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**Brexit  
Civil Society  
Alliance.**

## UK Internal Market Bill – Briefing Paper

*This is a joint briefing from the Wales Civil Society Forum on Brexit and the Brexit Civil Society Alliance, intended for MPs and peers as the UK Internal Market Bill is being debated in Parliament.*

*The Wales Civil Society Forum on Brexit is a partnership between the Wales Governance Centre and Wales Council for Voluntary Action to provide information on the law and policy of Brexit to civil society organisations in Wales.*

*The Brexit Civil Society Alliance is a UK wide alliance of charities, voluntary and civil society organisations. The Alliance does not take a position on the 2016 EU referendum but seeks to raise concerns on behalf of its members and work to ensure that the Brexit process delivers on three principles: open and accountable lawmaking; a high standards UK; and no governance gap after Brexit.*

### Executive Summary

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

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

- ⇒ The Bill breaches the UK's International Commitments.
- ⇒ It directly reverses the devolution of state aid contrary to the UK Government commitments to respect the devolution settlements throughout the Brexit process
- ⇒ It gives the UK Government spending powers in areas of devolved competence which appear to be replacements for EU Funding
- ⇒ The Mutual Recognition and Non-Discrimination Principles are excessively broad with very few grounds for derogation which will put devolved standards and the ability for policy innovation under considerable strain

⇒ It fails to ensure that devolved interests are reflected and protected in its architecture as it provides little to no role for the devolved institutions in many key areas. Ordinarily, Internal Market governance by mutual recognition requires institutions and processes involving all regions as equals to foster constructive discussion and trust. Yet this bill does nothing to address this underlying governance requirement which may ultimately further damage the already strained relationship between the devolved administration and the UK government.

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## **2 -The Threat to Rule of Law**

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

We share the concerns highlighted by MPs and peers across the political spectrum that the UK government has [explicitly confirmed](#) that the Bill will break international law. This treaty was thought to have finally settled the issue of a border on the Island of Ireland. Indeed the Prime Minister [told](#) the House of Commons as much in October 2019, shortly after the withdrawal agreement draft text was published, when he stated that the treaty as it stood was already in “perfect conformity with the Good Friday Agreement”. The protocol was at the heart of protecting the Belfast/Good Friday agreement and the principle of non-diminution of rights as the UK exits the EU. If the UK government is already stating that they are prepared to renege on its commitments under this agreement, before the transition period has even ended, then it bodes poorly for the future of other elements of that agreement as we move forward.

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

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

3. It purports to make the above clauses have effect ‘**notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent.**’<sup>1</sup>

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

*‘regulations under section 42(1) or 43(1) are **not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic law.**’<sup>2</sup>*

A pointed out by [Professor Mark Elliot in this blog post](#),<sup>3</sup> the UK IM Bill goes even further by stating that regulations made under these provisions continue to have effect even if they breach law deriving from the Withdrawal Agreement (as opposed to just the Northern Ireland Protocol) and removes the ability of individuals to enforce the treaty before UK courts –

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<sup>1</sup> United Kingdom Internal Market Bill – Clause 45 (1).

<sup>2</sup> United Kingdom Internal Market Bill – Clause 45 (2) (a).

<sup>3</sup> See n.1.

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

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

## **2- The threat to the devolution settlements**

Not only is there widespread agreement amongst experts that this Bill violates international law by breaching the UK’s commitments under the EU Withdrawal Agreement,<sup>4</sup> the proposed Bill also stems from the fundamentally flawed view:

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

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

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

### **2.1 - Removal of State Aid as a Devolved Competence**

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

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<sup>4</sup> Professor Ken Armstrong, ‘Can the UK Breach the Withdrawal Agreement and Get Away With It? – the United Kingdom Internal Market Bill’, available at:

<https://ukconstitutionallaw.org/2020/09/09/kenneth-armstrong-can-the-uk-breach-the-withdrawal-agreement-and-get-away-with-it-the-united-kingdom-internal-market-bill/>; Professor Mark Elliot, ‘The Internal Market

Bil - A Perfect Constitutional Storm’, available at:

<https://publiclawforeveryone.com/2020/09/09/the-internal-market-bill-a-perfect-constitutional-storm/>

Professor Katy Hayward, ‘What Happened When the UK Internal Market Bill Met the Ireland / Northern Ireland Protocol’, available at:

<https://ukandeu.ac.uk/what-happened-when-the-uk-internal-market-bill-met-the-ni-irl-protocol/>

Whether State Aid is in fact a reserved or devolved competence has been subject to disagreement between the Welsh and UK Governments since the onset of the work around Common Frameworks. Indeed the Framework Analysis by the UK Government lists state aid as a reserved power.<sup>5</sup> This was again contested by the Welsh Government when it responded to the White Paper consultation – rightly pointing out it is not listed in the Government of Wales Act 2006 and that if it were indeed a reserved power, there would be no need to legislate to that effect in this Bill.

The White Paper consultation also recognised that the existing devolution settlements do not contain a reservation of state aid, and thus Part 7 of this Bill constitutes a direct reversal of devolution in this area.<sup>6</sup>

## **2.2- The UK Internal Market Bill and the Shared Prosperity Fund**

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

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

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

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

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

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

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<sup>5</sup> See page 40 of the Framework Analysis available here:

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

<sup>6</sup> See the UK Government Response to the UK Internal Market White Paper Consultation, para.173. Available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/916154/ukim-consultation-government-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916154/ukim-consultation-government-response.pdf)

specifically. Only 15 charities UK wide responded to the consultation - had a question been asked about replacing EU funding, it is likely that many more would have engaged.

Many third sector organisations have been awaiting and repeatedly called for a consultation specifically on the UK Shared Prosperity Fund. Indeed, Parliament under-secretary of State for Housing, Communities and Local Government, Jake Berry MP stated on 14 May 2019 that the consultation would be starting very soon. It is disappointing that the UK government seems to have reneged on that commitment and left out the role for the devolved administrations in the process.

There are distinct differences in approach to the use of this funding across the UK that risks being lost if administration of these funds is centralised in London. Early UK Government communications suggested a focus on industrial strategy and this Bill now suggests a focus on infrastructure spending with no recognition of the devolved focus on equality and cohesion projects.

### **2.3 - Mutual Recognition and Non – Discrimination**

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

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

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

We already started to see this materialise in the UK Government's response to the consultation. Not only there is a predictable quantitative preponderance of views from businesses and industry but the analysis of these consistently favours market access while **concerns expressed around devolution are either acknowledged and then ignored, or downplayed.**<sup>7</sup> By way of further example clause 29 (8) (b) of the Bill which covers the Competition and Market Authority's role in monitoring the Internal Market, read in the wider context of the Bill seems geared towards viewing regulatory differences as inherently problematic for the purpose of its investigations.

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

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<sup>7</sup> See the UK Government Response to the UK Internal Market White Paper Consultation, ps.12 and 19 for example. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/916154/ukim-consultation-government-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916154/ukim-consultation-government-response.pdf)

The absence of other grounds to justify devolved policy, such as where a measure seeks to protect **and/or also promote** environmental, consumer protection and labour standards and even cultural diversity is significant. A central issue in the Bill is that it **only views potential harm as a valid reason to enforce local requirements, whereas it should enable the devolved regions to derogate where there is scope for improvement in the public interest.**

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

The consequence of this is that:

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

#### **Illustration: Chlorinated Chicken**

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

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

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

## **2.4- Devolution, Intergovernmental Relations and Governance Structures**

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

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

*opportunities for different levels of government – central, devolved, local – to collaborate and engage in constructive dialogue, including increased transparency between the UK Government and devolved administrations, early discussion and parity of participation.<sup>8</sup>*

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

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

Lessons from other internal markets underpinned by mutual recognition show that formal systems of intergovernmental dialogue are an essential characteristic.<sup>9</sup> These need to place participating governments on a level of parity and details around a variety of intergovernmental functions should be agreed **prior to the legislation being passed**. These might include dispute avoidance and resolution, cataloguing and reporting complaints, pre and post legislative dialogue as well as reviewing and updating the operation of the internal market by co-decision. Any new bodies should

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<sup>8</sup> UK Internal Market White Paper Consultation document, para.110.

<sup>9</sup> See the Wales Civil Society Forum on Brexit's response to the consultation for further discussion of this. Available at:

[https://www.cardiff.ac.uk/\\_data/assets/pdf\\_file/0004/2427925/Wales-Civil-Society-Forum-on-Brexit-WCVA-and-WGC-UK-Internal-Market-Consultation-Response.pdf](https://www.cardiff.ac.uk/_data/assets/pdf_file/0004/2427925/Wales-Civil-Society-Forum-on-Brexit-WCVA-and-WGC-UK-Internal-Market-Consultation-Response.pdf)



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

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

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

More generally:

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

The Government has stated that this new section of the CMA – the Office for the Internal Market, will **be operational by the end of 2021** and this further contradicts the UK Governments narrative that this legislation is urgent and necessary and must be rushed through before the end of transition.<sup>10</sup>

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<sup>10</sup> Government response to the consultation on the UK Internal Market, p.20