

Consultation Response from the Constitutional Law and Human Rights Subcommittee

UK Internal Market Review

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society. Our Constitutional Law and Human Rights Sub-committee welcomes the opportunity to consider and respond to the Committee's Call for Views on the UK Internal Market Act 2020 – Consultation and Review. We have the following comments to put forward for consideration.

General Comments

We have taken a keen interest over the years in commenting on proposals for legal and constitutional change arising out of the UK's Withdrawal from the EU including the implications for Scotland and its relationship with the rest of the UK, constitutional developments and changes in the law in connection with Brexit, the relationship of the UK and the EU, Trade Agreements and the impact on Devolution. In particular in relation to the UK Internal Market we responded to the UK Internal Market White Paper in August 2020 and participated by briefing at key stages in the UK Internal Market bill's parliamentary passage in September-December 2020: [United Kingdom Internal Market Act 2020 Stages - Parliamentary Bills - UK Parliament](#) and [Briefing on UK Internal Market Bill | Law Society of Scotland](#)

We also commented on

- a. the Finance and Constitution Committee in the Scottish Parliament Inquiry into Scotland and the UK Internal Market
<https://www.lawscot.org.uk/media/368476/20-02-28-tra-con-comp-fcc-uk-internal-market.pdf> ,
- b. the Scottish Affairs committee in the House of Commons Inquiry into the Relationship between the UK and Scottish Government
<https://www.lawscot.org.uk/media/361490/161118-inq-by-scottish-affairs-select-committee-relationship-btw-uk-plus-scottish-governments.pdf> ;and
- c. the Public administration and Constitutional Affairs Committee in the House of Commons Inquiry into Devolution and exiting the EU
<https://www.lawscot.org.uk/media/359260/271117-public-admin-consultation-response.pdf>.
- d. We also conducted a survey of the powers returning from the EU that intersect with the Devolution Settlement
<https://www.lawscot.org.uk/media/359818/ministers-111-paper-final-12-mar.pdf>

The United Kingdom Internal Market Act 2020 (UKIMA) forms part of the then UK Government's legislative response to Brexit, following the European Union (Withdrawal) Act 2018 and European Union (Withdrawal Agreement) Act 2020.

UKIMA was considered to be a replacement for the European Single Market – by regulating the UK internal market for goods and services. UKIMA sets out the market access principles for the UK Internal Market which have had constitutional implications. As a result of the Act many powers exercised by the devolved administrations require consent of UK Ministers.

We take the view that the UK's withdrawal from the EU removed the overarching EU internal market legal arrangements and that a UK based internal market legal framework is necessary.

UKIMA has been noted by Scottish Environment Link as important in connection with “deposit return systems, horticultural peat, glue traps, XL Bully dogs, the phasing out of gas boilers, and minimum unit pricing for alcohol”: [The-Internal-Market-Act-a-challenge-to-devolution-report.pdf](#) UKIMA has implications for many devolved policy areas.

The Secretary of State is required to conduct statutory reviews of the operation of Part 1 amendment powers (section 13) and Part 2 amendment powers (section 22), Services exclusions (Section 18 and schedule 2) and the arrangements relating to the use of the Office of the Internal Market to perform the functions in Part 4 of the Act (covering independent advice and monitoring of the UKIM) during the permitted period which is the period beginning with the third anniversary of the passing of the Act (17 December 2023) and ending with the fifth anniversary (17 December 2025).

It is appropriate that the Government recognises the importance of considering the operation of the Act beyond the statutory review requirements. We note that the scope of the review has been broadened to include the practical operation of parts 1, 2 and 3 of the Act, including the process for considering exclusions from the Act, and the role and functions carried out by the Office for the Internal Market as set out in Part 4: [Written statements - Written questions, answers and statements - UK Parliament](#)

We do not have data upon which to respond to many of the specific questions raised in the Government consultation. Instead, we think it is important to identify the current academic analysis which is being undertaken and of which is important for Government to be aware. Accordingly, we have identified the undernoted work from respected commentators.

Specific Comments

We note the views expressed by Professor Aileen McHarg in a submission to the Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee [ukima-cosultation-and-review-aileen-mcharg.pdf](https://www.scottish.parliament.uk/ukima-cosultation-and-review-aileen-mcharg.pdf).

Professor McHarg has identified major problems in UKIMA's interaction with devolution such as:

- a. *An unsatisfactory intersection with devolved competence.* In contrast with the EU internal market rules which they replaced, UKIMA's market access principles technically have no effect on devolved competence. The validity of devolved legislation (primary or secondary) is not affected by the market access principles. However, these may (depending on a range of contextual factors) have very serious implications for the effective operation of devolved legislation, such as to significantly constrain the scope of devolved law-making competence in practice.
- b. *Asymmetry.* Although formally applicable to legislation passed by all four of the UK's governments and legislatures, the devolved governments and legislatures are significantly more constrained by the market access principles than the UK Government and Parliament when legislating for England. This is partly because of the inherent asymmetry of market size in the different parts of the UK. It is also partly because of the operation of parliamentary sovereignty, which means that the UK Parliament can override the market access principles in order to protect regulatory choices for England, in a way that the devolved legislatures cannot (because UKIMA is a protected/entrenched statute under the devolution statutes).
- c. *An unsatisfactory balance between market access and regulatory divergence.* UKIMA as enacted gave significant priority to the principle of market access over protecting the ability to regulate local markets in accordance with local democratic choices. Exclusions from the market access principles for goods in particular are notoriously narrow, although these can be extended by amending Schedule 1. Only in the case of the indirect discrimination principle is there any explicit ability to balance market access against competing aims, but again legitimate aims are defined extremely narrowly (ss. 8 and 21).
- d. *Uncertainty.* UKIMA has added significant uncertainty to the devolved law-making process. This comprises legal uncertainty, regarding the meaning of the market access principles, which have not yet been tested in court; factual uncertainty, regarding the practical impact of the market access principles in any particular regulatory context; and political uncertainty, regarding the operation of the exclusions process, particularly as it

intersects with agreements on policy divergence reached via the Common Frameworks process.

Professor McHarg identifies a number of amendments to the UKIMA which are designed to resolve these problems.

- a. *Improve the process for seeking UKIMA exclusions.* A procedure for seeking UKIMA exclusions was agreed under the Common Frameworks process.³ However, there remains considerable uncertainty around the operation of that process, particularly around the timing of when exclusion requests should be made. A relatively minimal reform would be for the four governments to agree a new, more detailed exclusions process. More ambitious reforms in this space might include a role for stakeholder consultation and scrutiny by the UK and devolved legislatures before exclusions are agreed. Nevertheless, non-statutory reform would not address the underlying legal asymmetry in the exemptions process. Nor is there any guarantee that the process would be followed in practice, and it seems unlikely that it would give rise to grounds for judicial review if not. Statutory reform of the exclusions process would be more difficult to achieve but could be more satisfactory. For instance, UKIMA could be amended to create a formal process for requesting exclusions, subject to the agreement of all four governments, with a duty on UK ministers to lay amending regulations if agreement is reached, and duties to give reasons for failure to agree.
- b. *Expand UKIMA exclusions.* Regulation making powers under ss.10 and 18 of UKIMA could be used to expand the range of exemptions from the market access principles in Schedules 1 and 2, thus reducing the need for ad hoc exemptions. This would significantly tilt the balance of the Act away from market access and in favour of regulatory divergence, thus reducing the constraints on devolved law makers and reducing their exposure to political control by UK ministers.
- c. *Subject the market access principles to tests of proportionality and subsidiarity.* A more fundamental reform of UKIMA, requiring primary legislation, would be to subject the application of the market access principles in any particular case to principles of proportionality and subsidiarity, thus returning to something more like the position under the EU internal market rules where the preservation of free trade is balanced against competing regulatory objectives on a case-by-case basis.
- d. *Improve processes for considering the effects of UKIMA on proposed legislation.* A final reform option that the Committee may want to consider irrespective of the outcome of the UKIMA Review is to seek improvements in the Scottish Parliament's own processes for considering the potential effect of the market access principles when considering proposals for

primary or secondary legislation. One possibility would be to require explanatory notes or impact assessments to expressly address the potential impact of the market access principles and what steps are being taken (where necessary) to secure UKIMA exclusions. Standing Orders might also place a “UKIMA reserve” on the approval of Bills or secondary legislation where significant concerns remain.

We also note the report by Dr Coree Brown Swan, Professor Thomas Horsley, Professor Nicola McEwen and Lisa Claire Whitten: [Westminster Rules? The United Kingdom Internal Market Act and Devolution](#)

This report sets out a “call on the UK Government to change tack and address the Act directly in collaboration with the devolved institutions.”

The Report outlines that the UKIMA and the Market Access Principles (MAPs) pose significant challenges for the devolved institutions. The principle of mutual recognition precludes the devolved institutions from applying devolved policies to incoming goods and services, which significantly erodes the rationale for innovating in the first place.

It also examines the operational challenges that confront devolved administrations when they seek to exclude specific devolved policies from the application of the MAPs. The UK and devolved governments concluded an intergovernmental agreement to manage this process in December 2021, but the process remains ultimately subject to UK Government control.

The Report identified a “recent shift on the part of the devolved governments in favour of policy coordination with the UK Government and other devolved governments to manage the practical effects of the MAPs on devolved competences.”. This highlights improved intergovernmental relations which are vital to “developing a model of governance for the internal market that relies on more than just the relative strength of the UK Government.”.

The Report discusses four options to reform the UKIMA.

Option 1: The Status Quo

Under this option, UKIMA structures would operate in their present form, perhaps bolstered by improved intergovernmental relations between the administrations with the addition of the Council of the Nations and Regions.

Option 2: Repeal the UKIMA

Option 2 is that the UKIMA could be repealed. This option has been supported by the Scottish Government and Parliament. In a symbolic vote on 3 October 2023, a majority in the Scottish Parliament supported a motion to repeal the Act. But repealing the UKIMA would not resolve the underlying problem that it was designed to address: the risk of regulatory difference between the four administrations creating new barriers to trade and mobility. It would also place a heavy burden on a machinery of intergovernmental relations. It could risk destabilising the legal underpinning to Northern Ireland’s role within the UK

domestic market whilst implementing the access to the EU single market for goods given by the Protocol/Windsor Framework and raise questions for UK trade policy.

Option 3: Legislative Reform

Legislative change presents a set of options for example UK Ministers may modify aspects of the UKIMA using existing delegated powers or reform the Internal Market regime through a new Act of Parliament.

In the context of managing the UK internal market, the two principles of proportionality and subsidiarity could be introduced in a new Act.

Option 4: Procedural Changes

A final set of options may supplement or act as alternatives to legislative change. These concern the procedural workings of the UKIMA that have been found wanting in the early years of its implementation. The Report offers two suggestions.

A clearer exclusion process could be developed, including the introduction of an exclusion request form, submitted to an impartial body, alongside requirements for timing and format in which the relevant parties are required to respond. This could be accompanied by an agreed evidence base required to evaluate decisions to grant or withhold an exclusion.

The second proposal for procedural change is to improve legislative tracking. Advanced notice where future regulatory difference is intended, either at a UK-level (legislating for England) or within the devolved legislatures, is essential to the proper functioning of the UK internal market. Yet, the present approach relies on political commitments on information sharing set out in intergovernmental agreements, rather than on any formalised framework.

A new framework for legislative tracking would support coordination and planning between the UK and devolved governments.

Reforming UKIMA

The Report emphasises that reforming the UKIMA should not be for the UK Government alone to determine, nor a matter for UK Parliament alone. The UKIMA was a unilateral intervention by a previous UK Government, backed by the UK Parliament, in the face of considerable opposition from the devolved governments and most opposition parties in the devolved legislatures. Collaborative working across the four administrations – with the engagement and oversight of the four parliaments – will be central to securing consent for the way ahead. As our Report highlights (Report, Part 3), despite continued disagreement on foundational issues, intergovernmental cooperation has improved in recent months. This is visible, for example, with the increased use of joint consultations and intergovernmental agreement on joint regulatory approaches (e.g. on tobacco and vaping). This provides a platform for more ambitious reform to deliver a meaningful resetting of relations with the devolved institutions.

Questions

1. What are your views on how the UK internal market for goods is best supported using the UK Internal Market Act?

Our Comment

The Office for the Internal Market's Annual report on the operation of the UK internal market 2023 to 2024 found that the market access principles, as embodied in the Act, were not how industry tended to prefer to manage divergence: "A notable finding from our case studies of Single Use Plastics, Precision Breeding and Deposit Return Systems is a clear view, particularly among the larger businesses in those sectors with significant operations in the devolved nations, that the Market Access Principles are unlikely to be used as the preferred approach to address regulatory differences."

2. What are your views on whether differing regulations that have effect later in the supply process are more straightforward for businesses to address?

Our Comment

This is a question to which business interests are best placed to respond.

3. What is the right balance between the potential for local regulatory innovations in sectors and UK-wide alignment?

Our Comment

The answer to this question will depend on the type of business responding. Large businesses operating across GB or UK will have a view which may be distinguished from that of smaller businesses working in a localised market.

4. What are your views on the operation of the market access principles for goods to date?

Our Comment

We have no data upon which to answer this question.

5. What are your views on the use that has been made of the Part 1 amendment powers – for example the exclusion for single-use plastics? In particular, we would welcome views on whether the changes have had or will have a positive or negative impact and whether they have been effective. (An explanation of what the Part 1 amendment powers are and what use has been made of them can be found in the Annex).

Our Comment

The Scottish Parliament Information Centre (SPICe) has published [From single-use plastics to the deposit return scheme: How are Common Frameworks and UK Internal Market Act exclusion processes operating? – SPICe Spotlight | Solas air SPICe](#)

This research highlights that market access principles apply even when an agreement to diverge has been reached through a common framework process. If such an agreement to diverge is reached, the process for seeking an exclusion to the market access principles within a framework involves:

1. The relevant government setting out the scope and rationale for the exclusion.
2. A review of the proposed exclusion and supporting evidence for it by the relevant framework forum; and if the exclusion is agreed.
3. The laying of a statutory instrument by UK Government Ministers in the UK Parliament to implement the exclusion.

UK Government Ministers have a discretionary power to disapply the market access principles by an exclusion. If UK Ministers agree to a request from a devolved administration for an exclusion to be implemented, the role of the Scottish Parliament is governed by the [Statutory Instrument Protocol](#). This protocol means that the Parliament scrutinises the Scottish Government's decision to consent to the implementing regulation rather than the legislation itself. SPICe identifies that the single use plastics exclusion which was the first exclusion from the MAPs: illustrates "the transparency challenges for the Parliament in scrutinising how common frameworks and the associated UKIMA exclusions processes are working."

SPICe narrates the process of the Scottish Government requesting the UK Government to legislate for the exclusion from the market access mutual recognition principle to prevent single use plastics from being sold in Scotland. The process involved inter-governmental discussions which were reported at the Inter Ministerial Group for Environment Food and Rural Affairs meetings on 6 December 2021 and 21 March 2022. The Scottish Parliament was informed of the exclusion on 6 May 2022 when the Minister for Green Skills, Circular Economy and Biodiversity Lorna Slater MSP sought the approval of the Parliament for Scottish Ministers to consent to the UK statutory instrument that would create an exclusion from UKIMA for the single-use plastics regulations. As SPICe point out "This meant that the Parliament was being asked to consent to Scottish Ministers consenting to the UK statutory instrument without any idea of the scope of the exclusion or details of framework discussions that supported the exclusion." The Parliament's Constitution, Europe, External Affairs and Culture Committee in its [UK Internal](#)

[Market Inquiry | Scottish Parliament](#) highlighted the lack of transparency and accountability (paragraphs 168-172).

It is not satisfactory where transparency and accountability are lacking in such important matters and where democratic institutions, and individuals and organisations lack engagement at the early stages of policy formulation and implementation. As the Constitution, Europe, External Affairs and Culture Committee stated in its report “There is a risk that the emphasis on managing regulatory divergence at an inter-governmental level leads to less transparency and Ministerial accountability and tension in the balance of relations between the Executive and the Legislature.” (paragraph 13).

6. What are your views on how the UK internal market for services is best supported using the UK Internal Market Act?

[Our Comment](#)

We have no comment to make.

7. What is the right balance between the potential for local regulatory innovations in services and UK-wide alignment?

[Our Comment](#)

We have no comment to make.

8. What are your views on the operation of the market access principles for services to date?

[Our Comment](#)

We have no comment to make.

9. What are your views on the use that has been made of the Part 2 amendment powers – for example, removing exclusions for certain services? In particular, we would welcome views on whether the changes have had or will have a positive or negative impact and whether they have been effective. (An explanation of what the Part 2 amendment powers are and what use has been made of them can be found in the Annex).

[Our Comment](#)

The changes which have been made to Schedule 2 UKIMA Part 1 (Services to which Section 19 (Mutual Recognition) does not apply) and Part 2 (Services to

which Sections 20 and 21 (Non-discrimination) do not apply) have been implemented through [The United Kingdom Internal Market Act 2020 \(Services Exclusions\) Regulations 2023](#) under section 18(2) of the UKIMA.

The Regulation had the following effects:

- a. Excluding services connected with the supply of gas and electricity, and water and sewerage and waste sector services from the scope of the mutual recognition principle in section 19 of UKIMA.
- b. Excluding services connected with the construction and operation of heat networks and the supply of thermal energy because of the different ways the service is regulated in the UK.
- c. Excluding services in respect of the award and authentication of academic or vocational qualifications because of the different ways the service is regulated in the UK.
- d. Amending the current social services exclusion in Parts 1 and 2 of Schedule 2 to clarify that the private provision of children's social care and childcare services are in scope of the existing exclusion.
- e. Removing the current financial services and electronic communication services exclusions in Parts 1 and 2 of Schedule 2, and the current postal services exclusion in Part 2 of Schedule 2 because the exclusions were no longer needed post-EU, and the regulation of these service sectors operates UK-wide.
- f. Removing the current services of temporary work agencies exclusion in Parts 1 and 2, and the current statutory auditor exclusion in Part 2 of Schedule 2 because these exclusions were no longer needed post-EU context and the services reserved for GB and NI generally replicate these laws.
- g. The new exclusions to Part 1 of Schedule 2 will mean that the mutual recognition principle will not apply to those service sectors.
- h. Amending the current social services exclusion will not alter the scope of the exclusion.
- i. Removing the identified current exclusions from Schedule 2 will mean that the mutual recognition and non-discrimination principles will now apply to those service sectors.

Apart from the exclusion of services concerning heat networks the Scottish Government did not agree to the statutory instrument given "its overall purpose of widening the scope of the UKIM Act": [SG Gaelic Cabinet Secretary for Finance and Economy](#) .

We are not in a position to confirm what effect, if any if the changes made under this statutory instrument have had. We note that the Scottish Government withheld consent. Accordingly, the inter-governmental process did not ensure that the Scottish Government were content with the instrument. Steps should be

taken to ascertain in the light of experience the Scottish Government would adhere to the views expressed in August 2022.

10. What are your views on how the UK internal market for professions is best supported using the UK Internal Market Act?

[Our Comment](#)

We have no comment to make.

11. What is the right balance between the potential for local regulatory innovations in professions and UK-wide alignment?

[Our Comment](#)

Professions which operate in the reserved areas under the Scotland Act 1998 will be suited to UK-wide alignment but any proposed changes by the UK Government would require adequate consultations with the professions affected.

12. What are your views on the operation of the system for recognising professional qualifications to date?

[Our Comment](#)

We have no comment to make.

13. How can the Office for the Internal Market best support the UK internal market through its role in providing independent monitoring and advice?

[Our Comment](#)

We take the view that the Office for the Internal Market (OIM) can best support the internal market by fulfilling its statutory objectives as contained in the IMA. These include:

- a. providing certainty for businesses that they can trade freely across the whole of the UK.
- b. providing expert, technical and independent advice to UK government and devolved administrations about the Internal Market.

14. What are your views on whether the current arrangements in Part 4 relating to the use of the Office for the Internal Market task groups are appropriate for securing the most effective and efficient performance of the CMA's Part 4 functions? We would welcome views in particular on any advantages or disadvantages of continuing with the current arrangements as compared with other possible ways of carrying out the Part 4 functions. (A full list of functions is set out in the Annex).

[Our Comment](#)

We have no comment to make.

15. What improvements could be introduced to facilitate more pragmatic management of the UK Internal Market Act's exclusions process?

[Our Comment](#)

We have no comment to make.

16. How should we ensure proportionate engagement with interested parties in relation to potential exclusions?

[Our Comment](#)

The process of creating exclusions should be open and transparent. Such an approach will ensure proportionate engagement with interested parties.

17. What evidence should be provided in support of an exclusion proposal by the proposing government, so the proposal can be fully considered (for example, information on potential impacts on businesses' ability to trade within the UK and the policy implications of not having an exclusion)?

[Our Comment](#)

We have no comment to make.

18. Should there be a different process to consider exclusions proposals which could lead to potentially significant economic impact, compared to those likely to lead to smaller economic impact?

[Our Comment](#)

We have no comment to make.

19. What do you think constitutes a potentially significant economic impact?

[Our Comment](#)

We have no comment to make.

20. Is there anything else you want to tell us about the operation of the UK Internal Market Act?

[Our Comment](#)

We have no comment to make.



For further information, please contact:

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