Change Blog:

“Let’s assume, for example, that the Scottish Parliament passed a law to introduce a series of measures designed to tackle obesity. Such a law might require producers to reduce the sugar content of food and drink or have bolder labelling on recommended daily intakes and the harmful effects of excessive sugar consumption, or perhaps restrict certain marketing activities of service providers.

The Market Access rules would not prevent such a law from being passed. But these rules would not apply to goods or service providers entering the Scottish market where these had already satisfied the (hypothetically less strict) regulations set in other parts of the UK. Given the likelihood that imported products would make up the bulk of the market, the ability of the Scottish policy to have the desired health benefits would be reduced”. <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/internal-market-bill-implications-devolution>

Section 6 defines a “relevant requirement” for the purposes of the non-discrimination principle as follows:

“Relevant requirements for the purposes of the non-discrimination principle

- (1) This section defines "relevant requirement" for the purposes of the non-discrimination principle for goods.
- (2) A relevant requirement, for the purposes of the principle as it has effect in relation to a part of the United Kingdom, is a statutory provision that— (a) applies in that part of the United Kingdom to, or in relation to, goods sold in that part, and (b) is within the scope of the non-discrimination principle.
- (3) A statutory provision is within the scope of the non-discrimination principle if it relates to any one or more of the following— (a) the circumstances or manner in which goods are sold (such as where, when, by whom, to whom, or the price or other terms on which they may be sold); (b) the transportation, storage, handling or display of goods; (c) the inspection, assessment, registration, certification, approval or authorisation of the goods or any similar dealing with them; (d) the conduct or regulation of businesses that engage in the sale of certain goods or types of goods.

- (4) A statutory provision is not a relevant requirement— (a) to the extent that it is a relevant requirement for the purposes of the mutual recognition principle for goods (see section 3), or (b) if section 9 (exclusion of certain existing provisions) so provides. (5) The Secretary of State may by regulations amend subsection (3) so as to add, vary or remove a paragraph of that subsection. (6) Regulations under subsection (5) are subject to affirmative resolution procedure. (7) Before making regulations under subsection (5) the Secretary of State must seek the consent of the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland. (8) If consent to the making of the regulations is not given by any of those authorities within the period of one month beginning with the day on which it is sought from that authority, the Secretary of State may make the regulations without that consent. (9) If regulations are made in reliance on subsection (8), the Secretary of State must publish a statement explaining why the Secretary of State decided to make the regulations without the consent of the authority or authorities concerned. (10) In this section "statutory provision" means provision contained in legislation."

Section 8 provides: "The non-discrimination principle: indirect discrimination (1) A relevant requirement indirectly discriminates against incoming goods if— (a) it does not directly discriminate against the goods, (b) it applies to, or in relation to, the incoming goods in a way that puts them at a disadvantage, (c) it has an adverse market effect, and (d) it cannot reasonably be considered a necessary means of achieving a legitimate aim. ... (6) "Legitimate aim" means one, or a combination, of the following aims— (a) the protection of the life or health of humans, animals or plants; (b) the protection of public safety or security. (7) The Secretary of State may by regulations amend subsection (6) so as to add, vary or remove an aim. (8) Regulations under subsection (7) are subject to affirmative resolution procedure. (9) Before making regulations under subsection (7), the Secretary of State must seek the consent of the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland. (10) If consent to the making of the regulations is not given by any of those authorities within the period of one month beginning with the day on which it is sought from that authority, the Secretary of State may make the regulations without that consent. (11) If regulations are made in reliance on subsection (10), the Secretary of State must publish a statement explaining why the Secretary of State decided to make the regulations without the consent of the authority or authorities concerned."

UKIMA Part 2 provides for a new market access regime for services in the UK based on the same mutual recognition and non-discrimination principles as for goods.

Our Comment

Part 2 provides that where a service is regulated across the UK, the authorisation for that service in one part of the UK authorisation will be recognised in all other parts. Again, some, including the Scottish Government, maintain that this undermines devolution.

Subsidy Control

One provision which is yet to be commenced is Part 7 (Subsidy control).

Our Comment

In our Second Reading Briefing on the Subsidy Control Bill, we commented on the reservation of subsidy control as follows: “As subsidy control has now been substantially returned to the UK and is a reserved matter, much of the autonomy that the Scottish government had when the UK was under the EU state aid regime has been transferred to the UK government. The UKIMA recognised the importance of consulting with the devolved administrations on its proposals for subsidy control. We hope that the spirit of section 53 will continue throughout the development of the regime, and that that the UK government will take the opportunity to consult fully with the devolved legislatures and administrations and other interests based in each of the UK jurisdictions”: <https://www.lawscot.org.uk/media/371606/subsidy-control-bill-second-reading-briefing.pdf> .

Accordingly, devolution has already been impacted by the UKIMA with regard to list compliance with the legislative consent convention where the Scottish Parliament's withholding of consent did not result in the UK Parliament amending the UKIMB but rather the bill was passed in spite of consent being withheld. Devolution has also been impacted by the provisions relating to subsidy control in the UKIMA where a devolved matter has been reserved.

Common Frameworks

Another aspect touching on devolved matters is that of the creation and maintenance of Common Frameworks. Section 10 of the UKIMA (which was added late during the bill's passage) makes provisions for further exclusions from market access principles in schedule 1.

Section 10 states: (1) Schedule 1 contains provision excluding the application of the United Kingdom market access principles in certain cases. (2) The Secretary of State may by regulations amend that Schedule. (3) The power under subsection (2) may, for example, be exercised to give effect to an agreement that— (a) forms part of a common framework agreement, and (b) provides that certain cases, matters, requirements or provision should be excluded from the application of the market access principles.

Section 10(4) defines a “common framework agreement” as a “consensus between a Minister of the Crown and one or more devolved administrations as to how devolved or transferred matters previously governed by EU law are to be regulated after IP completion day”.

The interaction of devolved matters across the UK and interaction with the Northern Ireland protocol are emphasised in Section 10 (7) which provides: In making regulations under subsection (2), the Secretary of State must have regard to the importance of facilitating the access to the market within Great Britain of qualifying Northern Ireland goods.

Furthermore subsections (9), (10) and (11) confirm the requirement for UK Ministers to seek the consent of devolved administrations before making regulations under section 10 although consent can be dispensed with if a month expires and the devolved administration does not give consent. Similar provisions regarding seeking consent to regulations can be found in sections 6,8,18,21,26.

It is also worthwhile pointing out that the UKIMA contains in Part 4, Section 34 powers for the Competition and Markets Authority (CMA) to “at the request of a relevant national authority give advice, or provide a report, to the authority with respect to a qualifying proposal”.

The qualifying condition is that the regulatory provision to which the proposal relates would fall within the scope of this Part and be within relevant competence. In turn, Section 45 defines relevant competence as: in relation to the Scottish Ministers, Scottish devolved competence. In its turn section 45 defines that term as: A regulatory provision, so far as applying to Scotland— (a) is within Scottish devolved competence if it— (i) would be within the legislative competence of the Scottish Parliament if contained in an Act of that Parliament, or (ii) is provision which could be made in subordinate legislation by the Scottish Ministers, the First Minister or the Lord Advocate acting alone; (b) otherwise, is within reserved competence. This adds to the provisions in the Scotland Act 1998 without referencing the competence provisions of that Act.

Welsh Litigation

In Wales, the Welsh Government issued formal proceedings seeking permission for a judicial review to seek declarations as to the scope of provisions of the UKIMA, in January 2021, on the basis that in the opinion of the Welsh Government the Act created uncertainty in terms of the Senedd’s ability to legislate (see Written Statement, 19 January 2021: [Written Statement: Legal challenge to the UK Internal Market Act 2020 \(19 January 2021\) | GOV.WALES](#)).

The Welsh Government’s application for permission was refused by the Divisional Court, on the ground that it was premature. The Court did not form a view on the substance of the claim. An appeal was subsequently submitted.

The Court of Appeal, by Order dated 23 June, has granted permission to appeal the Divisional Court’s decision, noting there are compelling reasons for this appeal to be heard by the Court of Appeal and that the case raises important issues of principle going to the constitutional relationship between the Senedd and the Parliament of the UK.

Our Comment

It is clear however that more impacts on devolution will only follow as businesses or individuals take advantage of the market access principles for the provision of goods or services across the UK. We have no empirical evidence about the extent to which such activity is being undertaken.

2. Scrutiny, transparency and accountability challenges – including how the Parliament can best address these challenges.

The Parliament does face a number of challenges in scrutiny, transparency and accountability when considering the UK Internal Market and the relevant legislation and related issues such as intergovernmental relations.

Scrutiny – Internal Market issues

The application of the market access principles applies across the whole UK. Therefore, there could be legislation from the UK, Welsh or Northern Irish legislatures which will engage those principles. This situation could be exacerbated by action taken by individuals or businesses who wish to exercise the rights conferred by the mutual recognition or non-discrimination principles.

The Parliament will need to consider the resources which will be necessary to devote to scrutiny of these matters. Many Committees of the Parliament could conceivably engage with Internal Market issues, not only the Constitution, Europe, External Affairs, and Culture Committee but Delegated Powers and Law Reform, Economy and Fair Work, Equalities, Human Rights and Civil Justice, Finance and Public Administration and other Committees could find Internal market issues on their agendas.

We draw attention to the recommendation of the Legacy Expert Panel Report to the Finance and Constitution Committee of 12 February 2021: [Legacy_Finaldoc\(1\).pdf \(parliament.scot\)](#).

The Panel recommended that Parliament in consultation with the Scottish Government needs to clearly define its scrutiny role in response to Brexit. This should include consideration of –

- an overall approach to the scrutiny of the policy development process in areas previously within EU competence which is proportionate and deliverable;
- the extent to which the Scottish Government can provide the Parliament and its committees with regular updates on developments in EU law within their respective remits;
- the appropriate and proportionate level of scrutiny of the operation of the future relationship with the EU, the keeping pace power, common frameworks and the market access principles and how these interact;
- meaningful scrutiny of inter-governmental working

The Expert Panel also highlighted “scrutiny challenges arising from Brexit which require systematic consideration by the Parliament rather than by individual committees” (page 20). Issues which are likely to arise include regulatory alignment or divergence between the different parts of the UK, future divergence from, and future alignment with, EU rules by the Scottish (through the keeping pace provisions in the UK Withdrawal From the European Union (Continuity) (Scotland) Act 2020) and UK Governments, the impacts of the UKIMA, common frameworks and the Trade and Cooperation Agreement (TCA) and circumstances in which the UK Government may use secondary powers to legislate in devolved areas without seeking the consent of the Scottish Government.

Transparency and accountability - Intergovernmental Relations

The revitalised UK Government central collection webpage on Intergovernmental Relations published in November 2020 is a significant step forward along with the paper on progress made by the UK government

and devolved administrations on the joint review of intergovernmental relations which was published in March 2021. However, the nature of intergovernmental relations is that it relates to relations between the Governments.

This is clear from paragraph 7 of the above mentioned paper:

Communication 7. Intergovernmental relations are best facilitated by effective sharing of information and respecting confidentiality of the content of the discussions. The governments have committed to effective and timely communication with each other, particularly where one government's work may potentially have some bearing on the responsibilities of another; and to transparency in the conduct of their relations. The governments believe that sharing information freely between them is likely to be of benefit both to each government and to the people they serve. They will ensure that appropriate formal and informal processes are available for sharing information, both multilaterally between all governments and bilaterally between governments where that is appropriate. The governments commit to respecting the terms under which information is shared.

The question to be asked is where does the Parliament (or any legislature in the UK) stand in relation to such matters? Effective communication coupled with confidentiality means that discussions between the Governments are not subjected to proper scrutiny by the Parliament or the public. Communiqués from the Joint Ministerial Committee (JMC) contain no detail of the content of the meetings whereas other groups e.g. the Inter-Ministerial Group for Environment, Food and Rural Affairs (IMG EFRA) and the Inter-ministerial Group for Elections and Registration do contain detail.

What is required however is an agreement between the Governments and Legislatures across the UK which will allow for transparency, scrutiny and openness so that the Legislatures can perform their functions of holding Governments to account.

3. The challenges and opportunities in domestic policy divergence including the risks/rewards of policy divergence between the four parts of the UK and the EU.

EU law is not static, and it is important to emphasise the scale of its ongoing change. There is significant change on a year-to-year basis. In 2020 there were a total of 1356 legal acts adopted and a further 734 amending acts adopted as follows.

	Adopted acts	
	Basic	Amending
Legislative acts - Ordinary legislative procedure	31	32
Other legislative acts	276	108
Non-legislative acts (Delegated)	34	98
Non-legislative acts (Implementing)	583	419
Total	1356	734

Source: *Eur-Lex* <https://eur-lex.europa.eu/statistics/2020/legislative-acts-statistics.html>

If the policy intention were to avoid divergence, retained EU law would need to be modified to reflect these changes. It is important to distinguish between UK wide divergence with the EU and divergence within the

UK. The latter could occur because a devolved administration has chosen to align with the EU rather than the rest of the UK. It is also worth emphasising that keeping pace with EU law, as the Scottish Government has legislated to do, will require scrutiny from the Scottish Parliament. Even if Scottish Ministers were to adopt only a small fraction of the laws adopted by the EU this could be a significant undertaking.

We do not have a view on the merits or otherwise of divergence in general except to note that it would be beneficial for any such divergence to occur in a constructive and open manner through a formal intergovernmental system (see our answer to question 5).

In relation to domestic policy across the UK, legislative divergence is a necessary effect of devolution. The purpose of devolution was to ensure that decision making was brought closer to the people and is more democratic. With four legislatures making law within the United Kingdom, it is obvious that there will be policy and legislative divergence. Even prior to the establishment of the Scottish Parliament the UK Parliament made law for Scotland which only applied in Scotland, respecting the provisions of the Union legislation of 1706/7 which acknowledged the distinctive nature of the Scottish Legal System.

Policy divergence allows for policy to be framed considering the circumstances of the jurisdiction and enables legislative solutions to be created which will bring the policy into effect through law.

It is not for the Law Society to comment on the risks or rewards of policy divergence amongst the four jurisdictions or between the UK and EU as these are political assessments stretching into matters of economics, fiscal arrangements and social policy.

4. The relationship between the [Protocol on Ireland and Northern Ireland](#) and the operation of the UK internal market – including whether this poses challenges for Scotland.

The Northern Ireland Protocol is in some flux at the moment as negotiations between the UK and the EU continue to refine its terms and application. At the time of writing the College of EU Commissioners has approved four non-papers (i.e. non-legislative texts) covering the following areas: [Commission proposes bespoke arrangements to benefit NI \(europa.eu\)](#):

“1. A bespoke solution for Northern Ireland on food, plant and animal health (i.e. “Sanitary and Phytosanitary issues”) – leading to approximately an 80% reduction in checks This solution would result in a Northern Ireland-specific solution in the area of public, plant and animal health (i.e. “SPS”). In practice, this means vastly simplified certification and a significant reduction (approximately 80%) of official checks for a wide range of retail goods moving from Great Britain to be consumed in Northern Ireland. This is in addition to the solutions that the EU put forward on 30 June, which facilitates the movement of live animals from Great Britain to Northern Ireland. In order to protect the integrity of the Single Market, this would be subject to a number of conditions and safeguards, such as the UK delivering on its commitment to complete the construction of permanent Border Control Posts, specific packaging and labelling indicating that the goods are for sale only in the UK, and reinforced monitoring of supply chains. In addition, safeguards would include a rapid reaction mechanism to any identified problem in relation to individual products or traders, and unilateral measures by the EU in case of failure by UK competent authorities or the trader concerned to react to or remedy an identified problem. These specific conditions and safeguards

would provide a robust monitoring and enforcement mechanism that would make a significant reduction of checks possible without endangering the integrity of the Single Market.

2. Flexible customs formalities to facilitate the movement of goods from Great Britain to Northern Ireland – 50% reduction in paperwork This solution consists of measures that will simplify and make customs formalities and processes easier. It will cut in half the documentation currently needed for goods moving from Great Britain to Northern Ireland. This is also subject to safeguards, such as the UK committing to providing full and real-time access to IT systems, a review and termination clause, as well as the UK customs and market surveillance authorities implementing appropriate monitoring and enforcement measures. When taken together, the bespoke solutions for both SPS and customs rules will create a type of “Express Lane” for the movement of goods from Great Britain to Northern Ireland, while at the same providing for a robust monitoring and enforcement mechanism in order to protect the integrity of the Single Market.

3. Enhanced engagement with Northern Ireland Stakeholders and Authorities These proposals aim to improve the exchange of information with stakeholders and authorities in Northern Ireland with regard to the implementation of the Protocol and relevant EU measures. This would make the application of the Protocol more transparent, while at the same time respecting the UK's constitutional order. This solution consists of establishing structured dialogues between Northern Ireland stakeholders (authorities, civic society and businesses) and the Commission. This would involve the creation of structured groups with the participation of experts to discuss relevant EU measures that are important for the implementation of the Protocol. Northern Irish stakeholders would also be invited to attend some meetings of the Specialised Committees. It will also create a stronger link between the Northern Ireland Assembly and the EU-UK Parliamentary Partnership Assembly. A website will also be set up to show in a clear and comprehensive way the EU legislation applicable in Northern Ireland.

4. Uninterrupted security of supply of medicines from Great Britain to Northern Ireland for the long-term the result of this proposal will be that pharmaceutical companies in Great Britain – when supplying the Northern Irish market – can keep all their regulatory functions where they are currently located. This means, for instance, that Great Britain can continue acting as a hub for the supply of generic medicines for Northern Ireland, even though it is now a third country. In this way, the long-term supply of medicines from Great Britain to Northern Ireland can be ensured. The Commission will hold further discussions with the UK and stakeholders before finalising its proposal for amending existing rules. This proposal involves the EU changing its own rules on medicines”.

Obviously, these proposals and those of the UK Government, for example on the role of the European Court of Justice will have implications for trade between Scotland and Northern Ireland and impact on businesses which conduct that trade. However, it is premature to come to any conclusions whilst the negotiations are still being conducted.

5. What the establishment of the UK internal market and the increasingly interconnected nature of devolution means for intergovernmental and interparliamentary relations – including what opportunities and challenges they present.

Although 1998 was a watershed year for devolution it is trite to acknowledge that the devolution architecture and pillars for each of Scotland, Northern Ireland, and Wales were differentiated by legal, political, social, historical, and economic considerations. It is difficult to conceive of a means to have a more schematic approach to devolution given the different political considerations which apply between the three devolved parts of the UK. Therefore, it would appear that a bespoke approach to the devolved constitutional arrangements is inescapable.

However, that should not mean that there could not be further formalisation between the constituent parts of the UK with constitutional issues firmly on the table. Some may advocate governance ideas which involve federalism. Such a change would raise many important issues such as entrenchment, symmetrical governance, the impact on devolution to Scotland, Wales and Northern Ireland, what institutions are needed for England and how to include the English regions.

The need for a new Governance Agreement

We agreed with the analysis in the SPICe Paper Common UK Frameworks after Brexit ((2 February 2018 SB 18-09) which noted on page 14 that “The 1999 devolution settlements were designed on the principle of a binary division of power between what was reserved and what was devolved. This model had advantages in terms of clear accountability, but it meant the UK did not have to develop a culture of or institutions for ‘shared rule’ between central and devolved levels. The UK’s membership of the EU further contributed to the weakness of intergovernmental working, since many policy issues with a cross-border component (including environmental protection, fisheries management, and market- distorting state aid) were addressed on an EU-wide basis”. The SPICe Paper also noted that “when more decisions are taken through intergovernmental forums, as in some federal systems, accountability and parliamentary scrutiny can suffer. The creation of common frameworks signals a move away from a binary division of power towards more extensive joint working between UK and devolved governments. This therefore increases the importance of ensuring that intergovernmental bodies are transparent and accountable”.

In our view the current arrangements lack sufficient transparency and accountability. The Communiqués from the JMC meetings are frequently commented upon for their lack of detail. It is essential that all legislatures in the UK have adequate information of the discussions within the JMC structure in order to hold Ministers, in all the administrations, to account. A helpful step towards providing further information is the recent publication of the reports on The European Union (Withdrawal) Act and Common Frameworks, the tenth edition of which is referred to below. The Inter-Governmental Relations written agreement between the Scottish Parliament and Scottish Government dated 10 March 2016 was considered to be a strong development in parliamentary scrutiny of inter-governmental relationships.

http://www.parliament.scot/20160309_IGR_Agreement3.pdf It would however enhance parliamentary scrutiny if Ministers in all legislatures could provide an oral report (which goes beyond the relatively uninformative published communiqués) soon after any JMC or specialised JMC meeting.

Reforming the intergovernmental system

On 24 March 2021, just before the pre-election period began Lord Dunlop's Review of UK Government Union Capability was published by the UK Government. This report (which was submitted in November 2019), proposed a Cabinet role of Secretary of State for Intergovernmental & Constitutional Affairs, supported by a Cabinet sub-committee. The sub-committee would be "tasked with preparing crossgovernment strategic priorities to enhance the Union and ensure their effective delivery" with resourcing from a new fund for UK-wide projects.

Such proposals are matters of political controversy on which the Law Society has no view although we note that there is currently a designated Minister of State for Constitution and Devolution, Chloe Smith MP and advancement to Cabinet level is a matter which is in the gift of the Prime Minister which could be exercised or withdrawn at any time.

We have suggested in the past that new inter-governmental structures could include "new JMC-type committees in areas where common frameworks are created" with accompanying sub-committee structures. We have also suggested that the JMC (and consequently any replacement) is put on a statutory footing, that it is given a defined structure and that its Sub-Committees are reformed in such a way as to be clearer and better understood by those who have contact with them and that the dispute resolution arrangements are more structured.

Lord Dunlop proposed replacement of the Joint Ministerial Committee (JMC) with a new UK Intergovernmental Council (UKIC). No matter what formal structures are put in place or what they are called, their effectiveness depends on matters of substance such as mutual trust, transparency and respect being in place too. Those aspects are beyond legislation. If the JMC is replaced, we agree with the creation of relevant sub-committees.

The development of a new body will require revision of the Memorandum of Understanding between the UK Government and the devolved administrations which in turn will require revision of the Devolution Guidance Notes. We have already stated that such a revision is necessary in the light of withdrawal from the EU. Lord Dunlop has suggested that the UKIC should look to take on a decision-making role via co-decision by consensus. We agree that if a new body is established this would be an innovative approach to decision making which could build on the precedent of Common Frameworks.

6. The impact of the EU-UK Trade and Cooperation Agreement and other bilateral trade agreements on the operation of the UK internal market and devolution.

We continue to have concerns about the broader institutional framework contained in the TCA and the impact on devolution.

Title III: Institutional framework

We note Article 7 and Annex 1 (Rules of Procedure of the Council and the Committees) provide for the establishment of the Partnership Council, which will comprise representatives of the EU and of the UK and will be co-chaired by a member of the European Commission and a UK Government minister. The remit of

the Council is the attainment of the objectives of the TCA and any supplementing agreement. The Council will also supervise and facilitate the implementation and application of the TCA and any supplementing agreement and along with Committees can make decisions binding on the UK and the EU and all bodies set up under the TCA. We particularly welcome Annex 1 rules 10 and 13 which make provision for the transparency of Council and Committee meetings. The impact of this provision can be seen in the publication of the Minutes of the Meeting of 9 June 2021 see https://ec.europa.eu/info/sites/default/files/first-meetin-partnership-counci-09062021_en.pdf and [UK Government statement on the meeting of the Partnership Council: 9 June 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statements/2021/06/09) .

The Council is only one of a number of structural arrangements (e.g. the Trade Partnership Committee and various specialised committees and working Groups) mentioned in Title III, which create a dialogue between the UK and the EU.

We welcome provision Article 11 for the UK and EU Parliaments to be able to establish a Parliamentary Partnership Assembly consisting of members of both Parliaments “as a forum to exchange views on the partnership”. However, there appears to be no mechanism for the devolved legislatures to be able to express views to either United Kingdom Parliament or the European Parliament. The Government should explain how the devolved legislatures and administrations will have a role in this process. It is important that the devolved legislatures are involved because under the various devolution statutes international relations including those with the European Union are reserved to the United Kingdom whereas the implementation of agreements in areas of devolved competence lie with the devolved legislatures and administrations. Clear lines of communication and the ability to input into the process of decision-making would be of advantage to both the UK and devolved legislatures and administrations and help to ensure smooth implementation of any decisions.

We welcome Article 12: Participation of civil society; Article 13: Domestic Advisory Groups, and in particular Article 14: the Civil Society Forum which reflects a suggestion we made in connection with the structural architecture of the Withdrawal Agreement in 2018.

Article 12 states that the parties “shall consult civil society” on the implementation of the TCA and supplementing agreements, in particular through interaction with domestic advisory groups and the Civil Society Forum as set out in the next two articles.

Domestic Advisory Groups

Article 13 states that each party shall consult “its newly created or existing domestic advisory group or groups comprising a representation of independent civil society organisations” on issues covered by the TCA and supplementing agreements.

The organisations to be consulted include “nongovernmental organisations, business and employers' organisations, as well as trade unions, active in economic, sustainable development, social, human rights, environmental and other matters”. Each Party may convene its domestic advisory group or groups in different configurations to discuss the implementation of different provisions of the TCA or supplementing agreement. The Article also provides that each party shall consider views or recommendations submitted

by its domestic advisory group or groups and should aim to consult with them at least once a year. We propose that the Government take note of the role which the legal professions throughout the UK play in the administration of justice and the maintenance of the rule of law – two principles which are key to the implementation and functioning of the TCA. In that context we consider that the DAGs should comprise members of the legal professions from each of the UK jurisdictions. The DAGs should also include membership of the bodies referred to in Article 13 so that they produce a balanced representation from around the UK. The UK and EU should try to ensure that meetings of the DAGs take place more than once a year.

To promote public awareness of the domestic advisory groups, each party shall endeavour to publish a list of participating organisations as well as a contact point for the groups. The parties will also promote interaction between their respective domestic advisory groups.

Civil Society Forum

Article 14 provides that the parties shall facilitate the organisation of a Civil Society Forum to conduct a dialogue on the implementation of Part Two of the TCA (relating to trade, transport, fisheries and other arrangements). The Partnership Council will adopt operational guidelines for the conduct of the Forum. The Forum will meet at least once a year, unless otherwise agreed by the parties. It will be open to the participation of independent civil society organisations established in the territories of the parties, including members of the domestic advisory groups referred to in Article 13 (see 14.3). This provision with its reference to the “territories of the parties” would suggest that the Civic Society Bodies should be drawn from the jurisdictions within the UK and EU. This should not however mean that because this phrasing is used in Article 14 its spirit should not be applied to Article 13,

Each Party shall promote a balanced representation “including non-governmental organisations, business and employers’ organisations and trade unions”. We encourage the Government to apply the proposals which we have made regarding the DAGs to the Civil Society Forum particularly regarding meeting more than once a year. Annual meetings will not suffice to create cohesion in the group nor to give pace to the forum’s work.

The UK Government should follow the spirit of the Principles of Public Appointments contained in the Governance Code on Public Appointments (2016) when making appointments to the DAGs and the CSF: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/578498/governance_code_on_public_appointments_16_12_2016.pdf

The Government should also establish principles of engagement which relate to the work of TCA implementation. These should include transparency and accountability, equality and inclusiveness. Expressions of interest should be sought but also the Government should actively seek involvement from organisations and individuals who may be able to contribute to the work of the DAGS due to skill, knowledge or expertise. We consider that the DAGs should include members of the legal professions from each of the UK jurisdictions. The DAGs should also comprise membership of the bodies referred to in Article 13 so that they produce a balanced representation from around the UK. The UK and EU should try to ensure that meetings of the DAGs take place more than once a year.

We agree that the DAGs should meet more than once a year. Meeting on fewer occasions will reduce the cohesiveness of the DAGs and the amount of work they can undertake. The remit for the DAGs is set out as “to discuss the implementation of different provisions of the TCA or supplementing agreement”. Clearly due to the extensive nature of the TCA there will need to be a number of DAGs which correspond to those parts of the TCA which are being considered. Due to the continued presence of Covid-19 meetings should be held on a hybrid basis. Agendas should be issued well in advance of the meetings to enable representative groups to gather membership views. The scope should focus on the parts of the TCA under discussion and where appropriate any broader consultation papers and results should be available to members. Explanatory notes and impact assessments should be the norm.

The suggested additional criteria all have merit and we would add representation from not only the network of business and civil society groups which Government usually consults such as the professions, academia but also a broad range of bodies based in the devolved areas and groups representing minorities, vulnerable and marginalised groups. As Lord Frost alluded to in the House of Lords, Trades Unions and Charities should be included. The UK Government should enable and facilitate contact between the UK and EU stakeholders by hosting introductory meetings, providing (where necessary) translating facilities and arranging for exchange of contact details.



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