

The UK internal market

Balancing frictionless trade
and regulatory autonomy



About this report

This paper looks at how the UK should manage its internal market post-Brexit. It looks at the arrangements already in place to govern intra-UK trade – common frameworks, the UK Internal Market Act 2020 and the Northern Ireland protocol – the intergovernmental tensions these have created, and how concerns about the operation of the UK internal market could be addressed to make the system work most effectively.

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Summary

Since the EU referendum in 2016, the 'UK internal market' – the arrangements governing trade between England, Scotland, Wales and Northern Ireland – has become a new and controversial term. When the UK was a member of the EU, the EU single market provided the framework for trade between the four nations of the UK. The UK's exit, on 31 December 2020, removed this framework.

The main aim of Boris Johnson's deal with the EU was regulatory autonomy: to "take back control" so that the UK could do things differently. It now can – but so too can its constituent nations. Under the devolution settlements, the powers to regulate that were returned from Brussels have gone to Edinburgh, Cardiff and, in many areas, Belfast as well as London. The ability of each administration to use these powers to introduce different rules in their jurisdiction brings benefits, allowing policies to be tailored to local circumstances and political preferences, but also creates a real risk of increased barriers to trade, costs and, ultimately, economic harm. Any system governing the UK internal market must recognise, and reconcile, this tension.

There are now three key elements to the framework managing the UK's internal market. In 2017, the UK, Scottish and Welsh governments agreed* to establish '**common frameworks**', which set out processes to manage divergence in specific policy areas previously governed by the EU through intergovernmental agreements. But the UK government considered these insufficient to provide certainty for businesses and passed the **UK Internal Market (UKIM) Act 2020** in December. This guarantees businesses market access across the UK, provided they meet the regulatory standards in the part of the UK in which their goods are produced, or service providers originate.

The third element to the internal market is part of the Withdrawal Agreement reached with the EU in October 2019, the **Protocol on Ireland/Northern Ireland**, which requires Northern Ireland to align with EU law in certain areas to prevent a hard border on the island of Ireland. That means goods produced to standards acceptable in England, Scotland and Wales may not be acceptable in Northern Ireland if they do not meet EU standards, but Northern Ireland businesses are guaranteed "unfettered access" under the UKIM Act to markets in the rest of the UK.

These arrangements have immediately proved controversial. The UKIM Act was strongly opposed by the Scottish and Welsh governments, who argued that it undermined devolution, requiring them to accept any goods that met English standards, even if they undercut their own. Although these effects could apply in reverse, the size of the English market leaves the devolved administrations more vulnerable to these effects. The UKIM Act also gives UK ministers substantial powers to amend the act itself, risking further disputes as it is implemented.

* The Northern Ireland executive was not operational at this time but agreed to these principles when it was re-established in 2020.

Although divergence carries economic risk to the country overall, there is little data on trade flows within the UK or understanding of the impact of existing divergence (such as different rules on the sale of raw drinking milk or the labelling of natural spring water) on the UK's internal market. The absence of evidence is not evidence of an absence of risk but the UK government has not yet demonstrated that what the House of Lords Constitution Committee has described as a "heavy-handed" approach is proportionate. Instead, it rushed through such constitutionally significant legislation in only a few months.

In Northern Ireland, opposition to the protocol has only grown since it came into force in January. The protocol has already created trade barriers within the UK internal market, with paperwork and checks required on goods entering Northern Ireland from Great Britain – as required by EU law. But future divergence between the EU and UK statute books will create more friction for businesses trading across the Irish Sea, and the UKIM Act alone is unable to prevent this. Unionist parties are now calling for the abolition of the protocol.

The government is right that the UK internal market needs protecting post-Brexit for the sake of the prosperity of the whole country and to enable it to strike trade deals. It had to act to fill the void left by EU membership. But its willingness to proceed on a unilateral basis has led to a constitutional stand-off. If it continues in this spirit, rolling disputes based on accusations that English regulations are undermining Scottish or Welsh ones or creating new barriers to trade across the Irish Sea feel inevitable.

This report makes recommendations about how the internal market can be managed in a way that is more collaborative, requiring the UK government to consider how to minimise economic barriers while respecting devolution and accounting for Northern Ireland's unique position. But achieving this will require a change in attitude from the UK government. In its current approach, Westminster has sought to assert its authority, often at the expense of the devolved administrations. At such a delicate time for the union, this is risky. Devolution is popular across the UK, and a perception that Westminster is trying to undermine it could alienate a population the UK government wants to win over.

There is also a risk that the devolved administrations oppose UK-wide deals and practices for the sake of political point-scoring. Doing so would miss out on an opportunity to shape the system that will govern intra-UK trade for the foreseeable future. It is in the interests of all four governments, as well as UK businesses and consumers, to ensure the internal market is a success.

Recommendations in brief

In this report we make recommendations on four key components: policy co-ordination in the UK government; governing in the interests of all four nations; effective monitoring; and scrutiny by the four legislatures.

Co-ordinating the approach to the UK internal market within the UK government

- **The UK government should create a central unit in the Cabinet Office to ensure a co-ordinated approach to all the elements of the UK internal market.** Management of common frameworks, the UKIM Act and the Northern Ireland protocol is split across departments. The government needs to be capable of considering different and competing aims and imperatives – economic, policy outcomes and constitutional – and reaching a decision about which to prioritise. A central unit should oversee how the system is working and track divergence within the UK and its implications for trade, devolution and the union.

Governing the UK internal market in the interests of the four nations

- **The four governments should use common frameworks to manage divergence as far as possible, aiming to make the UKIM Act a 'backstop'.** This could allow the four governments to jointly raise standards or agree to exempt certain policies – such as those with public health and environmental aims – from the Act, addressing the concerns of the Scottish and Welsh governments. Frameworks should also be used as a way for the four governments to consider changes to EU law that could create GB/NI divergence and make decisions about whether to update regulations that apply to Great Britain or put other mitigations in place.
- **The four governments should agree a clear process for amending the UKIM Act.** UK ministers have powers to change the scope of the Act, including in response to agreements reached in common frameworks. To avoid disputes over when this and other powers should be used, the four governments should agree clear criteria – based on the already-agreed principles underpinning common frameworks – for assessing changes. Decisions should be based on evidence and consider both the economic implications and the policy aims of possible divergence.
- **The four governments should agree updated intergovernmental structures to avoid and manage disputes over the UK internal market.** Current structures are not working well and have been under review since 2018; an update published in April 2021 shows good progress. The four governments have agreed an improved dispute resolution procedure. But outstanding disagreements over other issues, such as how disputes over money are treated, threatens the implementation of these vital reforms.

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- **Where the UK government takes a decision without the agreement of the devolved administrations, it should clearly demonstrate how it will benefit all four parts of the UK.** Reformed structures alone are insufficient to prevent disputes arising, or to resolve matters of fundamental political or constitutional disagreement. And the UK government holds the ultimate decision making power. However, it must be mindful of its dual role as both the government of the whole of the UK, and the government of England in devolved areas like food standards, and do all it can to guard against perceptions that it is prioritising the interests of part of the UK over the others.

Monitoring the UK internal market by the Office for the Internal Market

- **The UK government must do its best to ensure the Office for the Internal Market (OIM) commands the confidence of all four administrations.** The UKIM Act established a new panel, the Office for the Internal Market, to oversee the functioning of the internal market and advise all four governments. The current tensions over the Act mean that building trust with the devolved administrations will be an uphill battle. UK ministers should appoint members to the OIM only with the consent of the devolved ministers and ensure they have a good understanding of the constitution and devolution as well as expertise in economics.
- **The OIM must demonstrate its value and independence within its first year.** To avoid becoming politicised, the OIM must manage expectations about its role by clearly stating its proposed remit. It should use its powers to initiate a review in its first year to demonstrate its value and prioritise developing better data on intra-UK trade and the implications of existing divergence. Although regulations implementing the Northern Ireland protocol are out of the scope of the OIM, it should consider the implications of GB regulations for Northern Ireland and the overall impact of the protocol on the internal market.

Scrutiny of the internal market by the four legislatures of the UK

- **The UK parliament should ensure it has the necessary structures to scrutinise the UK internal market.** House of Commons committees with an interest in various aspects of the UK internal market, including the scrutiny of EU law applicable under it, should nominate one 'lead' select committee to co-ordinate the scrutiny in this area. The House of Lords should extend the timeline of the current Common Frameworks Committee and broaden its remit to consider the UK internal market as a whole, working closely with the Northern Ireland protocol sub-committee.

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- **The UK government should commit to sharing relevant information with parliament.** This should include EU documents that relate to legislation applicable under the Northern Ireland protocol with accompanying explanatory memoranda, as well as reviews and updates on the functioning of common frameworks. UK ministers should establish guidelines around the existing practice of giving evidence to devolved legislatures to ensure invitations to appear in front of devolved committees are accepted or rejected on a fair basis. Devolved ministers should also commit to sharing relevant information with their legislatures.
 - **The four legislatures should co-ordinate interparliamentary working.** To most effectively scrutinise intergovernmental working the four legislatures should work together to share information and highlight common recommendations. Co-operative working could be facilitated by a revitalised interparliamentary forum on the UK internal market, following the model used for Brexit scrutiny.

Putting the arrangements in place to manage the UK internal market was the easy part; making it function effectively will be more difficult. But for the sake of the businesses and consumers of the UK – and the integrity of the union that binds it together – the UK government and the devolved administrations must be willing to work together to make it a success.

Introduction

At the end of 2020 the UK concluded a free trade agreement with the EU and left the transition period. But while Brexit may be 'done' in that sense, the implications of this constitutional upheaval are still unfolding. These include decisions on how to manage the UK internal market – the arrangements governing the movement of goods and services between the four nations of the UK – now the framework of the EU single market, which limited opportunities for divergence and barriers to trade, has fallen away.

Against the background of increasingly strained relationships over Brexit and rising support for Scottish independence – and the UK government's pursuit of international trade deals – the four governments have clashed over what to do with policy powers in devolved areas that were previously held at EU level. They initially made progress in developing 'common frameworks' – agreed intergovernmental processes for managing divergence in specific policy areas. But last year the UK parliament passed the controversial UK Internal Market (UKIM) Act 2020 – guaranteeing that goods and services from one part of the UK could be sold in the others – despite strong objections from the Scottish and Welsh governments, leading to a major constitutional clash.

Brexit also has implications for Northern Ireland's trading relationship with the rest of the UK. The need to prevent a hard border on the island of Ireland, to satisfy the EU's red line of protecting the single market and the UK's for complete regulatory autonomy for Great Britain, led to the Northern Ireland protocol – which keeps Northern Ireland aligned with EU law in many areas. But there is increasing opposition within Northern Ireland to these arrangements, and the recently departed DUP leader, Edwin Poots, had said that removing the protocol was his "top priority".¹

This is a delicate time for the union. The government at Westminster is under considerable pressure to demonstrate the value of being part of the UK, something not helped by repeated, damaging battles with the devolved administrations. Yet it also has a need to try to secure a post-Brexit future for the UK overall, including through trade deals. For their part, the devolved administrations have sometimes seemed motivated by a desire to show that the union is not working well. It is within this politically fraught context that the UK government – working with the devolved administrations – must implement its new arrangements for managing the UK internal market. It is important that it gets it right.

This report examines the different aspects of the internal market – common frameworks, the UKIM Act, and the Northern Ireland protocol – and how they could work most effectively. The first part looks at the case for managing the internal market and the arrangements put in place so far. The second makes recommendations about how the UK government should co-ordinate its approach across Whitehall, how the four governments should work together to oversee the internal market, how the new Office for the Internal Market should approach its monitoring role, and how the legislatures of the UK should work together to scrutinise their respective governments.

What is the UK internal market?

The definition of an 'internal market' is itself disputed. For the purpose of this report, we understand the UK's internal market to be the arrangements governing the movement of goods and services between the four nations of the UK – that is, those *within* the UK as opposed to trade with the rest of the world.

All countries have internal markets in principle but they do not all look identical. Pure unitary states, like Japan or New Zealand for example, have no need to implement specific measures to maintain their integrity because there are no subnational governments with powers that could create internal barriers to trade. But federal states across the world grapple with the same challenges the UK is now confronting: how to balance frictionless trade between regions with the right of individual jurisdictions to set their own rules.

Brexit has created questions about how the UK should manage its internal market

Devolution to Scotland and Wales, and in its most recent form to Northern Ireland, took place in 1999 within the context of EU membership. The EU provided the framework for frictionless trade not just between member states – including across the island of Ireland – but also between different parts of the UK as powers over areas like agriculture, food standards, environmental policy and procurement were devolved.

The EU single market is underpinned by thousands of harmonising regulations and directives which are approved by the Council of the European Union, the grouping of ministers from all member states, and the European Parliament, in which the citizens of all member states are represented. All member states (and regions of member states where the issue falls within their powers) are obliged to implement these various acts, constraining their autonomy. When the UK was an EU member, this limited the scope for divergence between the four nations of the UK.

However, this did not always lead to uniformity across devolved policy areas. EU *regulations* – setting, for example, the levels of pesticide residue permitted on food products and rules for how organic products are labelled¹ – had direct effect in UK law and would have been consistent across the UK. EU *directives*, on the other hand, set goals and allow member states to devise legislation to achieve those goals. For example, the directive on national emissions ceilings for certain air pollutants sets targets for reducing four types of pollutants and requires each government to draw up its own plan to meet these.² The UK's devolved administrations had the discretion to achieve these in different ways; indeed, each set different policies and different targets to comply with the EU Waste Framework Directive.³

In non-harmonised areas, the EU prevents member states from implementing measures that prohibit the sale of goods from other member states or make it harder or less attractive to do so. For example, a requirement introduced by the Irish government

to label imported souvenirs as “not a product of Ireland” was found to be illegal on this basis.⁴ However, there is a broad exception for legitimate public interest grounds such as public health, environmental or even cultural reasons.⁵ So, for example, a restriction could be justified if it is a legitimate means of reducing greenhouse gas emissions or tackling obesity.

The European Commission plays an important role in enforcing these rules in conjunction with the European Court of Justice (ECJ) and in determining which measures meet the threshold for exemption. For example, Denmark’s bottle deposit return scheme that required drinks to be sold in certain authorised containers was challenged in the ECJ on the basis that it created an obstacle to trade with the EU, but was permitted on environmental grounds.⁶

The devolved administrations have always had the freedom to diverge in devolved areas that fall outside of EU competence. But as harmonisation in these areas was not considered necessary to protect the single market they have fewer implications for direct trade. One example is building regulations, which have historically been different in Scotland and England.

Leaving the EU increases the chance of more significant divergence in a much wider range of areas. The European Union (Withdrawal) Act 2018 ended the direct effect of EU law in the UK, copying EU *acquis* as it stood on the day the UK formally left the bloc (31 December 2020) into the domestic statute book. This ‘retained EU law’ currently provides a consistent legal framework in England, Scotland, Wales and Northern Ireland. However, over time each government is likely to change or update its legislation and divergence is likely to occur.

Regulatory divergence could introduce new costs for business and therefore consumers

The OECD has identified three ‘costs’ of regulatory divergence in an international context⁷ that can also be applied to the different nations in the UK:

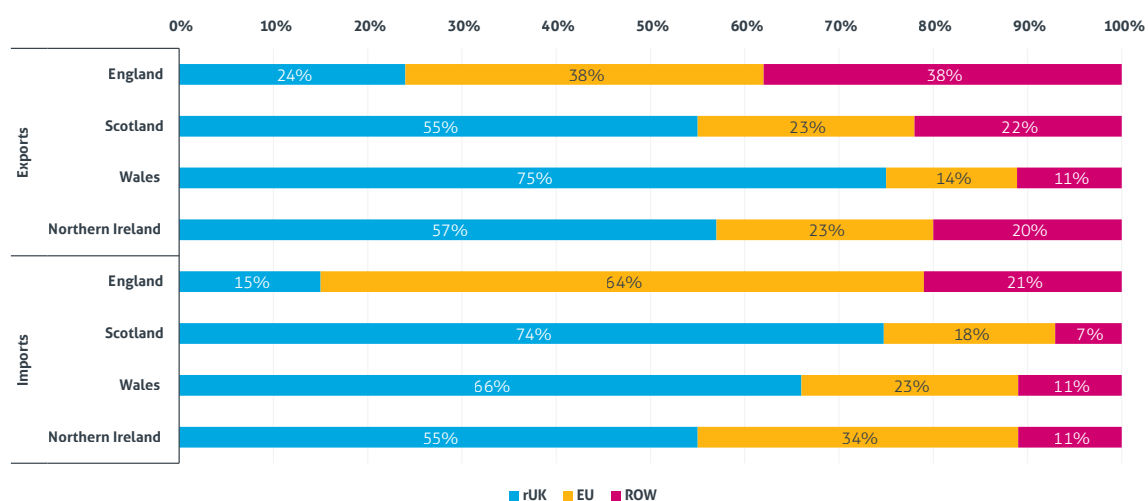
- **Information costs** – if a business needs to research different requirements in another jurisdiction before deciding whether to locate or sell there.
- **Specification costs** – when business may need to make changes to comply with different regulations, including differences in production, packaging, or labelling.
- **Conformity assessment costs** – to prove that the specification costs have been met, for example, additional laboratory testing to show that a product meets standards.

New costs could create inefficiencies within an internal market, making it harder and/or more expensive for producers and service providers from one part of the UK to sell their goods or services in another. In sectors where compliance costs are particularly high (for example, chemicals) or where profit margins are particularly low (groceries), these costs could prevent businesses from one part of the UK from accessing other markets altogether.

Trade between different parts of the UK is integral to the UK economy. Perhaps surprisingly, there are no official statistics on trade within the UK, but the data that is available – from the European Commission, on regional trade flows within the EU in 2010 – show that Scotland, Wales and Northern Ireland all trade more with the rest of the UK than with the EU or the 'rest of the world' (ROW – see Figure 1).⁸ More recent export data from the Scottish government also shows that in 2018, 60% of Scottish exports went to the rest of the UK, compared to 19% to the EU, and 21% to the rest of the world.⁹ Data from the Northern Ireland Statistics and Research Agency (NISRA) shows that in 2018, almost half of all external sales (49%) from Northern Ireland were to Great Britain, 31% to the EU (including 19% to the Republic of Ireland) and 21% to the rest of the world.¹⁰

These figures show that disruption to intra-UK trade could be bad for the UK economy – particularly at a time when businesses are already having to cope with increased barriers to trade with the EU, and from Great Britain to Northern Ireland owing to the Northern Ireland protocol.

Figure 1 **Destination of exports and origin of imports, UK countries, 2010**



Source: Institute for Government analysis of European Commission, Euregio dataset, 2020. rUK = Rest of UK; ROW = Rest of World. This figure shows exports of final goods and services rather than total trade.

If barriers emerge that increase costs, businesses will face a choice about how to respond. They could pass on any additional costs to shareholders through lower profits, or to consumers through higher prices. If the new costs mean they become uncompetitive they may withdraw from one or more markets, which would deprive consumers of product choice or the benefits of additional competition from other firms. And it is not just actual divergence but the potential for divergence that could have implications for the UK internal market. Uncertainty about whether new barriers could arise in future may disincentivise businesses from investing in operations in all four parts of the UK.

Regulatory autonomy can allow governments to tailor policy solutions in devolved areas to local circumstances

The UK's constitution allows the four governments to diverge; in devolved areas like health, agriculture and the environment the UK government takes decisions for England and the governments in Scotland, Wales and Northern Ireland take decisions for their respective nations. This can bring benefits. It allows ministers in each administration to tailor policy interventions to the needs of their local population, rather than the UK as a whole, as well as to pursue their own political priorities based on their specific democratic mandate. The question is how to reconcile the risk of new economic costs for businesses trading across the UK with this reality.

Where divergence does create economic costs, governments may simply judge it to be worth it to achieve a specific aim. The system for managing the EU single market permits some trade friction for public policy purposes. For example, in 2012 the Scottish government introduced its own minimum-unit alcohol pricing to address Scotland's higher rate of alcohol-related deaths relative to other parts of the UK.¹¹ Although this move was supported by the UK government at the time, the policy was challenged by the Scotch Whisky Association (supported by European drinks trade associations and several member states) on the grounds that it imposed disproportionate and unjustified barriers to trade.

This opened up a lengthy legal battle, with the Scottish government having to defend its decision in the courts. The ECJ ruled that the policy could be permissible on public health grounds if it was "proportionate" and the only way to achieve the objective required¹² and referred the issue back to the Edinburgh Court of Session. On appeal from the Court of Session, the UK Supreme Court ultimately ruled in favour of the Scottish government.¹³

In other cases, divergence has allowed the governments of the UK to learn from each other when designing policy responses for different problems – devolution acting as a 'policy laboratory'. For example, Scotland was the first nation to introduce an indoor smoking ban, in 2006, and Wales the first to introduce a 5p charge for plastic bags, in 2011. The success of both policies led to them being adopted across the rest of the UK. An approach to the UK internal market that places greater constraints on each government's regulatory autonomy than is necessary risks undermining such policy innovations that may have benefits across the UK.

There may be situations where the impact on trade is so great that the costs of divergence outweigh the benefits – and divergence should not just be pursued for the sake of it. But any system governing the internal market needs to be able to evaluate the economic costs against the policy gains of new regulations proposed. A key argument made by pro-Brexit campaigners during the 2016 referendum was that leaving the EU would allow the UK to "take back control" and have the freedom to make regulatory decisions that best reflected the UK context and preferences. The UK government should apply the same logic to the devolved administrations and their ability to make policy choices for their part of the UK.

What arrangements are in place to manage the internal market?

The arrangements governing the UK internal market consist of three elements:

- Common frameworks aim **to manage divergence and its consequences** through intergovernmental agreement.
- The UK Internal Market Act aims **to guarantee market access across the UK** by preventing statutory rules that could create barriers to trade from being applied.
- The Northern Ireland protocol aims **to prevent a hard border on the island of Ireland** by requiring NI to align with EU law in many areas captured by the EU single market.

Establishing these arrangements has been fraught. In the past four years there have been multiple showdowns between Westminster and Edinburgh and Cardiff – with disputes over the return of powers from Brussels in the EU Withdrawal Act 2018 as well as recent strong opposition to the UKIM Act. The Northern Ireland protocol further complicates the current framework governing the UK's internal market with asymmetric access for firms operating across the Irish Sea. These arrangements are still relatively untested and may have broad implications for devolution.

Common frameworks

The UK government and devolved administrations agreed to establish 'common frameworks' but disagreed over whether they were sufficient to manage the internal market. In 2017, the UK, Scottish and Welsh governments (there was no functioning executive in Northern Ireland) all agreed that common frameworks would be established "where necessary" to replace EU policy frameworks based on six principles, including "to enable the functioning of the UK internal market, while acknowledging policy divergence".^{*} The aim was to manage divergence through intergovernmental agreements, a model that would operate on the basis of a consensus between different governments. The re-established Northern Ireland executive endorsed the common frameworks principles in 2020.

Initially, it was agreed the common frameworks would consist of "common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition". In practice, those published to date focus largely on process – setting out ways of working, and practices around information sharing and consultation – rather than engaging with substantive policy issues. Despite repeated delays to finalising frameworks, mainly due to capacity constraints relating to Brexit and then coronavirus,¹ this process has been an example of good intergovernmental working.

* The other five principles are: to ensure compliance with international obligations, to ensure the UK can negotiate and implement new trade agreements and international treaties, to manage common resources, to administer and provide access to justice where there is a cross-border element, and to safeguard the security of the UK.

But since their inception there has been disagreement between the UK government and devolved administrations as to whether frameworks alone would be sufficient to prevent the emergence of new barriers to trade. The devolved governments viewed common frameworks – based on calculated risks identified in specific policy areas and the aim of reaching consensus across the four nations – as sufficient. The UK government, however, sought a “shared approach to the UK Internal Market” that cut across various policy areas and provided certainty to businesses operating across the UK. Introducing its *UK Internal Market* white paper in July 2020, the Johnson government argued that common frameworks were not robust enough:

Frameworks on their own cannot guarantee the integrity of the entire Internal Market. As they tend to be sector-specific, they do not address the totality of economic regulation or the cumulative effects of divergence, i.e. the consequences of regulatory difference in one sector that affects other sectors. Finally, they do not fully address the question of how best to substitute the wider EU ecosystem of institutions and treaty rights.²

The Scottish government withdrew from work on an overarching UK internal market framework in March 2019. The Welsh government, while not opposed to an overarching arrangement in principle, rejected the UK government’s specific proposals and approach.³ The UK government decided to press ahead with legislation regardless.⁴

The UK Internal Market Act

The UK government introduced the UKIM Act to bring certainty to business

In September 2020, the UK government introduced the UKIM Act to “guarantee UK companies can trade unhindered in every part of the United Kingdom”.⁵ This borrows the EU principles of mutual recognition and non-discrimination and enshrines them in UK law, as ‘market access principles’ (MAPs) that apply to both goods and services:

- **Mutual recognition.** If a good is compliant with the statutory rules relating to its sale in the part of the UK in which it was produced or imported into, then it will automatically be acceptable for sale in the other parts of the UK. A service provider who is authorised to provide a service in one part of the UK is automatically authorised to provide that service in the others. For example, sweets made in Wales will be able to be sold in Scotland, even if the requirements for their production in Scotland are different to those in Wales.⁶
- **Non-discrimination.** Statutory rules about how a good must be sold, or how a service must be provided, that discriminate against goods or service providers from another part of the UK – directly or indirectly – will be not be applied.⁷ For example, if the UK government introduced a requirement in England that prevented milk from travelling more than 20 miles before being sold, this could indirectly discriminate against milk produced in Scotland, Wales and Northern Ireland.^{**8}

* These rules will remain on the statute books, but any agencies of public bodies with a role in enforcement will be obliged not to enforce them where they are deemed to have discriminatory effects.

** Indirect discrimination can be justified in pursuit of a ‘legitimate aim’.

There are specific exclusions from the MAPs for provisions that are already in force, taxation, and some specific services and goods regulation.

The Act provides businesses with the certainty that they will continue to be able to operate across the UK, or at least Great Britain – as the UK government argues is necessary.⁹ Rather than relying on intergovernmental agreements (which any party can walk away from at any point) to prevent divergence or requiring businesses to comply with multiple regulatory regimes, it offers guarantees that new regulatory costs will not be introduced that would make continued trade in one part of the UK unsustainable in the future.

The UKIM Act places new constraints on the exercise of devolved powers

The UKIM Act has implications for devolution. Outside of the EU, the four governments have greater freedom to exercise their regulatory powers, but the act creates new limits on their use and application. Under its terms, a regulation made by any of the UK's devolved administrations will apply to goods and service providers in their nation, but it will not necessarily be enforceable on goods or service providers sold there if they have been produced or originally imported into other parts of the UK.

This may undermine each government's ability to implement certain policies that are within scope of the Act successfully. For example, the Welsh government's proposed ban on single-use plastic cutlery would be enforceable on plastic products produced only in Wales. It would be unable to prevent plastic cutlery produced in England from being sold and disposed of in Wales, undermining its policy objective of reducing plastic waste.¹⁰

Like the EU single market, the Act sets out specific areas where the MAPs will not apply. This list of exclusions includes regulations that were already in force* (protecting existing divergence), public services and certain policy purposes, including regulations to prevent the spread of pests, unsafe food and feed as well as certain elements of chemicals and fertiliser regulation.

The regulatory requirements caught under the Act are more specific than those caught by EU single market rules.¹¹ For example, mutual recognition applies only to a specific list of "sale of good" requirements – rather than potentially applying to any measure that might hinder the access of goods from one EU member state to another.

However, in contrast to the EU single market, the UKIM Act does not include broad public policy exceptions. This means that prohibitions or restrictions on goods cannot now be justified based on public health or environmental objectives. Therefore, devolved governments' policy making is more constrained than previously. For example, Scotland's ban on the sale of raw drinking milk, if introduced today, could not be applied to milk coming from elsewhere in the UK.

* Provided existing requirements are not substantively changed.

The UKIM Act would make it easier to reduce standards than raise them

There is a risk that the MAPs' design could lead to a 'race to the bottom', if one government decided to reduce standards to increase the competitiveness of its businesses. Under the EU framework, thousands of harmonising regulations prevented one member state from undercutting another, but in the absence of similar minimum standards, the UKIM Act means it is far easier for a government to reduce standards rather than raise them.

For example, if the UK government lowered food standards in England, say to permit the sale of chlorinated chicken, neither Scotland nor Wales could prevent those goods being put on sale in their nations.* But if one government decided to impose higher animal welfare requirements, creating new costs for their farmers, the regulations within scope of the MAPs would apply only to producers in that part of the UK. This would allow producers from elsewhere in the UK to undercut local products, putting local producers at a competitive disadvantage. This could ultimately force that government to back down on introducing higher standards – creating a 'chilling effect' in many policy areas across the UK.

The relative scale of the national markets means that, save for a few sectors such as Scotch whisky, England will be the dominant rule setter for the whole UK market, so these pressures will be greater on the devolved administrations than the UK government.

The UKIM Act makes it easier for the UK government to implement trade deals in devolved areas

The Act will also have implications for the way new trade deals are implemented. International trade is a reserved matter, which means the UK government has exclusive responsibility for negotiating and signing new free trade agreements (FTAs). The UK government may choose to consult with the devolved administrations before doing so, but the latter would have no formal role in the process.

But trade deals and associated 'side bargains'¹² – agreements to make changes to regulatory standards accompanying FTAs – often have implications for devolved areas like agriculture and food standards. Prior to the UKIM Act, even if the UK government agreed with a partner country to change its regulations, it would have had to ask the devolved administrations to make their own implementing legislation to give effect to that agreement in their territories. The UK government retains the power to overrule its devolved counterparts were they to refuse to do so, but that would likely have had political consequences.

Although the devolved administrations would still need to implement aspects of UK-wide FTAs, they would no longer need to change their domestic regulations to give effect to any 'side bargains'. As the principle of mutual recognition under the Act applies to goods imported into one part of the UK, the UK government will only need to change the regulatory standards in England to ensure imported goods can be sold

* In Northern Ireland, goods that do not comply with EU law applicable under the protocol, e.g. on foods standards, cannot be sold in Northern Ireland, but in areas where EU law does not apply, mutual recognition will apply under the UKIM Act.

across the UK.* For the UK government, this is a key strength of the Act, providing certainty to its negotiating partners that they can benefit from market access across the UK (or at least Great Britain).

But the Scottish and Welsh governments argue that this could force them to accept lower standards for products entering the UK from overseas under FTAs – adding to the already noted concerns over being undercut by other UK nations’ lower standards. This is a particular concern for the agriculture sector, which is much more important to the economies of Scotland, Wales and Northern Ireland than England, accounting for 0.85%, 0.81% and 1.62% respectively in 2019, compared with just 0.51% in England.¹³

The UK government has given itself considerable power over the interpretation and application of the UKIM Act

The Act is not static. The list of regulatory requirements within its scope and the exclusions to the MAPs can be amended by UK government ministers – after they have sought the consent of the devolved administrations. However, if consent is not given within a month, the Act allows the UK government to proceed regardless. Therefore, the UK government could unilaterally change the effect of the Act – something that the Welsh government argues would amount to unilaterally changing the devolution settlement itself.** The UK government has already consulted on amending the exclusions for services, which unlike the exclusions for goods, broadly replicate EU law. In February the business department, which conducted the consultation, argued that “it may be appropriate to add to, remove from, or vary the current list of exclusions”, introducing the possibility that a whole range of services may be brought into scope of the Act without the consent of the devolved administrations.¹⁴

Unlike under the EU framework, there is no independent arbiter – like the European Commission – to actively challenge legislation that contravenes the MAPs. According to the Act, any regulations doing so “do not apply” or are “of no effect” and should not be enforced against goods and services coming from other parts of the UK. Businesses may be able to challenge the application of regulations in court if they believe they have been incorrectly applied – but there remains considerable uncertainty around how the MAPs will be policed in practice.

The Act establishes an Office for the Internal Market (OIM), which can conduct reviews into the functioning of the internal market, advise governments on existing or proposed regulations and, from 2023, is required to publish periodic reports on the functioning of the Act. However, its functions are only advisory, and it will have no powers to enforce its recommendations or compel any government to act.

* Although goods entering Northern Ireland must comply with EU law where applicable.

** The Welsh government has launched a legal challenge to the Act, although the court has dismissed the case on the basis that until this power is used, the argument is hypothetical. *The Counsel General for Wales v The Secretary of State for Business, Energy and Industrial Strategy, Grounds for Judicial Review*, retrieved 26 May 2021, <https://gov.wales/sites/default/files/inline-documents/2021-01/210119%20Counsel%20General%20for%20Wales%20v%20Secretary%20of%20State%20for%20Business%20-%20grounds%20for%20judicial%20review.pdf>

The *UK Internal Market* white paper, in which the UK government first set out its proposals, envisioned a strong role for existing intergovernmental mechanisms to oversee the functioning of the market access principles:

Governance arrangements will seek to build on the existing collaboration between the UK Government and devolved administrations, ensuring a strong basis for political decision-making, oversight, and dialogue in relation to the Internal Market.¹⁵

However, the four governments have acknowledged that existing machinery for this does not function well – meetings are infrequent, and often fail to provide much meaningful engagement – and is currently under review. The current dispute mechanism allows the UK government to determine both whether there is a dispute and the outcome. This gives the devolved administrations little recourse in the event of disagreement over the implementation or application of the Act.

The UK government has not yet demonstrated that its approach is proportionate

There is a clear risk that leaving the EU without any arrangements in place to manage the internal market could lead to new economic barriers within the borders of the UK (we will come on to Northern Ireland's specific circumstances later). But the UKIM Act places greater constraints on the Scottish and Welsh governments' regulatory autonomy than when the UK was an EU member – despite the fact that it need regulate only four jurisdictions, with similar cultures and compositions, as opposed to 27 diverse member states. During the passing of the act the House of Lords Constitution Committee concluded that the bill was an "unnecessarily heavy-handed approach".¹⁶

Setting out its opposition to the bill the Senedd's External Affairs and Additional Legislation Committee said:

The UK Government has been unable to provide evidence of where a devolved administration is planning a significant policy divergence that would have an unduly distortive effect on the UK internal market or why existing intergovernmental mechanisms and the powers available to UK Ministers would be insufficient to manage such a situation.¹⁷

There is little evidence on the risks or implications of intra-UK divergence that justifies legislating for such a rigid approach. This is not the same as evidence that regulatory divergence will *not* incur economic costs; there is a clear need to implement measures to manage the UK internal market. But regulatory change does not happen overnight. New policy proposals will take years to develop and implement. There was no clear 'day one' risk of the UKIM Act not being law on 1 January 2021. But rather than build an evidence base before pursuing such a politically contentious approach, the UK government decided to proceed regardless.

Ministers have done little to engage with the substance of objections from the devolved administrations and instead have picked apart specific policy examples used to illustrate those concerns and reiterated the UK government's commitment to high standards.¹⁸ But with levels of intergovernmental trust so low, it is little surprise its response is not sufficient to reassure their devolved colleagues.

At the same time, there is also not much evidence on how the UKIM Act will constrain devolved policy making in practice. As existing divergence is excluded from the MAPs, any examples of regulations that could be caught under the Act are at this point hypothetical. And where there are risks, each government may be able to design policies that achieve the same environmental or public health objectives through alternative means: for example, rather than a ban on single-use plastics the Welsh government could introduce rules around how such products should be recycled.

The Northern Ireland protocol

The protocol has driven a wedge through the UK internal market – which the UKIM Act alone cannot remove

Despite the UK government's willingness to override the Scottish and Welsh governments' concerns to 'protect' the UK internal market, it has already accepted a big, legally enforceable, division of that same market in the shape of the Northern Ireland protocol.

To avoid a hard border on the island of Ireland, more than 300 EU directives and regulations in areas such as customs, VAT, agriculture and product regulation will continue to apply in Northern Ireland. This, in combination with the loose UK–EU trading relationship negotiated at the end of 2020, has meant that new barriers to trade have already been erected in the Irish Sea.

Any goods entering Northern Ireland from Great Britain are required to demonstrate compliance with EU law in those areas where it applies under the protocol. This means the introduction of customs formalities, new paperwork and checks at the point of entry for products of plant or animal origin – although the exact nature and frequency of the latter are still under discussion in the UK–EU Joint Committee. Behind the border, GB-based businesses serving both the NI and GB markets are required to comply with two regulatory regimes, and where necessary obtain two types of certification. The nature of these checks and processes (designed to apply to international trade) creates extra challenges and costs to businesses trading across the Irish Sea that are far greater than could feasibly apply within Great Britain.

The border created by the protocol is also asymmetric. It requires EU law to apply to goods sold in Northern Ireland in protocol areas, but the UK has discretion over the requirements placed on goods sold in GB. In the UKIM Act, the UK government legislated to guarantee "unfettered access" for Northern Ireland businesses to the UK's internal market, following commitments to ensure no new checks and processes for "qualifying" Northern Ireland goods moving NI–GB.¹⁹

Like the protocol, the MAPs apply asymmetrically too; “qualifying” goods can benefit from the mutual recognition principle and guaranteed access to the GB market, but goods from GB cannot benefit from mutual recognition in Northern Ireland in areas where Northern Ireland is bound by EU law.

The Withdrawal Agreement, and implementing legislation, was unanimously opposed in the Northern Ireland assembly²⁰ and unionist parties are calling for the outright abolition of the protocol. But there are at present no alternatives that would satisfy both the EU’s aim of protecting the integrity of the EU single market – and the strict application of EU law – and the UK’s desire for absolute regulatory autonomy for Great Britain.

The result of Boris Johnson’s desire for a looser relationship with the EU, prioritising regulatory freedom over frictionless GB–EU trade, has made further disruption in both directions more likely as, if or when the UK and EU statute books diverge, Northern Ireland will need to keep pace with EU law. Divergence from the EU could create further barriers to NI–GB trade, and if the costs of complying with two regulatory regimes become too high, businesses in GB – particularly those that currently trade only within the UK— may stop serving the NI market altogether. If complying with EU rules creates higher costs for Northern Ireland producers than their counterparts in Great Britain, Northern Ireland goods could become uncompetitive on the GB market.

The UK government needs a change of approach to avoid further damage to the union

Coming on the back of four years of disagreements over Brexit, the controversial passing of the UKIM Act has resulted in a constitutional stand-off. Both the Scottish and Welsh parliaments refused consent for the bill sought in accordance with the Sewel Convention (that Westminster will not normally legislate in devolved areas without the consent of the devolved legislatures).^{*} The Scottish government is still refusing to engage with the programme of the work, and the Welsh government has launched a legal challenge against the Act. The UK government is currently proceeding with the implementation of a system that will govern intra-UK trade indefinitely on a unilateral basis.

Doing so at a time when the union is so fragile is risky. The Scottish parliamentary elections in May brought an increase in the pro-independence majority in Holyrood, and First Minister Nicola Sturgeon has described a request for the power to hold a second independence referendum as “a matter of when, not if”.²¹ The Welsh elections saw a strong endorsement of Welsh Labour and its pro-devolution brand of unionism.

The UK government has failed to set out how it intends to manage the impact of the protocol – and its potential for divergence – in the long term. This has sharpened unionist fears that Northern Ireland will drift further from the UK internal market.

* The Northern Ireland assembly did not formally vote on a legislative consent motion, and the executive did not produce a legislative consent memorandum. However, the assembly passed a motion opposing the bill, due to its provisions to override elements of the Northern Ireland protocol, which were later removed; Northern Ireland Assembly, Official Report: Tuesday 22 September 2020.

The political situation remains delicate with tensions in the executive making the functioning of NI government increasingly difficult.

The UK government was able to override the devolved administrations and pass the UKIM Act using UK parliamentary sovereignty and use its reserved powers over international agreements to sign the protocol despite fierce political opposition in Northern Ireland. But putting these in law was the easy part for a Westminster government with an 80-plus majority: it must now make them work. Failure to do so could lead to rolling disputes over issues like food standards, environmental protection and public health measures – likely in the form of accusations that English regulations are undermining Scottish or Welsh ones – or creating more friction in the Irish Sea.

The devolved administrations have incentives to overstate the potential implications of the UK government’s approach. Demonstrating that the union or the UK’s constitutional arrangements do not work makes the case for greater devolution or even independence (in the case of Scotland at least) easier, and there may be the temptation to protect their own devolved powers even at the expense of economic benefit for the UK as a whole. To navigate this tricky period for intergovernmental relations, the UK government will need to be able to demonstrate that it is striking the right balance between economic considerations and respect for devolution.

The UK government must set out its views on how the UK internal market should be:

- **Co-ordinated within the UK government** – to consider the intersections between the UKIM Act, common frameworks and the Northern Ireland protocol, and manage the competing aims and trade-offs between these three elements within Whitehall
- **Governed between the four governments of the UK** – to ensure future decisions on its operation are made with the agreement of the devolved administrations based on good intergovernmental working, as set out in the government’s white paper
- **Monitored by the Office for the Internal Market** – to build an evidence base for future decision making on the internal market and provide an independent authoritative source of advice that is trusted by all four governments
- **Scrutinised by the four legislatures** – to ensure proper oversight and accountability.

The UK government needs to show that it acknowledges the devolved administrations’ concerns and wants to adopt a more collaborative approach – but the devolved administrations also need to be willing to co-operate with the UK government to make that work. While they may not like the UKIM Act, it is now law. To have the best chance of influencing the system that will govern intra-UK trade they must work with, not against, the UK government.

Co-ordination within the UK government

The UK Internal Market Act, common frameworks and Northern Ireland protocol all have different aims. But they have implications for many of the same policy areas. This means that the UK government may face competing imperatives – economic, political, constitutional, policy – when making regulatory decisions. This will inevitably require it to weigh up different factors and make difficult trade-offs.

Managing the internal market will require much stronger intergovernmental working than exists now and an improved evidence base. This will require reorganisation within the UK government to ensure ministers and officials have oversight of the whole system and are able to develop a coherent internal UK government position when working with the devolved administrations.

The UKIM Act, common frameworks and the Northern Ireland protocol will apply to the same regulatory areas

Initial UK government analysis identified 153 policy areas where EU law and devolved competence intersected. For these, it proposed establishing 106 common frameworks, concluding that 49 required no further action as existing intergovernmental working was considered sufficient.¹ The number of common frameworks has been revised down to just 33, with the rest requiring no further action.² In those areas four governments have instead decided to rely on existing working practices including concordats or agreements predating Brexit, engagement through regulatory bodies, or other ways of working.

There is significant overlap between common frameworks, the Northern Ireland protocol and the regulatory areas in scope of the UKIM Act. Of the 33 legislative common framework areas set out in the most recently published analysis, 24 are areas where Northern Ireland is bound by EU law under the protocol, and 21 are areas that would be within scope of the UKIM Act – mostly mutual recognition of goods, which means regulatory standards set in one part of the UK would be acceptable in the others.

Table 1: Intersection between common frameworks, Northern Ireland protocol and market access principles

| UK government department | Common framework | NI | S | W | NIP | UKIM |
|--------------------------|--|----|---|---|-----|------|
| BEIS | Implementation of EU Emissions Trading System (ETS) | ✓ | ✓ | ✓ | ✓ | ✗ |
| BEIS | Radioactive substances | ✓ | ✓ | ✓ | ✓ | ✓ |
| BEIS | Mutual recognition of professional qualifications (MRPQ) | ✓ | ✓ | ✓ | ? | ? |
| BEIS | Services Directive* | ✓ | ✓ | ✓ | ? | ? |
| BEIS | Company Law | ✓ | ✗ | ✗ | ✗ | ✗ |
| BEIS | Late payment (commercial transactions) | ✓ | ✓ | ✓ | ✓ | ✓ |
| BEIS | Specified quantities and packaged goods legislation | ✓ | ✗ | ✗ | ✓ | ✓ |
| Cabinet Office | Public procurement | ✓ | ✓ | ✓ | ✗ | ✗ |
| Defra | Agricultural support | ✓ | ✓ | ✓ | ✓ | ✓ |
| Defra | Agriculture – fertiliser regulations | ✓ | ✓ | ✓ | ✓ | ✓ |
| Defra | Agriculture – organic farming | ✓ | ✓ | ✓ | ✓ | ✓ |
| Defra | Agriculture – zootech** | ✓ | ✓ | ✓ | ✓ | ✓ |
| Defra | Animal health and welfare | ✓ | ✓ | ✓ | ✓ | ✓ |
| Defra | Fisheries management & support | ✓ | ✓ | ✓ | ✓ | ✓ |
| Defra | Plant health | ✓ | ✓ | ✓ | ✓ | ✓ |
| Defra | Plant varieties and seeds | ✓ | ✓ | ✓ | ✓ | ✓ |
| Defra | Air quality | ✓ | ✓ | ✓ | ✓ | ✓ |
| Defra | Best available techniques | ✓ | ✓ | ✓ | ✓ | ✓ |

* The legal framework in place to help service providers operate in different parts of the UK, by removing legal and administrative barriers and preventing regulators imposing discriminatory requirements.

** Rules on breeding pedigree animals and germinal products.

| | | | | | | |
|-------------|--|----|---|---|---|---|
| Defra | Food Compositional Standards and Labelling | ✓ | ✓ | ✓ | ✓ | ✓ |
| Defra | Ozone depleting substances and F-gases* | ✓ | ✓ | ✓ | ✓ | ✓ |
| Defra & HSE | Chemicals and pesticides | ✓ | ✓ | ✓ | ✓ | ✓ |
| Defra | Resources and waste | ✓ | ✓ | ✓ | ✓ | ✓ |
| DfT | Operator licensing (roads) | ✓* | ✗ | ✗ | ✓ | ✗ |
| DfT | Driver licensing | ✓* | ✗ | ✗ | ✓ | ✗ |
| DfT | Rail technical standards (Interoperability) | ✓ | ✗ | ✗ | ✓ | ✗ |
| DfT | Roads – Motor insurance | ✓ | ✗ | ✗ | ✓ | ✗ |
| DHSC | Nutrition Labelling, Composition and Standards | ✓ | ✓ | ✓ | ✓ | ✓ |
| DHSC | Blood safety and quality | ✓ | ✓ | ✓ | ✓ | ✓ |
| DHSC | Public health protection and health security | ✓ | ✓ | ✓ | ✗ | ✗ |
| DHSC | Organs, tissues and cells (apart from embryos and gametes) | ✓ | ✓ | ✓ | ✓ | ✓ |
| FSA | Food and feed safety and hygiene law | ✓ | ✓ | ✓ | ✓ | ✓ |
| GEO | Equal treatment legislation | ✓ | ✗ | ✗ | ✓ | ✗ |
| MHCLG | Hazardous substances planning | ✓ | ✓ | ✓ | ✗ | ✗ |

Source: Institute for Government analysis of Cabinet Office, Framework Analysis 2020, September 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919729/Frameworks-Analysis-2020.pdf; Protocol on Ireland/Northern Ireland; UK Internal Market Act 2020; Letter from Julia Lopez MP to Baroness Andrews, 24 May 2020, retrieved 15 June 2020, <https://committees.parliament.uk/publications/6176/documents/68907/default>. ? = subject to ongoing framework development. * = The protocol applies only in these areas in so far as it is necessary to maintain the conditions for north-south co-operation between the Republic of Ireland and Northern Ireland.

This means that the UKIM Act, the Northern Ireland protocol and/or common frameworks may all affect the implementation and application of certain regulatory changes in each part of the UK, for example proposals to ban certain types of single use plastics (see Box 1).

* F-gases are fluorinated greenhouse gases, including hydrofluorocarbons, often used a substitute for ozone depleting gases.

Box 1: Single-use plastics

The EU's Single Use Plastic Directive will come into effect on 3 July 2021. It bans a wide range of plastic items, including plastic plates, and introduces new labelling requirements. The directive is listed in the annexes of the Northern Ireland protocol and so will apply in Northern Ireland, but as it came into force after the end of the transition period, England, Scotland and Wales are not obliged to transpose it.

Nonetheless the Welsh government has announced plans to replicate a large part of the EU proposals with some modifications;³ likewise the Scottish government intends to “keep pace” with EU law in this area.⁴ The UK government is taking a different approach: it will ban some single-use plastic items, but it is not expected to include the full range of items prohibited under the EU regulations. For example, single-use plastic cutlery will still be permitted. As a result, there is likely to be divergence between the four parts of the UK.

This area falls within the scope of the Resources and Waste Common Frameworks, so changes to these regulations will trigger discussions between the four governments. Regulations that prohibit the sale of goods fall within scope of the mutual recognition principle under the UKIM Act. So Scottish and Welsh bans will not apply to goods produced in England, and plastic cutlery will be permitted to be sold in Scotland and Wales – undermining the purpose of the ban.

However, any goods sold in Northern Ireland must comply with EU law – so English producers will not be able to place these goods on the market in Northern Ireland.

The UK government needs a co-ordinated approach to the internal market that is able to balance competing objectives

So far, the UK has taken a piecemeal approach with different Whitehall departments taking the lead on different aspects of the UK internal market architecture.

The business department has led the development of the market MAPs and UKIM Act – and is leading on establishing the Office for the Internal Market (OIM) within the Competitions and Markets Authority (CMA). A Northern Ireland/Ireland unit in the Cabinet Office is primarily responsible for the NI protocol, although other departments are working to understand the implications of Brexit and the protocol for individual policy areas. Common frameworks have mostly been developed in individual policy departments, with the Department for Environment, Food and Rural Affairs (Defra) responsible for many key areas. The Cabinet Office has played a co-ordinating role – supporting intergovernmental relations and obtaining sign-off at ministerial level – but is expected to step back from this role once initial frameworks have been agreed. At present there is no one department or unit with oversight of this system.

As the Institute for Government has recently argued, the government still lacks a strategic approach to post-Brexit regulatory change, and should provide guidance to departments on how to take account of the risks and benefits of divergence from the EU.⁵ One of the key consequences the UK government will need to consider will be the impact that any divergence from the EU will have on the UK's internal market, in particular trade between GB and NI but also trade barriers within GB (which is entirely possible, with the Scottish government taking powers to 'keep pace' with EU law in devolved areas). Leaving each department to their own individual policy imperatives risks unanticipated consequences as competing priorities come into conflict – and could further undermine the UK government's relationship with the devolved administrations.

One key case study to illustrate this point is genetically modified organisms (GMOs). Defra has already announced a consultation relating to the use of gene technology and GMOs that said the UK government "may change the legislation to amend the definition of a GMO as it applies in England".⁶ Both the Scottish and Welsh governments have indicated their intentions to maintain the "precautionary approach" to GMO and to stay aligned with the EU in this area.⁷

However, as GMO products would fall within the scope of mutual recognition of goods under the UKIM Act, neither would be able to prevent goods that complied with England's new definition being sold in their respective nations. In addition, as the regulation of GMOs is an area where Northern Ireland is required to align with EU law under the protocol, a change to England's regulations would automatically introduce divergence between Great Britain and Northern Ireland.

After intergovernmental discussions* between the relevant policy departments – in this example Defra would lead for the UK government – the four governments may conclude that in this instance divergence would be permissible, and that Scotland and Wales should be able to prevent GMO products under the new English definition from being sold on their markets. To legally permit this, though, a UK minister would need to add a new exclusion to the UKIM Act. The minister who holds this power may not be the same minister whose department is engaged in the intergovernmental discussions (most likely this would be the business secretary, as the Act was sponsored by that department). However, after seeking advice from the OIM, that minister may conclude that such an exception would be too disruptive to the UK internal market and refuse to include it. Doing this may well lead to an intergovernmental dispute, which could be escalated to intergovernmental machinery.

In this case study, the UK government would face a number of competing imperatives. The policy imperative to introduce a new approach to GMO freedoms will necessarily create divergence between Great Britain and Northern Ireland, increasing barriers to trade. Then, the economic imperative to avoid a barrier to businesses trading across the whole of Great Britain conflicts with the political imperative to respect the devolved administrations' right to divergence and to avoid a dispute on a matter of high public interest.

* Until recently, GMO marketing was expected to be covered by legislative common framework, but the four governments are now expected to revise an existing concordat on GMO that has been in place since 2007.

The UK government needs to be capable of balancing different aims in deciding the way forward. The standard system in Whitehall for resolving issues that cut across departments is through discussion in cabinet committees or an exchange of letters between members of a committee, known as 'write-rounds'. But getting agreement from different ministers and departments on contentious issues is not easy.⁸ There are two cabinet committees that may have an interest in the internal market: Domestic and Economic Strategy and Union Policy Implementation;⁹ however, it is not clear how they will make the trade-off between policy choices for England and the broader implications for the union. This exacerbates the risk that legitimate grounds for divergence are not permitted because the MAPs will apply by default, adding to the grievances of the devolved administrations.

A single UK government department needs oversight over the UK internal market

Managing the UK internal market involves a wide range of actors including UK government departments, the devolved administrations, regulators – including the Food Standards Agency and the Health and Safety Executive – and the OIM. Local authorities with market enforcement functions will play a role too, alongside businesses and other key stakeholders.

The current approach within UK government appears to be to 'mainstream' understanding of the UKIM Act, common frameworks and the Northern Ireland protocol across Whitehall, so that each individual department is responsible for considering the implications of each element of the internal market for their own work programme separately. However, it is important that departments understand the intersection between them in each policy area – there needs to be a coherent approach across government to ensure that each aspect of the UK internal market is properly considered in the policy making processes.

The structures created to manage the UK internal market will have implications for how each of the four governments can exercise its powers; it is important for the UK government to continually monitor all aspects of its functioning and its implications for the UK constitution. This includes keeping track of regulatory developments across the UK and monitoring the extent and nature of divergence. The government also needs to understand the cumulative impact of divergence within the UK across the full range of policy areas, how common frameworks are working in practice, and identify where problems either are arising or may emerge.

To do so will require oversight of policy making, enforcement mechanisms, economic implications across all policy areas, and the state of intergovernmental relations. Under current arrangements, it is not clear who in Whitehall will fulfil this role or where this responsibility will sit.

For these reasons, there should be a co-ordinating team in the Cabinet Office to oversee work under the UKIM Act, common frameworks and the protocol and consider the economic, policy-related and constitutional implications of the arrangements governing the internal market. This team should work with the Europe Unit overseen

by Lord Frost, which will be managing the UK–EU Trade and Cooperation Agreement, and his new team charged with making the most of the post-Brexit opportunities. It will also be important to liaise with the Ireland/Northern Ireland unit, to identify any implications of divergence from the EU for the internal market. It should also work closely with the policy teams working on intergovernmental relations to understand the implications for devolution.

Recommendations

A co-ordinating team in the Cabinet Office should:

1. Act as a central point of co-ordination between different departments considering different aspects of the same policy area
2. Be responsible for ensuring that individual departments are aware of and are adequately considering common frameworks, the UKIM Act and the Northern Ireland protocol, and various aspects of it, in their policy work
3. Monitor regulatory developments and track policy divergence between the four parts of the UK
4. Identify common themes, challenges or issues in the functioning of the UK internal market and conduct exercises to identify potential future issues
5. Consider the devolution-related and constitutional implications of regulatory divergence and the mechanisms in place to manage it.

Governance by the four administrations

Disputes over the introduction of the UKIM Act have already damaged intergovernmental trust. There is potential for disagreements every time its provisions prevent one of the devolved administrations from implementing a specific policy effectively, or where decisions on its operation have to be made.

Governing the internal market will require the UK government to weigh up the risk of economic disruption and the potential benefits of policy divergence. These are inherently political decisions, with no one objective answer – but the more the UK government is perceived to be making these judgments unilaterally, the greater the potential for high-profile disagreements. To avoid constant disputes and the frustration of devolved policy aims, the governance of the new regime must evolve, from being seen as an overmighty imposition and power grab by Westminster into a genuinely shared endeavour. This section sets out how the UK government should use existing mechanisms for intergovernmental working, including common frameworks, to manage divergence and ensure the devolved administrations feel that the UKIM Act operates fairly.

The UK government should use common frameworks to address some of the concerns raised by the UKIM Act

Common frameworks could help address the concerns raised by the Scottish and Welsh governments about the UKIM Act. For example, concerns about a 'race to the bottom' could be countered if the four governments can agree to maintain or jointly raise standards through common frameworks. In many areas such as public health and environmental standards the policy objectives of the four governments are similar. For example, in 2018 Scotland, England and Wales all introduced bans on plastic microbeads – a policy that would have been captured by the mutual recognition principles if introduced now – in quick succession. Common action on these issues is likely to be more effective than four slightly differentiated approaches in each part of the UK. This could turn the UKIM Act into a rarely invoked 'backstop', activated only when the four governments are unable to agree to act jointly or on how to manage divergence.

The act allows UK ministers to add new exclusions to the MAPs. They can do this on the basis of agreement reached through the common frameworks process. This could prevent the MAPs disincentivising meaningful or effective divergence in some areas of market regulation – allowing regulations to apply to goods and services coming from elsewhere in the UK, rather than just those locally produced (see p. 26). For example, public health is not currently covered by an exclusion from the Act. However, the Nutrition Related Labelling, Composition and Standards Provisional Common Framework states that public health would be a legitimate ground for divergence between the four nations:

Policy consistency should remain where it is agreed that it is necessary or desirable, however, so too must potential for divergence, in order that administrations may respond to territory-specific needs; such as those which relate to public health.¹

Common frameworks could allow governments to consider excluding specific regulations, for example those intended to protect public health, on a case-by-case basis. Or, where there are recurring grounds for it, to agree to add broader exclusions based on specific policy aims. This could permit meaningful divergence in some areas and prevent the Act from having what the Scottish government calls a “chilling effect” on policy making.²

Agreement through a common framework is a specified reason, but not a necessary condition for adding a new exclusion; UK ministers maintain the discretion to do so for any reason. In policy areas that are not covered by a common framework – including those where the four governments have agreed “no further action” is necessary – the same results may also be achieved through other mechanisms for intergovernmental working. The four governments should aim to manage divergence by agreement, rather than the legal force of the Act.

There must be a clear process for amending the UKIM Act

While the act states that the power to make exclusions *can* be used where the parties to a common framework have agreed divergence is acceptable, it does not place a duty on UK ministers to do so, and the business minister, Paul Scully, has said the power would be used “in a small number of cases”.³ There is a risk that a decision not to add new exclusions could lead to intergovernmental disputes.

The UK government should be open to adding further exclusions where there is evidence that it is not necessary to apply the MAPs, or they are preventing one part of the UK from successfully implementing a particular objective. There may be grounds on which it may legitimately refuse such a request, but if decisions are perceived to be made in an opaque, unfair or unilateral basis, the UK government leaves itself open to accusations that it is once again overriding the devolved governments.

The business department has committed to holding annual ministerial meetings of all four governments to consult the devolved administrations on exclusions⁴ but there are few details of how powers to make regulations or add new exclusions will be exercised. In particular, there are no details of at what stage the content or outcome of the common frameworks process should feed into these discussions and what weight they should carry.

The four governments should agree a clear process for proposing new exclusions to the MAPs, and clear criteria according to which those proposals will be assessed. The common frameworks principles agreed in October 2017 – which include a commitment to maintain a minimum level of policy flexibility afforded by EU rules – could provide a useful basis on which these criteria could be developed.

Box 2: Common framework principles

1. Common frameworks will be established where they are necessary to:

- Enable the functioning of the UK internal market, while acknowledging policy divergence
- Ensure compliance with international obligations
- Ensure the UK can negotiate, enter into and implement new trade agreements and international treaties
- Enable the management of common resources
- Administer and provide access to justice in cases with a cross-border element
- Safeguard the security of the UK.

2. Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:

- Be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent
- Maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules
- Lead to a significant increase in decision making powers for the devolved administrations.

Decisions to add new exclusions should be based on evidence, taking into account the disruption to the UK internal market that could occur if a specific regulation were enforceable against all goods and the policy implications if it were not. OIM reports, along with evidence from business, industry and relevant regulators, and policy-specific information from the common frameworks process could all be used to inform decision making.

The four governments should use common frameworks to manage divergence created by the Northern Ireland protocol

As discussed, the Northern Ireland protocol means that changes to EU law that continue to apply to Northern Ireland (if not replicated by the UK) will create divergence between the different parts of the UK. This is already happening: changes to EU law have come into force after 31 December 2020, when the UK–EU transition period ended. For example, on 21 April 2021 the EU changed its requirements for

some agri-food imports, which have already begun to introduce minor divergence between Great Britain and Northern Ireland.⁵ But this is only the start of the process: more changes will inevitably arise.

Common frameworks set out processes that can facilitate intergovernmental working to address these issues. For example, they could provide an opportunity to discuss how the Northern Ireland executive implements EU directives, taking into account the relevant policy application in England, Scotland and Wales. They are also an opportunity for the UK, Scottish and Welsh governments to consider whether or how GB regulation should respond to changes at an EU level to minimise GB–NI divergence or mitigate its impact. Common frameworks could facilitate a discussion about how to respond to updates in EU law.

To ensure these conversations are happening at the appropriate time, and not after a new regulation has come into effect, the UK government needs a strategy for monitoring, and influencing, forthcoming changes to EU law – as the [Institute for Government](#) has consistently argued. The Withdrawal Agreement establishes a Joint Consultative Working Group on the implementation of the protocol, which will act as a forum for the exchange of information between the UK and the EU on planned and proposed changes to EU law relevant to the protocol. The UK government should ensure that processes are in place to pass on this information to the relevant Whitehall department and the Northern Ireland executive, and that this triggers subsequent discussions through the appropriate channels set out in each common framework.

Reformed intergovernmental relations structures could facilitate better co-ordination between ministers

While all four governments should commit to trying to resolve an issue related to the functioning of the UK internal market through common frameworks and good official-level working, there are many cases in which political intervention will be required.

Ministers should keep each other informed about regulatory developments in their respective governments, discuss policies with implications for the UK internal market and consider disagreements that cannot be resolved at a lower level.

However, existing intergovernmental machinery, including the Joint Ministerial Committee (JMC) structure, is deeply flawed. The JMC (Plenary), through which the leaders of the four administrations meet, has not met since 2018, and the only JMC meeting regularly is the soon-to-be-redundant JMC (EU Negotiations).

The four governments have been working on a joint review of intergovernmental relations (IGR) since March 2018. In April 2021, the UK government published a progress update that outlined proposals for a new system of IGR. The four governments have reached agreement in most areas, but there remain a small number of points of disagreement that are preventing the completion of the review and the implementation of the proposals.⁶

The progress update sets out three tiers of new machinery:

- **Portfolio-level engagement** – new inter-ministerial groups (IMGs) to facilitate working at departmental level
- **Middle tier** – an Inter-ministerial Standing Committee (ISC) to “to consider issues cutting across several ministerial portfolios”
- **Top-tier** – a forum for the leaders of the four administrations to meet at least annually, although this remains an area of disagreement.

IMGs can facilitate working between ministers on individual policy areas with implications for the internal market. For example, the EFRA (environment, farming and rural affairs) IMG – which is already operational – allows all four governments to inform each other of new policy developments and consider the impact these would have on the rest of the UK and the internal market. Each common framework sets out its own dispute resolution procedure, but it is expected that IMGs will also provide a forum to consider issues that cannot be resolved at the official level.

IMGs could also provide devolved ministers with the opportunity to have input into reserved issues – those in which the UK parliament retains exclusive policy making powers. The Trade IMG, for example, will allow ministers from Northern Ireland, Scotland and Wales to raise concerns about local implications of any new trade deals signed by the UK government. Good intergovernmental working at departmental level will be crucial to avoiding disputes arising in response to inadequate consultation or information sharing.

However, as set out in the previous section, managing the UK internal market also means managing a number of competing aims and considering cross-cutting issues. This makes the ISC the most appropriate place for intergovernmental co-ordination and oversight on issues relating to the UK internal market. The draft proposals task the ISC with providing “oversight of the common frameworks programme and their governance arrangements”.⁷ Its remit should be extended to give it responsibility for overseeing the UK internal market as a whole, including the functioning of the UKIM Act, the Northern Ireland protocol and all their intersections.

The UK government and devolved administrations urgently need to agree a proper dispute resolution procedure

Given the politically fraught context in which the UKIM Act was passed, disputes over the management of the internal market are inevitable. Unlike the EU single market, where the European Commission acts as an independent arbiter for member states, in the UK internal market, the referee – the UK government – is also a key player in the game.

Many decisions on the operation of, or with implications for, the UK internal market are within the gift of the UK government – including changes to the scope and exclusions of the MAPs, and negotiation on international trade. But its dual role as the government of the whole of the UK in reserved areas, and the government of

England in devolved areas, means that it should be mindful of any perception of bias. Where this is a risk, there must be a clear process for these decisions to be challenged, considered, and evaluated – to avoid perceptions of unfairness. It also needs to be sensitive to issues where the interests of a devolved nation legitimately diverge from those of the UK overall and consider carefully how to take these into account and how to make its case if it is indeed going to insist – as is its ultimate right – on its preferred outcome or trade deal.

The current procedure for resolving intergovernmental disputes gives significant discretion to the UK government to determine whether to refer a dispute to the JMC and the appropriate course of action to be taken. If not addressed, the inadequacy of this procedure – which has been used just four times and not since 2013 despite frequent public disputes in this period⁸ – will further contribute to the feeling that the regulation of the UK internal market has been imposed on the devolved administrations, with no access to recourse.

The IGR review progress update also outlines a new dispute resolution procedure, with a role for an independent secretariat staffed by officials from all four administrations in escalating disputes against clear criteria, an option to seek impartial advice, and mechanisms for transparency and accountability in dispute outcomes.⁹ Procedure alone is not sufficient to prevent or resolve political disagreements, and decisions over trade or the exercise of powers under the UKIM Act remain in the gift of the UK government. However, if disputes are adequately considered and resolved through a fair and impartial process, it could increase the likelihood that the outcomes will be accepted, and minimise damage to working relationships, or at the very least provide the UK government with a reasonable defence against complaints that it has acted unfairly.

The proposals set out in the progress update on the review of intergovernmental relations are a marked improvement on existing machinery. However, outstanding issues around the handling of financial issues and the appropriate format and frequency for top-tier meetings threaten the conclusion and subsequent implementation of these crucial reforms.

All four governments have a strong interest in ensuring that agreement is reached, and that these reforms are implemented. For the UK government, they could help guard against accusations of unreasonableness or lack of regard for the devolved administrations. For the devolved administrations they present an opportunity for more systematic engagement with the UK government – and would allow them to raise issues around the functioning of the UK internal market and, where necessary, to challenge the UK government on the interpretation or application of the Act.

Renewed structures are not on their own sufficient to repair the fractious relationships between the four governments, and we do not underestimate the challenges that the different constitutional positions of each government present to good intergovernmental working. However, given the clear problems with the current arrangements and the incentives to reach agreement on reform, the IGR review presents an opportunity to reset relationships and take a more co-operative approach to the UK internal market.

Recommendations

The four governments should:

1. Use common frameworks as the primary process for managing divergence between the four governments and mitigating against some of the problems posed by the Northern Ireland protocol and UKIM Act.
2. Agree process and criteria according to which new exclusions to the market access principles will be judged. These should be based on the common framework principles agreed in 2017, including that they will maintain “equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules”.
3. Work together to resolve the outstanding issues over the IGR review and conclude and implement the new arrangements.
4. Amend the Inter-ministerial Standing Committee (ISC) terms of reference remit to explicitly give it a role overseeing the functioning of the UK internal market at a political level.
5. Agree the new dispute resolution procedure set out in the IGR review progress report, allowing for a clear mediation process and greater transparency over the outcome of disputes.

Monitoring by the Office for the Internal Market

An overhaul of intergovernmental working at the political level is clearly needed to ensure the internal market functions properly. But it will also rely on a better evidence base than the governments of the UK have had access to so far. The new Office for the Internal Market (OIM), an independent panel within the Competition and Markets Authority (CMA), was set up in the UKIM Act to oversee the functioning of the internal market and could play a crucial role. In particular it could help defuse the tensions around the act.

The OIM's role is advisory – it cannot bring cases against the government or enforce changes to regulations.¹⁰ But there are three statutory obligations it must fulfil:

- To produce annual reports, starting in 2023, on the health of the UK internal market, including broad trends and developments
- To produce reports every five years on the effectiveness of the market access principles (MAPs), the interaction between those principles and common frameworks, and the impact of common frameworks on the internal market
- To advise the relevant administrations on the economic impact of regulatory provisions relating to the internal market if requested to do so by the relevant authority.*

It is also able to initiate its own reviews of any matter “it considers relevant” to assessing or promoting the effective operation of the UK internal market or the MAPs. Stakeholders can also request a review, although the OIM is not obliged to carry one out.

Ministers need to establish the OIM panel to command the confidence of all four administrations

The CMA is in the process of setting up the secretariat for the OIM, and the business department is recruiting members of the panel, but it is not expected to be operational until later in 2021.¹¹ The first report under the UKIM Act is due by 31 March 2023. One of the biggest challenges for the OIM will be building trust with ministers across the UK. The controversy surrounding the UK government's passing of the UKIM Act will mean that the OIM will start from a difficult position.

* Each administration may only request a report on its own regulatory provision, proposed or in force. An administration may request a report on a regulatory provision in force in another part of the UK if it is considered to be “detrimental to the effective operation of the internal market in the United Kingdom”.

Under the Act, a UK minister will be responsible for appointing a panel of experts and a chair to lead the work of the OIM. These decisions will be important. The panel will set the direction for the OIM and will begin the task of building trust with governments across the UK. The chair will also be a member of the board of the CMA.

The minister is required to seek consent for these appointments from Scottish and Welsh ministers and the NI Department of the Economy but can press ahead with the appointment if no consent is given within a month.¹² Doing so would undermine the role of the OIM before it had even got started. For their part, the UK minister in charge must make securing devolved consent a priority, while those devolved ministers should also recognise their incentive to engage constructively in the appointment process or risk a panel that poorly reflects their priorities in the long term.

The Act also requires the UK minister to consider the “variety of skills, knowledge and experience” among members of the panel, as well as the “appropriate balance” of knowledge of the operation of the internal market in different parts of the UK. This is especially important. To have any chance at building trust in the OIM as an independent institution, panellists need to understand the context of devolution, and the minister should work with their counterparts in the devolved administrations to appoint such individuals. Ignoring this could risk further alienating the devolved administrations.

The benefit of a ‘panel’ model is that it can be relatively responsive to issues as they arise. The chair is also able to appoint a ‘task group’, consisting of at least three members of the panel, to carry out the functions listed above. This could in theory allow the panel to juggle different reports or inquiries at the same time, depending on the size of the secretariat supporting them, although the comparatively small number of people on the task group could mean they are less representative of the UK than the panel as a whole.

The OIM should act quickly to demonstrate its value – particularly to sceptical devolved governments

One of the biggest challenges for the OIM will be clarifying the role it will play in this new ecosystem. The range of tasks assigned to the OIM and limited guidance in the explanatory notes accompanying the UKIM Act could – in theory – give it a relatively free rein to investigate different aspects of the internal market, using its power to initiate its own reviews. The OIM is primarily intended to be a source of economic advice and information. However, its role in considering the impact of common frameworks and the interaction with the UKIM Act suggests that it could also take into account the four governments’ approach to managing regulatory divergence, as well as the economic implications of divergence that might arise. This presents both challenges and opportunities. The CMA is currently consulting on draft guidance on how it intends to carry out its internal market functions.¹³

As the CMA is a non-ministerial department of the UK government, a key task will be demonstrating that the OIM has sufficient devolution credentials to be able to act “even-handedly” – as required under the terms of the Act – towards the four administrations. Given the politically fraught context in which it will operate, this may be hard, and there is a risk that its work is politicised.

The OIM will need also to manage the different expectations of different governments and make it clear from the outset what it considers its role to be, the nature of its work programme, and what it will – and more importantly will not – comment on in its reports and findings. The CMA’s draft guidance recognises “the balance to be struck between frictionless trade and devolved policy autonomy”,¹⁴ but isn’t clear how, or even whether, it will consider policy evidence in its reports and advice. If the CMA believes that the governments themselves, or other public bodies, should gather and consider this evidence, it should say so explicitly from the outset. If it intends to play a role in assessing the policy implications of regulations, and UKIM Act architecture more widely, it must provide more detail on how it intends to do so.

Demonstrating the value of its work early on could help the OIM build trust with the devolved administrations. The first statutory report is not due until 2023 and given the strong objections to the Act from the Scottish and Welsh governments, it is unclear how often its advice on regulatory provisions will be sought. The OIM should therefore use its powers to initiate its own review in the first year of its existence to gather evidence, build relationships with key stakeholders across the four nations and demonstrate its independence from the UK government.

The OIM should also consider where it can add value by providing useful evidence to inform intergovernmental discussions and decisions. As already discussed, some of the most important – and contentious – decisions on the operation of the Act will be around whether to exempt specific regulations from the MAPs of mutual recognition and non-discrimination by adding a new exclusion. The OIM could aid these discussions by offering evidence on the economic implications of adding a new exclusion – for example, the impact a Welsh government ban on plastic forks would have on the internal market if it were to be enforceable against goods from other parts of the UK.

The CMA states that its advisory reports will look at the economic impact of regulations “in light of the market access principles”.¹⁵ But where the UK government may be considering adding an exclusion, evidence about the economic impact of regulations if the MAPs *did not apply* would be most useful. The OIM should be open to providing this advice formally, as part of its statutory function, or, if this is not possible, informally.

The OIM should also prioritise building a better evidence base for the UK internal market

There is surprisingly little data on economic flows between the nations in the UK. The Scottish government and Northern Ireland executive have published some data on sales and exports to the rest of the UK, but there is no broader breakdown on trade flows between the different nations.¹⁶ The EU has also captured some data on trade flows at the regional level, which included some information on trade between the four nations of the UK. But it is not an official dataset, was constructed by researchers using assumptions and is currently available only up to 2010.¹⁷

This means that the decisions the UK government has already made about how to manage the UK internal market – including passing the UKIM Act – have lacked a robust evidence base. It was notable that the white paper relied heavily on the case studies of the construction sector and food labelling,¹⁸ but little else. A key role for the OIM should be building a better evidence base for any future decisions about the operation of the internal market and to inform how it performs its advisory role. This could prove especially useful when considering how the minister could use their exclusion-making powers under the UKIM Act.

The OIM is already working with the devolved administrations and the Office for National Statistics to address this. But for the first few years at least, it will have to rely on qualitative survey data by working with business groups to understand what barriers to trade businesses face, and the degree to which the UKIM Act addresses them. This could include the ONS survey of “business insights and impact on the UK economy”, which, since 2020, has asked broader questions from businesses such as the impact of Brexit,¹⁹ as well as the OIM’s proposed new online interface to gather intelligence from consumers, suppliers and producers.²⁰ It should also consider initiating sector-specific reviews into the behaviour of businesses across the UK.

The UK government explicitly excluded any regulations already in force from the MAPs to support its argument that the UKIM Act wouldn’t undermine the devolved administrations’ existing powers.* As such, the OIM should make the most of this opportunity to understand the impact of existing divergence on trade within the UK to inform any analysis of what the implications of future divergence are likely to be.

The OIM should provide analysis on GB–NI divergence under the Northern Ireland protocol

Although the OIM will be responsible for gathering evidence about the entire functioning of the internal market, regulations that give effect to the provisions of the Northern Ireland protocol – including transposing changes to EU law that apply there – are explicitly excluded from its advisory remit. This reflects the fact that the Northern Ireland executive or UK government are required to give effect to the protocol under international law and so have no discretion as to whether to adopt these changes, whatever the OIM advises.

The UK government also wanted to avoid the OIM being dragged into a contentious political row about the functioning of the protocol. However, it could still consider the implications of any regulations passed by the UK government, Wales or Scotland and the implications for GB–NI divergence under the protocol. The three governments of Great Britain should be ready to request reports on the potential for their new regulations to further encumber GB–NI trade.

The Northern Ireland protocol is the biggest risk to the internal market, with passive divergence almost inevitably changing the shape of GB–NI trade. The OIM panellists will not be able to stick their heads in the sand. Any work undertaken to review the functioning or health of the internal market will need to consider the NI protocol.

* Although existing requirements can be brought into scope of the Act if they are “substantively changed”.

Recommendations

The UK minister responsible for the OIM should:

1. Ensure that appointees to the OIM panel have sufficient expertise on the constitutional arrangements of the UK and the powers of the devolved administrations
2. Agree these appointments with the devolved administrations.

The OIM panel should:

1. Be clear about its remit and what work it will, and will not, be prepared to undertake – including whether and how it will assess the policy implications of proposed regulations and the UKIM Act
2. Publish an early report on the current health of the UK internal market, including the impact of existing divergence, to demonstrate its value to all of the governments of the UK, and its devolution credentials
3. Be open to providing advice on the economic impact of proposed regulations, if excluded from the MAPs either formally or informally
4. Work to improve (at the very least) the available data on trade flows between the four nations, to develop a stronger evidence base about the functioning of the internal market.

Scrutiny in the four legislatures

The way the internal market is managed has implications for businesses trading within the UK, the relationship between central and devolved government, and even devolution itself. How the four governments implement these arrangements and exercise their powers therefore demands scrutiny from all four legislatures.

There are gaps in the current scrutiny of the UK internal market in Westminster

Scrutiny of the process for agreeing common frameworks is ongoing, although only a small number have been published so far. The UK government has agreed to share provisional frameworks with relevant departmental select committees in the House of Commons as part of the process for finalising them. In the Lords, the Common Frameworks Scrutiny Committee (established in September 2020) is scrutinising the details of all frameworks and how the system is functioning more broadly – but is due to be in place only until the end of 2021.

Where legislation is required to implement regulatory changes within the scope of a common framework, the relevant legislatures will be given an opportunity to scrutinise policy changes and their implications for the UK internal market. But where frameworks are non-legislative, there are no clear 'hooks' for ongoing committee scrutiny. Of the frameworks that have been approved by ministers, all three have intergovernmental reviews baked in, ranging from annual reports to implementation reviews every three years. The lack of transparency over intergovernmental working makes scrutiny even more challenging although Chloe Smith, UK minister for the constitution and devolution, has promised guidance from the government later this year.¹

The committee structures in Westminster that will undertake scrutiny of the Northern Ireland protocol in the longer term are only just bedding in. As the Institute for Government has previously argued, the UK parliament and Northern Ireland assembly also need to be prepared to scrutinise EU law as it applies to Northern Ireland and understand the implications of policy decisions for the border in the Irish Sea.² The House of Lords has established the new Protocol on Ireland/Northern Ireland Sub-Committee to take on this role.³ Although the Commons has been less proactive, since the beginning of the year the European Scrutiny Committee (ESC) has continued to report on new EU legislation that will apply under the protocol.

The UK parliament needs to scrutinise the interplay between common frameworks and the UKIM Act

There is clearly a role for departmental select committees in the Commons to scrutinise the ongoing application of common frameworks, as well as any updates to those arrangements. Those select committees have the necessary policy expertise to understand what the implications of these decisions might be. But there is also a need to scrutinise how the system is working as a whole: how effectively frameworks are

functioning, whether any disputes over the application of the UKIM Act are arising and how are they being dealt with, whether there is a case to set up new common frameworks in emerging policy areas, and the implications of EU law for intra-UK divergence.

There are several committees with an interest in this area. The Public Administration and Constitutional Affairs Committee should scrutinise the Cabinet Office's work in intergovernmental relationships, the Business Committee should scrutinise BEIS's work on the UKIM Act and the OIM. The ESC as noted will play a role in scrutinising EU legislation that will apply in Northern Ireland, with the Northern Ireland Affairs Committee considering the implications of the protocol more broadly. All three should agree among themselves who will take the lead and how they will co-ordinate scrutiny in this area; the ESC will also need to decide whether, and if so how, to engage with Northern Ireland assembly committees on EU law that will apply in Northern Ireland – and the possible implications for the internal market.

The House of Lords Common Frameworks Scrutiny Committee is well placed to take forward the scrutiny of the UK internal market. Peers should consider extending the timeline of the committee beyond the end of the year and broadening its remit to be able to scrutinise the UKIM Act's implementation and the ongoing application of common frameworks. This should include any updates to the agreements as well as how disputes are handled. It should consider the economic, policy and constitutional implications of the UK internal market architecture, where necessary updating its membership to reflect that.

The committee should also lead the scrutiny of the role of the OIM and how it exercises its functions. The committee would need to be prepared to work with the Lords Protocol on Ireland/Northern Ireland Sub-Committee – and with some shared membership would be well placed to do so – and the new Lords Industry and Regulators Committee where their work intersects.

The four governments need to commit to actively sharing information with their legislatures

Effective scrutiny will require active information sharing from the government. A recent ESC report flagged concerns about the lack of transparency over decisions made in the UK–EU Joint Committee.⁴ Similarly, committees from the UK, Scottish and Welsh parliaments have all been critical of the information their respective governments have shared on the provisional frameworks – including how they have been developed and who has been consulted.⁵ Committees in the Northern Ireland assembly have shared similar concerns with their departments.

The UK government needs to set out how it will approach monitoring EU law in areas covered by the NI protocol – including the role of the Joint Committee and the Joint Consultative Working Group – as well as the interactions between different elements of the internal market. It is welcome that the government has continued to deposit documents relating to EU law in protocol areas with the ESC and the Lords protocol sub-committee, and Lord Frost has committed to providing explanatory memorandums

on measures that have direct effect in Northern Ireland. This will allow parliament to assess the implications of the protocol and, at the very least, will ensure that departments continue to monitor changes to EU law in these areas.

The UK government and devolved administrations should also commit themselves to regular updates to relevant committees on the functioning of common frameworks, including where any disputes have been raised and where updates have been made. For example, the government could commit to publishing reviews of frameworks and sharing with relevant departmental select committees. But where policy areas are going to be managed through existing intergovernmental arrangements, rather than common frameworks, there will not be the same 'hook' for scrutiny. Intergovernmental forums have consistently been criticised for lacking transparency;⁶ the proposed updates to intergovernmental structures provide an opportunity to make a commitment to greater transparency.

Post-Brexit, the intersection between devolved and reserved matters has become increasingly complex, and so the four governments should also consider addressing the interaction of the UKIM Act and the Northern Ireland protocol with any new legislation introduced in its accompanying explanatory memorandums. The UK government must also be willing to share information with the devolved legislatures directly, including through ministerial appearances before devolved committees.

This is already happening in practice, but the logic of ministerial appearances is inconsistent. Between January 2020 and the May 2021 devolved elections UK ministers appeared nine times before the Scottish parliament and six times in the Senedd but not at all before Northern Ireland assembly committees. In July 2020, Michael Gove, then the minister responsible for Brexit preparations, was invited to give oral evidence to the Committee for the Executive Office on the implementation of the Northern Ireland protocol. He declined. As he said: "The role of the Committee for the Executive Office is to scrutinise the work of the Northern Ireland Executive," despite having given similar evidence to that requested to the Scottish parliament a month earlier.⁷

UK ministerial appearances at devolved committees should be based on what committees require to perform effective scrutiny, not individual ministers' appetites to engage with the devolved legislatures. Although there is guidance on how UK ministers should respond to requests to give evidence from the devolved legislatures, this was last updated in 2011.⁸ It is clear this needs to be updated to reflect both interim changes to the devolution settlements and Brexit.

The devolved legislatures will play an important role in scrutinising the internal market

So far, we have focused mainly on the role of the UK parliament in scrutinising these new systems. But the devolved legislatures will also need to have the right structures in place to allow for proper scrutiny. Similar to Westminster, subject-specialist committees have taken the lead on scrutinising the detailed common frameworks, although the Scottish Finance and Constitution Committee, the Welsh External Affairs and Additional Legislation Committee and Northern Ireland's Committee for the Executive Office have played co-ordinating roles, including identifying the links between these different elements of the internal market.

Committees in the devolved legislatures will face the same transparency problems as those in the UK parliament, including how to scrutinise decisions taken in intergovernmental forums that lack transparency. Common recommendations may help put pressure on the governments to collectively agree to greater transparency over decisions taken in common framework forums. Maintaining strong interparliamentary relations, especially at the official level, could also help with informal information sharing.

In Scotland, there is the added question of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, which gives Scottish ministers powers to keep pace with any changes to EU law in devolved policy areas. This may mean that Scotland remains more closely aligned to Northern Ireland in certain areas, but the exercise of these powers will depend on domestic priorities and what implications there may be for Scottish businesses trading under the UKIM Act. This will not just be a matter for the Finance and Constitution Committee – policy committees will want to scrutinise how this function is exercised in specific policy areas – but this power will have implications for the UK's internal market.

Similarly, in the Northern Ireland assembly, committees will need to scrutinise the continuing application of EU law in protocol areas. Historically, EU scrutiny has not been seen as a priority in the assembly – but the Committee for the Executive Office should seek commitments from the executive to share relevant documents as well as signpost any legislation passed in Westminster that has implications for the application of the protocol.

Stronger interparliamentary working will improve scrutiny

With the UK internal market, the legislatures of the UK have a shared aim: to understand the implications of the UKIM Act and how common frameworks are being applied in practice, and to hold their respective ministers to account for the decisions that are made in those forums. Better interparliamentary relations would allow relevant select committees in the different legislatures to share information that will help in the scrutiny of these frameworks and allow greater focus on specific issues relating to each nation – rather than committees calling the same witnesses to answer the same questions. Ultimately the best chance to influence intergovernmental agreements is also through interparliamentary working.

An evidence session convened by the House of Lords Common Frameworks Scrutiny Committee that took evidence from committee chairs from the Commons, Scottish parliament and Senedd demonstrated the common problems experienced by different committees – including the lack of transparency and slow progress of the framework programme.⁹ Common recommendations, even if published in separate reports, could add pressure to the relevant governments to address the concerns raised. And stronger interparliamentary working can also avoid conflicting recommendations to each government.

For example, in 2018 the Interparliamentary Forum on Brexit wrote to the then chancellor of the Duchy of Lancaster, David Lidington, drawing together all the recommendations on reforming intergovernmental relations published by relevant committees in the Commons, Lords, Senedd and Scottish parliament.¹⁰ It may not have led to urgent reform, but it demonstrated a shared interest from the different legislatures and put pressure on all three sitting governments (there was no functioning executive in Northern Ireland at the time) to reach agreement on new structures.

If the legislatures want to seriously consider how to improve interparliamentary working, there are different options for doing so. These range from informal to formal:

- **Information sharing** at official level to build informal relationships between relevant committees and the legislatures and enhance individual scrutiny of each government, drawing on evidence from across the UK. This has already been much improved during the Brexit process – the next step could be commitments for more systematic information sharing.
- **Policy-specific chairs' forums** that could mirror the inter-ministerial groups in key devolved areas such as the environment to build relationships between committee chairs, identify shared interests and facilitate information sharing.
- **Interparliamentary forum(s)** on the internal market, building on the positive experience of the interparliamentary forum on Brexit that brought together chairs from across relevant committees from the legislatures. This could be a new forum whose membership could be flexible, with meetings attended by chairs from relevant select committees depending on the agenda items, or multiple forums could be set up across different key policy areas.
- **Joint evidence sessions and reports**, to bring different expertise when questioning witnesses and could lend weight to recommendations put forward in reports. This is likely to require changes to committee standing orders as currently only the Commons Welsh Affairs Committee is able to hold joint evidence sessions with committees from a devolved legislature (the Senedd).
- An **interparliamentary body for the UK with a standing membership, a small joint secretariat and similar powers to a select committee**, which would include holding evidence sessions and publishing reports. This is a model that has been proposed by former officials of the House of Commons.¹¹

The benefit of informal working is that it is more flexible and requires less administrative work, but still helps build up relationships and share information between different committees. The drawbacks are that it often relies on individual personalities and will not always be a priority. The interparliamentary forum on Brexit straddled this divide, and the range of committee officials and chairs invited provided a means for individual relationships to be formed and information shared, without a formal standing. But the relative regularity of meetings gave more of a structure.

The difficulty for any forum, however, will be building relationships with committees in Northern Ireland, owing to the political sensitivities about UK-wide projects. The interparliamentary forum on Brexit was operational at a time when there were no committees in the Northern Ireland assembly so meetings were attended by civil servants not ministers. This may mean a more informal forum, rather than a body with a formal standing and secretariat, could be easier to set up – at least in the short term.

In any case, it will take time for effective interparliamentary working to become embedded within the legislatures of the UK. The focus should be on developing ways of working that are not dependent on individual personalities, with proper resourcing. Any decision to formalise it should be agreed by all four legislatures.

Recommendations

The UK government should:

1. Commit to greater transparency on decisions taken in the UK–EU Joint Committee relevant to Northern Ireland, as well as continue to share relevant EU documents relating to the Northern Ireland protocol with committees in the Lords and Commons. (The Northern Ireland executive should make the same commitment to the assembly)
2. Share any reviews of common frameworks with the relevant parliamentary select committees, as well as provide an annual update on the functioning of the programme including any disputes raised and how they have been resolved
3. Update the guidelines for when UK ministers will appear before committees in the devolved legislatures to reflect changes in practice created by Brexit.

The House of Commons should:

1. Clarify the roles and responsibilities for scrutinising the Northern Ireland protocol, as well as how it will work with its counterparts in the Northern Ireland assembly
2. Ensure one select committee has responsibility for the oversight of how the government manages the internal market, but is prepared to work with departmental select committees where relevant.

The House of Lords should:

1. Extend the timeframe and remit of the Common Frameworks Scrutiny Committee beyond the end of 2021 to scrutinise the impact of the UKIM Act on the common frameworks programme, as well as the ongoing functioning of frameworks.

The four legislatures should:

1. Co-ordinate better interparliamentary working on scrutiny of the internal market, which should include a revitalised interparliamentary forum on the UK internal market.

Conclusion

Ensuring the UK internal market functions effectively will be among the UK government's most difficult but important tasks post-Brexit. There is a clear need for arrangements to be put in place to fill the void created by the loss of the EU single market framework and to allow for smooth intra-UK (if not GB–NI) trade. Not doing so risks severe economic costs across the UK.

A well-functioning internal market would demonstrate the value of the union: one in which goods, services and people can move freely while each government can continue to tailor decisions to their own specific contexts. But the early signs are not good. The UK government's approach to both the UK Internal Market Act and Northern Ireland protocol – on which it pressed ahead despite the strong and vocal objections of the devolved administrations – has put a major strain on relations within the union. This will make the task harder.

If the UK government continues down its current path, the UK internal market will end up being characterised by repeated battles over English food standards forced upon Scotland and Wales, popular environmental interventions rendered ineffective, and divergence leading to bigger barriers to trade in the Irish Sea.

To make the internal market work, Whitehall will need to be able to consider all three pieces of the puzzle together: common frameworks, the UKIM Act and the Northern Ireland protocol. Where necessary, it will need to make trade-offs between competing aims and imperatives. This will require effective intergovernmental working, focused on managing regulatory divergence between the four nations by agreement rather than by the force of law, to guard against barriers to trade while respecting the ability of each government to pursue its own policy aims.

The Office for the Internal Market will need to gain the trust of all four governments and build an evidence base – something that so far has been lacking – to inform decision making about any regulations that may have implications for the internal market and the functioning of the Act. The UK parliament and devolved legislatures will need to put arrangements in place to oversee the functioning of the internal market, scrutinise their respective governments and work together to scrutinise intergovernmental processes.

The UK government must weigh up the economic benefits that frictionless trade, the imperative to exercise its new regulatory freedoms for England, and the risk that repeated intergovernmental disputes could further erode support of the union.

In doing so it must keep in mind that devolution is popular – as the recent Scottish and Welsh elections demonstrated – and by appearing to undermine it, the UK government risks turning people away from, rather than towards, the union. The UK government, therefore, should consider a more sensitive approach, working with the devolved administrations and showing respect for the principle of devolution, as one means of protecting the constitutional integrity of the UK.

If the UK government is willing to embrace this change in approach, then the devolved administrations should be prepared to reciprocate. The goal of Scotland's SNP government – independence – means that it has an interest in maintaining a clear set of grievances against Westminster. But independence is by no means inevitable. It should not miss this opportunity to shape the system that will govern intra-UK trade for the foreseeable future. The Welsh government has similar incentives to demonstrate that it can do things differently from the government in Westminster, but it should not let defending constitutional principles get in the way of promoting economic growth.

The situation in the Northern Ireland executive is arguably even more delicate, with divisions in the executive deepening over the implementation of the protocol and strong opposition to it from the unionist community. Conversations around its long-term operation may therefore be difficult but participating in these discussions and clearly articulating Northern Ireland's interests is at present the most effective way of mitigating some of the biggest concerns about the protocol.

A well-functioning internal market will mean fewer barriers for businesses, better value for consumers, and a thriving UK economy. This should be the aim of all four governments. But unless or until they are willing to work together, it will be impossible to make it a success.

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