

AFTER BREXIT: The UK Internal Market Act & Devolution

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Table of Contents

Foreword	Michael Russell MSP, Cabinet Secretary for Constitution, Europe and External Affairs	1
Part One	Introduction	3
Part Two	Devolution since 1999	6
Part Three	The UK Government's approach to devolution since the EU referendum	8
Part Four	The UK Internal Market Act 2020	16
Part Five	The effect of UK Internal Market Act: on the devolution settlement	26
	on businesses, consumers and people in Scotland	28
	on Scotland's role in international trade negotiations	32
Part Six	Conclusion	36
ANNEXES	A: International examples of multi-level state market management	38
	B: The development of the UK's state and market architecture	41
	C: UK economic performance since devolution	44
	D: Overview of key exclusions to the UK Internal Market Act	46

Foreword

by **Michael Russell MSP**
Cabinet Secretary for Constitution,
Europe and External Affairs



The Scottish Government believes the best future for Scotland is to become an independent country.

Developments since the Brexit referendum in June 2016 have dramatically changed the context in which that debate on Scotland's future is taking place.

Scotland has been removed from the EU against the will of the overwhelming majority of people who live here.

Much of the focus continues to be on the direct impact of that decision on Scottish society and on the economy.

However, there has been another dramatic change since the Brexit vote: the steady and systematic undermining of devolution and the Scottish Parliament.

Supporters of Brexit said it was about "taking back control". Increasingly we can see they meant Westminster taking back control from Scotland.

Bit by bit, the settlement that secured 74% support in the 1997 devolution referendum, is being unpicked under the cover of Brexit and without the consent of the Scottish people.

This is not a big bang abolition of the Scottish Parliament. Westminster has instead put in train the slow demise of devolution in the hope that no-one will notice.

The Prime Minister himself has called devolution "a disaster". The Leader of the House of Commons has spoken of restoring the UK constitution to what he calls its "proper form" and has signalled his desire to "undo" devolution.

This document sets out how that undoing is under way:

- The Scottish Parliament's views on Brexit have been ignored by the UK Government.
- Terms of reference designed to agree Brexit negotiating objectives among the UK's four governments were disregarded.
- The UK Government and Parliament now regularly legislate in devolved policy areas without the consent of the Scottish Parliament.
- The EU Withdrawal Act constrains the powers of the Scottish Parliament in what was called a "power grab".
- UK Government Ministers have taken powers to spend in devolved areas - in effect a "funding grab".

Most alarming of developments since Brexit, the Westminster Parliament has recently passed the Internal Market Act, which substantially weakens the ability of the Scottish Parliament to legislate effectively in devolved policy areas.

This Act gives a UK Government Minister the power, at a stroke of his or her pen, to subject Scotland's NHS to what are called "market access" principles, by unilaterally changing the scope of the legislation.

This is a particularly worrying development given the UK Government's baffling refusal to include in its Trade Bill or, to our knowledge, other agreements being negotiated separately, protection for "a comprehensive publicly funded health service free at the point of delivery".

The Internal Market Act means that if chlorinated chicken and hormone-injected beef are accepted for sale in England after a trade deal with the US, then they would have to be accepted for sale in Scotland too.

And any future legislation in Scotland to ban single use plastics and the environmental damage they cause, or measures to tackle health issues such as obesity, could be rendered ineffective.

Given the direction of travel, who knows what further restrictions on the Scottish Parliament could be on the way?

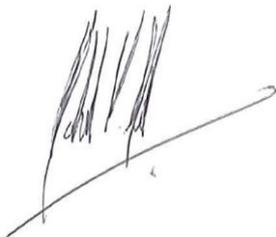
The Scottish Government believes people in Scotland have the right to decide their own future.

In this respect, it is important to set out that the choice we are facing is not between independence and the possibility of a beefed up Scottish Parliament or even the status quo.

The choice now, bluntly, is about saving the Parliament and the powers that people voted for in 1997.

The Scottish Parliament can go forward with independence, protecting and enhancing its existing powers – or it can go backwards, with Westminster stripping it of much of the democratic authority it has enjoyed for two decades.

The choice is now that stark – there is no other.

A handwritten signature in black ink, consisting of several vertical strokes followed by a long horizontal line that curves upwards at the end.

Michael Russell MSP
Cabinet Secretary for Constitution, Europe and External Affairs

Part One:

Introduction

1. In 1997, the Scottish electorate voted to establish the Scottish Parliament by a margin of 74% to 26%. On any assessment, devolution has been beneficial to Scotland. It has delivered an overdue measure of autonomy and self-government, and has demonstrated that centralisation and uniformity are not necessary preconditions for policy coherence and economic growth. Longstanding issues of importance to Scotland, from land reform to public health, have been tackled by the Scottish Parliament. Decisions that matter to people in Scotland are taken closer to people in Scotland, by a democratically elected and accountable Parliament.
2. Nevertheless, devolution has, in some quarters, always been a problem to be fixed, in a polity mistakenly conceived of as a “unitary state”¹ rather than a voluntary political union of nations.
3. EU exit has exposed the implications of this view and the UK Internal Market Act represents its institutionalisation.
4. As this paper will demonstrate, since the EU referendum, “taking back control” has come increasingly to mean wresting control and autonomy from the devolved institutions. Despite the UK Government’s stated commitment to work through intergovernmental structures to take an approach to EU exit that recognised the differing needs and priorities of Scotland, Wales and Northern Ireland – and that two of the four UK nations voted decisively to remain in the EU – Scotland’s distinct and legitimate interests have been repeatedly ignored.
5. To take one important example: in December 2016, the Scottish Government proposed a means to minimise and mitigate the risks of Brexit, and to protect and enhance devolution.² However, the UK Government refused even to discuss these proposals for reconciling the differing referendum results in different nations. Instead, in early 2017, in her Lancaster House Speech³, the then Prime Minister, Theresa May, unilaterally announced that EU exit would require the UK taking itself out of the European Single Market and Customs Union, in direct conflict with the Scottish Government’s proposals.

¹ Para 16, <https://www.gov.uk/government/publications/uk-internal-market/uk-internal-market>.

² This approach sought to explore common ground with the UK Government around a solution that would protect Scotland’s place in the EU single market from within the UK: <https://www.gov.scot/publications/scotlands-place-europe/>.

³ <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>.

There was no serious attempt by the UK Government to create the conditions for a consensual approach.⁴

6. Throughout the Brexit period, we have seen an increasing disregard of the Sewel Convention (the constitutional rule that the UK Parliament will not normally legislate for devolved matters, or adjust devolved competence, without the consent of the Scottish Parliament). That rule has been notably overridden on four separate occasions now – all instances where the UK Government recognised that the consent of the Scottish Parliament is required. Rather than an important protection, it has been effectively overruled by the UK Government, as can be seen most recently with the European Union (Future Relationship) Act 2020.⁵ The UK Government's Internal Market Act in some ways represents the culmination of this process: a Brexit that Scotland did not vote for is given as the rationale for radically undermining the powers and democratic accountability of the Scottish Parliament.
7. Legislation that undermines the Scottish Parliament has been accompanied by statements from UK Government Ministers that raise further concerns about the future of devolution - such as the Leader of the House of Commons recently suggesting the UK's constitution should be restored "to its proper constitutional form" after "constitutional tinkering".⁶
8. The Internal Market Act means that devolved powers will now be exercised in a system designed and controlled by UK Ministers, and imposed on the Scottish Parliament without its consent. These new constraints will operate automatically and without any of the exemptions and protections for – and recognition of the value of – local autonomy that apply in the EU single market. The Act also confers new powers on UK Ministers to change the powers of the Scottish Parliament without its consent: the secondary legislation powers in the Act enable areas currently controlled by devolved parliaments to be brought within scope of the market access principles by UK Ministers altering the Act's exclusions list.
9. This paper explains why the Act is a fundamental threat to the devolution settlement in Scotland. It will show that, contrary to UK Ministers' assurances,

⁴ The Scottish Government's proposals set out a prospectus for a rebalancing of powers in the UK to take account of EU exit, with additional powers in areas like migration and employment rights coming to Scotland. These proposals were similarly rejected without meaningful consideration.

⁵ There has been some recognition at Westminster of the need for a fundamental cultural and attitudinal shift in how devolution is recognised and respected as a permanent part of the UK's constitutional arrangements. The Public Administration and Constitutional Affairs Committee for example produced a report in 2017 on Brexit and devolution that recognised the implications of EU exit for the UK's constitutional arrangements: [Devolution and Exiting the EU: reconciling differences and building strong relationships - Public Administration and Constitutional Affairs Committee - House of Commons \(parliament.uk\)](#).

⁶ Leader of the House of Commons' answer to Imran Ahmad Khan, House of Commons, 26 Nov 2020: [Business of the House - Thursday 26 November 2020 - Hansard - UK Parliament](#).

the Act does not simply replicate the rules that provide for regulatory coherence in the EU single market; nor do its provisions mirror the internal market rules that pertain in other devolved or federal states. Rather, the Act fundamentally damages the devolution settlement. The paper also demonstrates that, far from ensuring clarity for business and consumers, the Act provides conditions for regulatory incoherence, business uncertainty and consumer confusion. During the passage of the Internal Market Bill, a range of stakeholders – including business and farming organisations, environmental groups, public health charities and professional organisations – raised concerns, which were downplayed, or not acknowledged, by the UK Government.

10. In a United Kingdom context, the Scottish Government recognises that leaving the European Union means that arrangements to replace EU law may be need to be agreed between the four governments in the UK, where these are in Scotland's interests and where they recognise and respect devolution. The Scottish Government has participated in good faith since 2017 in the development of common frameworks. Common frameworks are arrangements across a range of policy areas to manage any policy divergence upon EU exit. They are voluntary, negotiated and agreed by all four governments in the UK, not imposed by one. As this paper will explain, the Act makes progress on finalising these arrangements significantly more challenging.
11. The UK Internal Market Act is a tipping point. Current constitutional arrangements, as they have been understood for more than two decades, are becoming increasingly unsustainable. A majority of the Scottish people who voted in the EU exit referendum, voted to remain in the EU; in addition, Scottish people have not given their consent to the constraints that have been placed on the Scottish Parliament as a result of UK Government decisions and Westminster legislation since the Brexit vote. Yet both these events have happened: Brexit, and significant detrimental changes to the devolution settlement. It is against this background that the Scottish Government believes people in Scotland have the right to choose their own future as an independent country.

Part Two:

Devolution Since 1999

12. The devolution settlement voted for by people in Scotland in the 1997 referendum was a “reserved powers” model. This model established that a power is devolved to the Scottish Parliament unless expressly reserved to Westminster, significantly reducing the scope for disputes over competence. Importantly, there was no hierarchy of governments in the UK. The Scottish Government is accountable to the Scottish Parliament, elected by people in Scotland, not to the UK Government. UK Ministers have had no oversight of the decisions of the democratically elected and accountable Scottish Parliament and Government in devolved areas and apart from some very limited exceptions have no powers to intervene in their decisions.
13. That settlement is now in the process of being undermined by recent legislation at Westminster.
14. The competence of the Scottish Parliament has expanded over the last 20 years to include further tax powers and some aspects of social security policy, in a manner compatible with the model of devolution endorsed by people in Scotland in 1997. The Scottish Parliament and Government are responsible for making decisions on areas that matter to people in Scotland, ensuring decisions are made more locally to reflect Scotland’s specific social, demographic, industrial, cultural, environmental and geographic circumstances.
15. Recent UK legislation has started to reverse this process with, for example, the reservation of state aid in the Internal Market Act.
16. Devolution has been of huge benefit to the political, economic⁷ and social wellbeing of Scotland. It has enabled the Scottish Parliament and Government to set policy in areas of fundamental economic, social and cultural importance to Scotland, such as land reform; smoking and alcohol; free personal care; access to Higher Education; access to medicines; and stewardship of natural resources. These important issues have been addressed in ways that reflect Scotland’s particular needs and circumstances, and the views of people in Scotland. Devolution has enabled successive Scottish Governments to set a vision for the kind of outcomes we want to achieve in Scotland – as voted for by people in Scotland.
17. As part of the EU single market, where importance is placed on pursuing local social policy objectives alongside economic growth, devolution in Scotland has allowed for a strategic policy approach that balances sustainable economic growth with wider social and environmental goals. Devolution has

⁷ See Annex C for analysis of economic performance during modern devolution.

also led to policy innovation across the UK, with real value generated by diversity in policy making across the devolved legislatures.

18. The Scottish Government has set out its overall purpose, and performance outcomes and indicators, in the National Performance Framework. That purpose is:

“To focus on creating a more successful country with opportunities for all of Scotland to flourish through increased wellbeing, and sustainable and inclusive economic growth.”⁸

19. In considering how to exercise its powers and responsibilities, the Scottish Government looks at the effect on these national outcomes as a whole. The UK Internal Market Act’s narrower focus on “barriers” to trade or purely market considerations does not encompass these wider considerations under the National Performance Framework. There are many examples of devolved powers being used to effect market changes in pursuit of these wider policy objectives, including minimum alcohol unit pricing, a ban on the sale of raw milk on health grounds, banning the use of plastic cotton buds or microbeads in cosmetics and strict recycling targets.

⁸ <https://nationalperformance.gov.scot/>.

Part Three:

The UK Government's Approach to Devolution Since the EU Referendum

20. The UK Internal Market Act constitutes the most significant and far-reaching assault on devolution since 1999. It has prompted the Welsh Government to launch legal action, which the Scottish Government has supported, against what it calls an “attack” on the competence of the Senedd Cymru (the Welsh Parliament).⁹ However, the Act sits within a wider set of developments since the 2016 referendum: the devolved administrations’ involvement in the EU negotiations process, the EU Withdrawal Act, the first Scottish Continuity Bill, and the UK Government’s approach to the constitutional convention that safeguards devolved parliaments’ ability to protect devolution (the Sewel Convention).

The Brexit vote & subsequent negotiations process

21. In September 2016, in the EU exit referendum, the vote to leave won by a margin of 52% to 48%. Overall in Scotland, of votes counted, remain won by 62% to 38%, with every local authority area in Scotland voting by a majority to remain.

22. Despite the clear wishes of Scottish voters in the referendum, the UK Government, under successive Prime Ministers, has consistently pursued an approach to EU exit that does not recognise the clear position in Scotland of supporting EU membership.

23. The Scottish Government has sought to engage constructively with the UK Government on the terms of the UK’s departure from the EU, to protect Scotland’s interests whilst respecting, with regret, the result of the referendum in other parts of the UK.

24. Following negotiations and agreement between the then Prime Minister, Theresa May, and the heads of the devolved governments including the First Minister of Scotland, the Joint Ministerial Committee on EU Negotiations (JMC(EN)) was established in 2016 to provide a mechanism for the devolved administrations to be engaged in determining the UK’s approach to EU exit. Its Terms of Reference are that,

⁹ [Written Statement: Legal challenge to the UK Internal Market Act 2020 \(19 January 2021\) | GOV.WALES.](#)

“through the JMC(EN) the governments will work collaboratively to:

- discuss each government’s requirements for the future relationship with the EU;
- seek to agree a UK approach to, and objectives for, Article 50 negotiations; and
- provide oversight of negotiations with the EU, to ensure, as far as possible, that outcomes agreed by all four governments are secured from these negotiations; and,
- discuss issues stemming from the negotiation process which may impact upon or have consequences for the UK Government, the Scottish Government, the Welsh Government or the Northern Ireland Executive.”¹⁰

25. The JMC(EN) has met 28 times. Despite requests from the devolved administrations, the Committee did not work jointly on negotiating positions prior to the UK Government adopting its position on behalf of the whole UK. Devolved administrations were invited to express their views at various stages, but given no meaningful opportunity to influence the UK position which was decided by the UK Government alone. Information shared in the Committee by the UK Government has too often gone no further than that which was already available to the media and the general public.

26. As a consequence, JMC(EN) has been unable to fulfil its terms of reference. For example:

- the Scottish Government was only made aware of the date on which the UK Government would trigger Article 50 (the process of leaving the EU) when it was reported in the media;
- there was no meaningful attempt to engage with devolved administrations and incorporate their policy priorities ahead of the publication of the UK Government’s negotiation principles which proved decisive in determining that the outcome of the negotiations would be the hardest possible Brexit short of no deal; and
- the devolved administrations were not fully sighted on UK negotiators’ negotiating mandate, or principal documents, including legal texts underpinning negotiations.

26. The Scottish Government has set out clear policy positions, with supporting rationales, on a wide range of specific policy consequences of EU exit. These issues include replacement EU funding (such as the replacement to European Structural Funds, the UK’s “Shared Prosperity Fund” and Erasmus Plus); mobility and freedom of movement; policing; energy and climate change; international security; fisheries; science; consumer protection; air transport and road haulage; and governance issues impacting on the future relationship

¹⁰ [Joint Ministerial Committee communiqué: 24 October 2016 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/joint-ministerial-committee-communicue-24-october-2016).

with the EU.¹¹ None of these were reflected in the UK Government's approach to negotiating EU exit.

27. Most recently in June 2020, the Scottish Government published a detailed paper setting out why it was essential to extend the EU exit transition period given the COVID pandemic and economic crisis.¹² The UK Government disregarded that evidence as well as the repeated calls to extend the transition period, at great cost to Scotland and the whole UK.
28. Despite significant work and consistent good faith from the devolved administrations, the JMC(EN) has not been a four-nations forum to discuss and work through issues related to EU negotiations. The process, which was intended to forge genuine collaboration across the UK's constituent nations, to reflect the views and needs of people across those nations, failed to recognise the legitimacy and value of devolved administration's voices in negotiating positions. The outcome is a damaging, hard Brexit that in no way reflects the democratic will of people in Scotland.

The European Union (Withdrawal) Act 2018

29. The European Union (Withdrawal) Bill was introduced in the House of Commons on 13 July 2017. The UK Government set out the principal purpose of the Bill as,

"[providing] a functioning statute book on the day the UK leaves the EU. As a general rule, the same rules and laws will apply on the day after exit as on the day before. It will then be for Parliament and, where appropriate, the devolved legislatures to make any future changes."¹³

30. To achieve this, the Bill provided for the repeal of the European Communities Act 1972, converting EU law into domestic law at the moment of withdrawal, delegated powers, including temporary powers for corrections to be made to the laws that would otherwise no longer operate appropriately once the UK left the EU, and to implement any future withdrawal agreement.
31. Clause 11 of the Bill as introduced contained a provision to place the modification of retained EU law outside the Scottish Parliament's competence in a way which would not have been compatible with EU law immediately before withdrawal - effectively freezing devolved competence for an extended period after EU exit, with the discretion to lift any restrictions lying solely with UK Ministers. This provision would have given the UK Parliament and UK Government the unilateral power to make decisions in devolved policy areas

¹¹ [Brexite - gov.scot \(www.gov.scot\)](http://www.gov.scot).

¹² [Coronavirus \(COVID-19\): the case for extending the Brexit transition period - gov.scot \(www.gov.scot\)](http://www.gov.scot).

¹³ [European Union \(Withdrawal\) Act 2018 \(legislation.gov.uk\)](http://legislation.gov.uk).

previously affected by EU law. Schedule 3 of the Bill made parallel provision in respect of the powers of Scottish Ministers.

32. The Scottish Government rejected in principle the proposition that devolved competence should be constrained in this way following EU exit, arguing that policy responsibility for matters within devolved competence lie with the Scottish Government, accountable to the Scottish Parliament. This underscored a wider principle: that on EU exit, the Scottish Parliament should be in the same position as the UK Parliament: able to act within its area of competence in the way it sees fit.
33. Following widespread criticism of Clause 11 (including the unanimous report of the Scottish Parliament's Finance and Constitution Committee¹⁴), the UK Government brought forward amendments now contained at Section 12 of the enacted legislation. This provision gives powers to UK Ministers to unilaterally impose constraints on devolved competence, without the consent of the Scottish Parliament.
34. One of the fundamental principles of the devolution settlement is that the powers and responsibilities of the Scottish Parliament, and in turn, the Scottish Government, cannot be changed without its consent. This is embodied in the statutory procedures under the Scotland Act 1998 which require the agreement of the Scottish Parliament, as well the House of Commons and the House of Lords, before such changes can be made by secondary legislation.¹⁵ The Sewel Convention similarly provides that consent will normally be sought from the Scottish Parliament before changes can be made by primary legislation at Westminster.
35. The reasons for this requirement are clear: the doctrine of Westminster's sovereignty means that, without the need for consent from the Scottish Parliament, its functions and its powers are not protected in the UK's current constitutional system – but built on sand.
36. The power in section 12 of the EU (Withdrawal) Act 2018 ("EU Withdrawal Act") for UK Ministers to change that competence, unilaterally and without consent, overrides that fundamental constitutional principle of the devolution settlement, which is why it was rejected by both the Scottish Government and the Scottish Parliament.
37. Despite the refusal of legislative consent by the Scottish Parliament, the UK Government proceeded with the legislation, consciously and deliberately overriding the Sewel Convention for the first time since devolution in 1999. The Sewel Convention is considered further below.

¹⁴ [European Union \(Withdrawal\) Bill - Parliamentary Business : Scottish Parliament.](#)

¹⁵ SS. 30 and 63, [Scotland Act 1998 \(legislation.gov.uk\).](#)

38. It is noteworthy that the UK Government's insistence on this section and its override of the Sewel Convention has been unnecessary. The UK Government has a statutory duty to publish quarterly reports on any use of these Section 12 powers. These powers have not been used to date: the four governments of the UK have been able to work together through the common frameworks process.
39. The passage of the EU Withdrawal Act demonstrates two wider themes of the UK Government's approach to devolution during the process of leaving the EU, both of which have continued with the UK Internal Market Act.
40. First, the original Clause 11 and the subsequent section 12 demonstrated both a concern that devolved competence might be used in a way that diverged from the UK Government's preferred policy; and a desire for the UK Government to have power to override devolved decision making when it disagrees. The Bill therefore rejected an approach based on negotiation and agreement between different decision-making bodies in favour of centralisation of power in Whitehall and Westminster.
41. Second, the effect of the Bill was not fully captured. The Bill and the process of EU exit tended to be framed as returning powers to the Scottish Parliament. In fact, these powers were vested in the Scottish Parliament by the Scotland Act 1998; the effect of EU exit was to remove the obligation to comply with EU law in their exercise (an obligation that the Westminster Parliament also had to follow). The actual effect of the Bill, in both its original and final forms, is to constrain existing devolved competence - not as a result of international obligations, but as a result of domestic UK law, including the unilateral exercise of powers by UK Ministers.

The First Scottish Continuity Bill

42. One of the constraints placed on the powers of the Scottish Parliament by the EU Withdrawal Act was to add the Act to the list of "entrenched" laws at Schedule 4 of the Scotland Act 1998 that cannot be modified by the Scottish Parliament.
43. The result was to undermine the competence of the Scottish Parliament to make its own provision for legal continuity on leaving the EU. This was done after the Scottish Parliament had passed the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. That Bill did not proceed to Royal Assent as it was referred to the UK Supreme Court by the UK Government in order to question the Scottish Parliament's competence to pass the legislation.

44. The UK Supreme Court decided that, for all but one minor provision, the Continuity Bill had been within competence when it was passed by the Scottish Parliament.¹⁶ However, the effect of the EU Withdrawal Act coming into force before the Scottish Bill received Royal Assent was to constrain the Scottish Parliament's competence at the point the Court considered the case, as so many of its provisions had, retrospectively, been put beyond competence.

45. This sequence of events was succinctly described later by Lord Reed, now President of the UK Supreme Court:

“The consequence is that it is legally possible for the UK Government to react to the passage of a Bill in the Scottish Parliament by making a reference [to the Supreme Court] and then persuading the UK Parliament to amend the Scotland Act so as to render the Bill invalid.”¹⁷

46. The UK Internal Market Act has similarly been included in Schedule 4 of the Scotland Act, further constraining devolved competence and again without the consent of the Scottish Parliament.

The Sewel Convention

47. The Sewel Convention stipulates that the UK Parliament should not normally legislate on a devolved matter, or adjust legislative competence, without the consent of the devolved legislatures.¹⁸ It is named after the UK Government Minister, Lord Sewel, who set out the terms of the policy in the House of Lords during the passage of the Scotland Bill 1997-98 on 21 July 1998:

“Section 28 (7) of the Scotland Act 1998 makes it clear that the devolution of legislative competence to the Scottish parliament does not affect the ability of Westminster to legislate for Scotland even in relation to devolved matters. Indeed, as paragraph 4.4 of the White Paper explained, we envisage that there could be instances where it would be more convenient for legislation on devolved matters to be passed by the United Kingdom Parliament. However, ... *we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament.*” [emphasis added]¹⁹

48. The Sewel Convention has been fundamental to the operation of devolution in the UK since 1999.²⁰ The doctrine of unlimited Parliamentary sovereignty of

¹⁶ [THE UK WITHDRAWAL FROM THE EUROPEAN UNION \(LEGAL CONTINUITY\) \(SCOTLAND\) BILL - A reference by the Attorney General and the Advocate General for Scotland \(Scotland\) \(supremecourt.uk\)](#); [Continuity Bill update - gov.scot \(www.gov.scot\)](#).

¹⁷ P17, [Scotland's Devolved Settlement and the Role of the Courts \(supremecourt.uk\)](#).

¹⁸ [Scotland Act 2016 \(legislation.gov.uk\)](#).

¹⁹ [Scotland Bill \(Hansard, 21 July 1998\) \(parliament.uk\)](#).

²⁰ [Post-Devolution Primary Legislation affecting Scotland \(publishing.service.gov.uk\)](#).

the Westminster Parliament (sometimes referred to as Diceyan sovereignty after the English jurist A.V. Dicey) means that it is not possible for Westminster to reduce or diminish its own sovereignty. It can therefore legally continue to legislate in devolved areas or to change or abolish the Scottish Parliament. The Sewel Convention recognises that there is little point in a Scottish Parliament that is overruled by legislation at Westminster and little stability in a Parliament that can have its powers changed against its will, or that can be abolished.

49. As Diceyan sovereignty remains the predominant view at Westminster, the only way of securing the power and role of the Scottish Parliament is therefore by a self-denying, binding rule that Westminster would not legislate in devolved areas or adjust devolved competence without the express consent of the Scottish Parliament. Hence the establishment of the Sewel Convention, which is known as a constitutional convention: a rule that while not legally enforceable, is binding on the actors in the system, and recognised to be so. Prior to the 2016 referendum, the Sewel Convention had been observed consistently and diligently by successive UK Governments.

50. Following the independence referendum of 2014, the all-party Smith Commission, established to consider further powers for the Scottish Parliament to strengthen its place in the UK, recommended that the Sewel Convention be placed on a statutory footing and its wording is now on the face of the Scotland Act.²¹ While the UK Supreme Court has ruled that this legislative provision is not enforceable,²² it is recognised as playing a fundamental role in the operation of the UK's constitution.²³ Until recent events, it was the sole guarantee that Westminster's exercise of its parliamentary sovereignty would respect of the powers and autonomy of the devolved legislatures.

51. However, the UK Government has chosen to override the Sewel Convention on a number of occasions since the Brexit vote:

- The EU Withdrawal Act in 2018 – this marked the first time Westminster had legislated without the consent of the Scottish Parliament.
- The EU (Withdrawal Agreement) Act 2020 - which was rejected by the Scottish Parliament, Senedd and the NI Assembly.
- The UK Internal Market Act 2020 – despite both the Scottish Parliament and the Welsh Senedd refusing consent on grounds the Act fundamentally changes, and damages, the devolution settlement of the UK.

²¹ [The Smith Commission Report-Overview \(parliament.scot\)](https://www.parliament.scot/SmithCommission/SmithCommissionReport-Overview).

²² Para 148, [R \(on the application of Miller and another\) \(Respondents\) v Secretary of State for Exiting the European Union \(Appellant\) and 2 Judicial Reviews \(supremecourt.uk\)](https://www.supremecourt.uk/cases/r-on-the-application-of-miller-and-another-v-secretary-of-state-for-exiting-the-european-union/).

²³ Para 151, *ibid*.

- The European Union Future Relationship Act 2020 – the UK Government pressed ahead with legislation on the EU-UK deal without the consent of the Scottish Parliament.

52. The UK Government has sought to justify this on the grounds that the circumstances of EU exit were “not normal” and that, therefore, it could proceed with these pieces of legislation without consent. However, on each occasion the UK Government sought the consent of the Scottish Parliament, which indicates it was required for elements of each Bill. The exception to the Sewel Convention for circumstances that are “not normal” can have no meaning if it is only applied retrospectively once the Scottish Parliament has made its decision, and refused consent. This reasoning of the UK Government has therefore emptied the Convention of its force, and replaced a binding constitutional rule with a procedure that can be disregarded at UK Ministers’ discretion.

53. The importance of these developments for the devolution settlement cannot be overstated. While the circumstances of EU exit are undoubtedly unprecedented, overriding the Sewel Convention was not justified, especially in the case of the UK Internal Market Act which was not necessary to implement an international treaty or to progress the process of EU exit. The effect is that the UK Government has shown it is willing to reshape the devolution settlement, unilaterally and in the most fundamental way, setting aside any rules of the UK constitutional system that it finds inconvenient.

Part Four:

The UK Internal Market Act 2020

What is an “internal market”?

54. The term “internal market” does not have a fixed or widely accepted single meaning. Trading activities intersect with a large range of other policy considerations that make up the governance arrangements of a state, such as:

- the civil law to underpin contracts and resolve disputes;
- product standards for safety and consumer protection;
- safety in the workplace;
- employment laws;
- competition policy;
- formation of companies, to limit risk and liability;
- intellectual property;
- rules for transport and safety of vehicles;
- environmental standards;
- promotion of human health;
- protection of animal and plant health;
- provision of public services, such as health and education;
- government procurement rules; and
- taxation of trading activities.

55. An internal market can therefore be seen to encompass many, if not almost all, areas of government and parliamentary activity, and public policy considerations. Internal markets are, in the view of legal authority, Professor Michael Dougan,

“...not merely about 'trade'. They are also about fundamental policy choices concerning how to structure your economy and society; as well as basic constitutional questions about the institutions, processes and values that underpin your public and democratic realm.”²⁴

56. The UK Government’s White Paper preceding the Bill describes the existence of a “UK internal market” that has been the bedrock of shared prosperity since 1707, a “centuries old” institution, overlaid between 1973 and 2020 by membership of the supranational European institutions (paragraphs 58-64).²⁵

57. While it is true that any state’s market oversight arrangements are particular to that state’s constitutional and economic development, the model offered by

²⁴ <https://news.liverpool.ac.uk/2018/03/02/watch-professor-michael-dougan-uks-internal-market-dependent-eu-rules/>.

²⁵ [UK internal market \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/674442/uk-internal-market-act-2020.pdf).

the UK Government in the White Paper disregards the complex dynamics that led to the 1707 Union, and the development of the UK state thereafter (see Annex B for more detailed discussion). The UK Internal Market Act does not represent a restoration or continuation of trading relationships across the UK before the EU single market: it is a new, unilaterally designed and imposed regime, that will operate in a manner that does not allow for adequate consideration of the types of fundamental policy choices outlined by Professor Dougan.

58. The UK Government's approach advances a narrow view of the internal market in the UK, at least for the purposes of the provisions in the Act:

"The UK's Internal Market is the set of rules which ensures there are no barriers to trading within the UK."²⁶

59. Unlike the EU single market, the UK Government's approach does not recognise that there is a far greater range of legitimate policy goals – for example tackling inequality or environmental protection – that nations in a shared market area can pursue through market regulation. Annex A explores different existing international models in more detail.

EU Exit and the UK's internal market arrangements

60. In 2017, the four UK governments undertook to work together to agree common ways of working in relation to devolved matters then subject to EU law: the common frameworks process. It was agreed that common frameworks would be developed in respect of a range of factors, including "ensuring the functioning of the UK internal market, *while acknowledging policy divergence*" [emphasis added].²⁷

61. The Scottish Government has participated in good faith in the common frameworks process since 2017, and believes that this process, which is designed to manage policy differences on the basis of agreement and is founded on respect for devolution, is all that is needed to manage the practical regulatory and market implications of the UK leaving the EU.

62. There are now around 30 areas where there is agreement that common frameworks may be required, covering a range of policy areas formerly subject to EU rules, such as agricultural support, public procurement, fisheries, animal health, food safety and plant health.

63. Common frameworks are based on agreement, not imposition, and the incentive to agree ways of aligning and managing differences is fundamentally weakened when the market access principles of the Internal Market Act

²⁶ Para 72, *ibid.*

²⁷ [Joint Ministerial Committee communiqué: 24 October 2016 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/joint-ministerial-committee-communicue-24-october-2016).

require standards coming from other UK nations to be accepted across all nations.

64. What started as discussions of the UK's internal market within the common frameworks project rapidly became a parallel project led by the UK Department for Business, Energy and Industrial Strategy (BEIS).
65. It became increasingly evident over the course of 2017 and into 2018 that the policy proposals emerging from this BEIS-led activity were incompatible with the principles and operation of devolution in the UK since 1999.
66. The Scottish Government withdrew from this UK Government internal market project in March 2019. This decision was taken after it became clear that the Scottish Government's concerns regarding the project and the implications for devolution, and for the common frameworks process, were being ignored.
67. The Welsh Government, which stayed part of the UK Government's internal market project, has criticised the UK Government's approach saying that "it was agreed that this would be a joint piece of work [and] it is wholly unacceptable that we now seem to be faced with a solely UK Government generated proposal."²⁸
68. On 16 July 2020, the UK Government published its White Paper on the Internal Market, giving stakeholders no advance copy²⁹ and just four weeks to digest and respond to the far-reaching and complex proposals. The consultation period fell during the Scottish Parliamentary recess. The length and timing of the consultation period was something highlighted by a number of stakeholders in responding to the White Paper consultation, including by the other devolved administrations. Full consultation responses have never been published by the UK Government.
69. On 9 September 2020, the UK Government published the UK Internal Market Bill, which was shared for the first time with the devolved administrations late the evening before. The UK Government then disregarded constitutional norms set out in the Sewel Convention by proceeding with the legislation despite both the Scottish Parliament and Welsh Senedd refusing consent to it. The Act came in to force on 1 January 2021.

Overview of the Act's provisions

70. The Act received Royal Assent on 17 December 2020 after the truncated scrutiny process and considerable resistance in the House of Lords where peers from all parties criticised the Bill, attempting to alter it numerous times. The Act, as enacted, contains a number of amendments made in the

²⁸ Welsh Government, letter to the Duchy of Lancaster & Alok Sharma, 7 July 2020:

<https://gov.wales/sites/default/files/inline-documents/2020-07/letter-to-gove-and-sharma.pdf>.

²⁹ Devolved administrations were given no advance copy of the proposals, despite the far-reaching implications for devolution.

Commons and the Lords during its final parliamentary stages, the most significant of which are outlined below.

71. The Act introduces a new market access regime, comprising mutual recognition and non-discrimination principles. The regime means that goods which are sold in one part of the UK (where they originate from or are imported to) are automatically accepted across all other parts of the UK, regardless of the rules there; and where provision of a service is regulated across the UK, the authorisation for that service in one part of the UK authorisation will be recognised in all other parts. The principles are outlined in more detail below.
72. The Act also introduces new rules for the recognition of professional qualifications in the UK. It establishes a new body, the Office for the Internal Market (OIM), within the Competition and Markets Authority (CMA), to monitor, advise and report on the internal market. The Act confers new powers on UK Ministers to spend in devolved policy areas, without the oversight of the Scottish Parliament and reserves state aid, a previously devolved matter. As discussed above, the entire Act has been placed beyond any modification by the Scottish Parliament, introducing further uncertainty over the exercise of devolved competence in the future, when compared with the well understood EU law constraints that applied symmetrically across the UK until the UK exited the EU.
73. The main provisions of the Act are: ³⁰

Part 1 and Schedule 1 - UK Market Access: Goods

74. This section introduces a new market access regime for goods in the UK. The regime is based on the principles of:
- (1) mutual recognition - any good that meets regulatory requirements in one part of the UK can be sold in any other part, without having to adhere to the relevant regulatory requirement in that other part; and
 - (2) non-discrimination - a prohibition on direct or indirect discrimination based on treating local and incoming goods differently. It also provides for limited exclusions from these rules, based on individual policy areas.
75. There are some goods currently excluded from the market access principles such as pesticides, fertilisers and animal feed. However, exclusions are limited in their application, which creates a complex new regulatory landscape (more detail on exclusions is at Annex D). The Act introduces “delegated powers” (where primary legislation can be changed without needing a new Bill), which mean that UK Ministers alone have the power to change what is in and out of scope of these provisions, with no formal role for the devolved legislatures. These powers are referred to as “Henry VIII” powers. The Bill

³⁰ [United Kingdom Internal Market Act 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk).

was amended in the House of Lords to require UK Ministers to seek the consent of the devolved administrations before exercising the Henry VIII powers to alter the scope of the non-discrimination principle, or to amend Schedule 1 (exclusion of the market access principles in certain cases). As a result of the amendment, UK Ministers can proceed without this consent after a period of one month and must make a statement to the UK Parliament explaining why. UK Ministers can then change what is excluded from the market access principles through using secondary legislation, whether these changes affect devolution or not, and without consent from the devolved administrations.

76. An amendment to the Bill during scrutiny in the House of Lords means that UK Ministers may also use these delegated powers to exclude “certain cases, matters, requirements or provision” in common frameworks areas from the market access principles. This can only be done with agreement across the four UK nations, and then only with the consent of the UK Government Secretary of State to exercise their powers in this respect. The default position is that policy areas already subject to the common frameworks process will be within scope of the Act’s market access principles.
77. This part of the Act was also amended by the UK Government to exclude manner of sale requirements from the Act’s mutual recognition principle. A manner of sale requirement is a statutory requirement “that governs any aspect of the circumstances or manner in which the goods are sold (such as where, when, by whom, to whom, or the price or other terms on which they may be sold).”
78. The exemption will not apply to any requirement that “appears to be designed artificially to avoid the operation of the mutual recognition principle in relation to what would otherwise be a requirement within the scope of that principle.”
79. This amendment was characterised by UK Ministers as providing legal certainty that measures such as minimum unit pricing (MUP), or similar conditions on the sale of goods, are exempt from the mutual recognition principle. MUP and similar measures could in future, however, still be caught by the Act’s non-discrimination principle.

Part 2 and Schedule 2 – UK Market Access: Services

80. This establishes a new market access regime for services in the UK based on the same mutual recognition and non-discrimination principles as above. Again, it provides for limited exemptions from these provisions; and what is in or out of scope can be changed, unilaterally, by the UK Secretary of State, with no powers for the devolved legislatures.
81. As a result, a UK Minister can subject devolved policy areas to “market access” principles regardless of the view of the people of Scotland or the

Scottish Parliament. The Parliament's ability to regulate, and set policy for, services in Scotland could therefore be fundamentally undermined.

82. The practical effect is potentially far-reaching. Policy areas which could be brought under the market access principles by the UK Government against the wishes of the Scottish Parliament, include:

- transport services, such as railways;
- water supply and sewerage services; and
- social services relating to social housing.

83. Perhaps most noteworthy of all, the UK Government has given itself, and any subsequent UK Governments, the power to subject "healthcare services provided in hospitals" and "other healthcare facilities or at other places" in Scotland, to market access principles.

84. The UK Government maintained during the passage of the Bill that it should be allowed the power to take this action without the consent of the Scottish Parliament.

85. As above, the Act was amended in the Lords to require UK Ministers to seek the consent of the devolved administrations before exercising the delegated powers to amend Schedule 2 (services exclusions). However, UK Ministers can proceed without this consent after a period of one month, making a statement to the UK Parliament explaining why.

86. The Bill was also amended to require UK Ministers to seek the consent of the devolved administrations before exercising the delegated powers to alter the list of legitimate aims specified in S21(7) of the Act. Under the Act, a relevant devolved measure would not be covered by the indirect discrimination provisions where it cannot reasonably be considered a necessary means of achieving a legitimate aim.³¹ UK Ministers can, however, again proceed without this consent after a period of one month, making a statement to the UK Parliament explaining why.

Part 3 – Professional Qualifications and Regulation

87. This provides for a system for the mutual recognition of professional qualifications that are regulated in law across the UK. It introduces an "automatic recognition" principle for a professional qualified in one part of the UK to be treated automatically as qualified in respect of that profession in another part of the UK, as well as setting out the situations where the automatic recognition principle does not apply. Certain legal professions are excluded, as is school teaching, which was eventually excluded after considerable pressure from Scottish teaching organisations, the Scottish Government and peers during the passage of the Bill.

³¹ Para 75 highlights that similar provisions apply to goods, under section 8.

Part 4 – Independent Advice and Monitoring of UK Internal Market

88. This provides for the creation of a new reporting, advising and monitoring function for the Competition and Markets Authority (CMA), by creating “the Office for the Internal Market” within the body. In addition to these functions, the CMA will have powers to require information from an individual, business or public authority, and powers to issue penalty fines for non-compliance. It will report to all four governments, and where a report is requested by one of the UK administrations – and supplied by the CMA – the relevant government must make a statement to its respective legislature. The powers of the CMA are limited, however: it can choose not to exercise them and there is no obligation on the governments to act on CMA reports. It is also not clear how disputes will be resolved.

Part 5 – Northern Ireland Protocol³²

89. This Part contains provisions relating to the Protocol and state aid.

Part 6 – Financial Assistance Powers

90. This section gives UK Ministers a wide new power to take decisions on spending on the following devolved matters across the UK: economic development, infrastructure, culture, sporting activities, domestic educational and training activities and exchanges, and international education and training activities and exchanges. This restores to UK Ministers powers that (with a few minor exceptions) were removed from them by the Scotland Act in 1998 and transferred to the Scottish Ministers to be exercised under the authority of the Scottish Parliament. This is a fundamental change which undermines a central plank of devolution: the clear split of governmental responsibilities that was established in 1999.
91. This new power allows the UK Government to bypass devolved decision making, overriding democratic processes for allocating spending in Scotland. UK Ministers have already used it to replace programmes previously administered via the European Structural Funds. In January 2021, the UK Government announced it would use the power to bypass the devolved administrations to replace European Structural Funds with a centrally controlled fund: the Shared Prosperity Fund. For Scotland, this means more than £100 million a year could be spent in areas that are normally devolved to

³² When the Internal Market Bill was originally introduced, it contained provisions that would have allowed for UK Ministers to act in conflict with international law by acting in contradiction to the EU Withdrawal Agreement in respect of the Northern Ireland Protocol. It would have enabled the UK Government to disregard parts of the Protocol agreement with the EU on state aids, unfettered Northern Irish access to British markets and tariffs on goods moving from Great Britain to Northern Ireland. The EU launched infringement proceedings against the UK Government in respect of this part of the Bill and the Withdrawal Agreement; and the relevant clauses received criticism in the House of Lords with peers removing them. The UK Government initially reintroduced the clauses, but eventually conceded to further amendments from peers which stripped the clauses from the Bill.

the Scottish Parliament – with no say for Scotland’s elected representatives in the Scottish Parliament.³³

92. The UK Government has also announced plans to use these spending powers in a new “Levelling Up” Fund which will bypass devolved administrations and parliaments in allocating spending in ways that could contradict priorities set by the Scottish Parliament and Government. This new £4 billion fund was originally intended for England only. Following the UK Government’s Spending Review, it was expected that consequential funding (the mechanism which means funds will be made available to devolved nations to spend, reflecting public spending in England) would come to the devolved nations to be spent in line with devolved spending priorities. This is now not the case.

93. Finally, the powers given to the UK Government in this part of the Act have led to the UK Government replacing the Erasmus Plus EU learning programme with a UK-wide programme.³⁴ We discuss this later in the document.

Part 7 - Subsidy Control

94. This part amends Schedule 5 of the Scotland Act 1998 to remove power over subsidy controls from devolved legislatures, taking the powers to Westminster instead when the UK ceased to follow EU state aid rules. The subsidy regime is being developed by the UK Government separately. At the time of this publication there is still no regime in place.

Part 8 - Final Provisions

95. This adds the Act to the list of protected enactments in Schedule 4 of the Scotland Act 1998. The effect of this is that the Scottish Parliament cannot change the content of the Act, or how it is applied.

Comparison with the EU Single Market

96. Devolution in the UK was established in the context of EU membership. EU rules governed not only the UK’s external trade relationships with other EU member states, but also questions of trade and regulatory coherence across the UK’s nations.³⁵

97. The UK Government’s position is that the UK Internal Market Act will simply replace EU rules with similar rules for the UK upon exit from the EU single

³³ [New UK Shared Prosperity Fund to bypass Holyrood - BBC News.](#)

³⁴ [New Turing scheme to support thousands of students to study and work abroad - GOV.UK \(www.gov.uk\).](#)

³⁵ [UKIM, Briefing, Paper, -, Prof, Michael, Dougan, 15, September, 2020.pdf \(liverpool.ac.uk\).](#)

market. However, the process through which EU rules are developed is fundamentally different. EU processes seek to find agreement between member states, whereas the Act unilaterally imposes regulation on the devolved institutions. The EU rules aim for a balance between economic interests and other policy goals (the principle of proportionality), as well as valuing and protecting the principle that decisions should be made as locally to people as possible (the principle of subsidiarity). The Act has no such balance or protection.

98. The UK Government's expressed view is that EU exit could lead to differences emerging between the UK and devolved governments in regulation governing the access of goods and services to their respective domestic markets, and that this will be to the detriment of internal UK trade flows.
99. It states that this is an issue that arises as a result of the UK exiting the EU single market where the implementation of mutual recognition and non-discrimination principles are key tools preventing impediments to the smooth operation of the EU single market. In the Scottish Government's view, this does not adequately reflect the way in which the EU manages the single market and draws an inaccurate equivalence between the EU regime that we have left and that which the Act imposes.
100. As a result – despite the ongoing common frameworks project – the UK Government's Internal Market Act includes provisions requiring strict adherence to the principles of non-discrimination and mutual recognition between the four nations of the UK.
101. Although non-discrimination and mutual recognition are core elements in the EU single market tool-kit, so too is a common legislative framework whereby all member states jointly and collectively agree on the broad regulatory framework – including the basic or minimum standards with which goods and services must comply, governing the EU single market. This ensures that all EU member states are represented when minimum EU-wide standards for goods and services are decided.
102. This also ensures that mutual recognition – that is the principle that a good or service that meets the regulatory standards in one part of the single market can be sold in any other part of that market – does not involve a race to the bottom. Even so, EU law allows for exceptions to both principles of non-discrimination and mutual recognition (and therefore to free movement of goods and services), as long as such exceptions can be justified as necessary and proportionate to the outcome that is obtained, and which cannot be achieved by other means.
103. Article 36 of the Treaty on the Functioning of the European Union provides that prohibitions or restrictions on imports or exports may be permitted if justified on a number of grounds including the protection of:

“...public morality, public policy or public security; the protection of health and life of humans, animals or plants...”³⁶

104. There is extensive case law confirming that member states, and indeed sub-state governments may legally prohibit imports of goods from other parts of the EU internal market on grounds including protecting public health and the protection of the environment.
105. The provisions of Article 36 and the manner in which it has been applied demonstrate that EU law respects the subsidiarity principle: that there will be instances where “local” responses to “local” problems are justified, even though this might involve prohibiting imports and thereby contravening the underlying principles of the EU single market.
106. The contrast between this cohesion and flexibility in the EU single market, and the Internal Market Act definitions of non-discrimination and mutual recognition is stark. In the UK legislation, the principles of non-discrimination and mutual recognition are almost absolute - even if this will be to the detriment of the social, environmental and health goals; and legislation of a particular UK nation. There are only very limited provisions that permit the prohibition of the sale of goods or services in one UK nation that are legally sold in other parts of the UK.
107. The development of the European single market, over decades, has been based on principles of trust, equality, cooperation, co-decision, proportionality, subsidiarity and consent, and setting a baseline of minimum agreed standards for member states’ own rules. The Act is based on unilateral decision-making and imposition, with no minimum standards or guarantees. The Act also creates a power for UK Ministers to alter what is in or out of the scope of the Act unilaterally (for example, health services are currently excluded), without the consent of devolved administrations.

³⁶ [Consolidated version of the Treaty on the Functioning of the European Union \(legislation.gov.uk\)](https://legislation.gov.uk).

Part Five:

The Effect of the UK Internal Market Act

The effect of the Act on the devolution settlement

108. Through the UK Internal Market Act, the UK Government has set in statute an “internal market” for the post-EU exit UK. This new regime will dictate the nature of policy making and the way the constituent parts of the UK engage with each other from now on.

Case study: Spending powers & the replacement of EU Structural Funds

The Issue: EU Structural Funds (ESF) support economic development across member states to invest in “smart, sustainable & inclusive” growth. UK nations no longer have access to these funds after exiting the EU.

What Scotland can do: The Scottish Government has successfully managed the ESF for many years, both before and after devolution, and expected to manage any replacement UK-wide fund in Scotland after EU exit.

What the Act means: The UK Internal Market Act at Part 6 gives the UK Government spending powers in devolved policy areas which means that the UK Government can exercise unilateral control over the UK replacement to ESF (the Shared Prosperity Fund, or SPF), bypassing the devolved administrations in ways that could undermine devolved spending choices, in devolved policy areas.³⁷ The ESF and replacement SPF are of great importance to the Scottish economy and to communities across Scotland. The Scottish Government has published a clear, detailed delivery plan for how we would spend the replacement funds which was developed in partnership with stakeholders and based on a broad consultation carried out at the start of 2020.³⁸

The UK Government has already decided to use these new powers to override devolution and operate the SPF unilaterally, bypassing the Scottish Government. This removes powers previously exercised by Scottish Ministers to take decisions on spending that reflect the investment needs of Scotland’s people, businesses and communities, and does not take into account the majority of consultation responses, which supported the Scottish Government’s approach. It is also not known what the priorities of spending will be, just that it will have “common branding”. EU Structural Funds allowed Scotland to establish funding priorities based on local conditions. The UK Government’s Shared Prosperity Fund allows for no such local prioritisation.

³⁷ For example, in Wales, concerns have been raised that the UK Government could act in direct conflict to the Welsh Government's decision not to build an M4 relief road: [M4 relief road: UK ministers 'could bypass Welsh Government' - BBC News](#).

³⁸ [Scottish Replacement For EU Structural Funds - gov.scot \(www.gov.scot\)](#).

109. While devolved legislatures will technically still be able to legislate as they currently do, laws that they pass will be fundamentally undermined by the Act's market access principles as well as being potentially open to legal challenge under the Act.
110. The legislation put in place in the Act is untested, complex and cuts across a wide range of areas and market features. It will create huge legal uncertainty and it can be expected that it will lead to a large amount of litigation.
111. The UK Internal Market Act will be an imposed constraint on devolved decision making, impacting asymmetrically on the devolved institutions in comparison to Westminster, as it will be a domestic legislative constraint imposed, and controlled, by Westminster.
112. It will also have a wide ranging and difficult to predict effect on devolved decision making. Being forced to accept goods, services and professional standards regardless of the standards set by devolved legislatures could also have a "chilling effect" on legislation. Potential new policy measures may not even be considered at all given the constraints on devolved powers to set standards across Scotland, and the possible asymmetric competition impacts on Scottish businesses of regulation. Constraining powers could constrain valuable policy innovation of devolved legislatures, with negative implications for the whole of the UK.

Case study (illustrative): Market access principles for goods & obesity

The Issue: Scotland has some of highest incidences of obesity among OECD countries. Being obese can cause a range of harms, including an increased risk of developing diseases like type 2 diabetes, hypertension, heart disease and some cancers.

What Scotland can do: The Scottish Parliament has powers to legislate for health matters. The parliament could in the future, for example, decide to legislate for measures to help tackle obesity, such as regulating in relation to certain food content standards.

What the Act means: If the Scottish Parliament decided to pass a law to regulate the content of goods to tackle the problem of obesity - in a manner that consciously sought to create a market impact in pursuit of a public health goal - it could not impose those standards on goods coming into Scotland from other parts of the UK, nor could it prevent those goods from entering the Scottish market, provided these satisfy regulations set elsewhere in the UK. Such a law may also be challenged by Scottish producers as an unnecessary barrier to their ability to trade freely across the UK.

This would be a direct constraint on the Scottish Parliament's ability to exercise devolved powers in health, making any attempt to regulate for food content standards meaningless and potentially open to legal challenge.

113. Fundamentally, the approach is inconsistent with the founding principles underpinning devolution within the UK, which depends on respect for devolved competence and restraint by Westminster in exercising its retained absolute parliamentary sovereignty. Differences in devolved areas have not

been problematic, and a solution which imposes a new unilaterally designed, decided and managed regime was not needed. The Act does not recognise the particular role or status of devolved institutions in the UK's constitutional system: in the case of Scotland, the Scottish Parliament and Government were guaranteed their permanence by the Scotland Act, after the Smith Commission following the 2014 referendum. The Scottish Parliament and Government are not just stakeholders in the UK: they are fundamental components of the machinery of government in the UK.

Case study: EU education programmes & Spending powers

The issue: Upon exiting the EU, the UK Government decided to cease participation in (and by doing so also ended Scotland's access to) Erasmus+, the EU mobility programme which has benefited Scotland as part of the EU.

What Scotland can do: Education is devolved, and the Scottish Government has always been clear that ongoing participation in Erasmus+ is in the best interests of Scotland – a view backed up by stakeholders such as NUS Scotland; and a view which has seen significant support from across Europe, reflected in a letter signed by over 145 MEPs and sent to President von der Leyen on 22/01/2021.³⁹ The President of the European Commission confirmed in her response that as a part of the UK, Scotland will not be able to participate as a full “Third Country” in its own right in Erasmus. We remain committed to encouraging full use of the elements of Erasmus+ that may remain open to Scotland, and we will look to explore further with the European Commission how we might maximise Scottish institutions' access to this vital programme.

What the Act means: The Act gives the UK Government power to provide financial assistance for specific purposes, including international education and training, and exchanges. UK Ministers have since confirmed that they intend to circumnavigate devolved administrations entirely and impose a replacement to Erasmus in Scotland without the consent of the Scottish Parliament: the UK Turing Scheme. This is a UK Government scheme that is likely to see Scotland worse off financially, leaving us unable to capitalise on our historic excellent performance under Erasmus; and with reduced opportunities for students, teachers and young people. The UK Government's plan to use the Internal Market Act to implement Turing negatively impacts upon our ability to provide students in Scotland with the best options for educational mobility and exchange; and impacts on devolution.

The effect of the Act on businesses, consumers and people in Scotland

114. The Scottish Government recognises that businesses want clarity in the context of an uncertain EU exit, and the global health and economic crisis caused by the COVID pandemic. The UK Government position is that that the Act gives business certainty, but it does the opposite: it destabilises devolution by undermining the Scottish Parliament's ability to set industry standards in devolved policy areas; creates regulatory incoherence (rather

³⁹ [MEPs ask if Scotland, Wales can rejoin Erasmus student program – POLITICO](#).

than collaboration) across the UK; opens the door to legal challenges; and risks a lowest common denominator approach to regulation and standards.

115. As we have already shown, the scope of the Act also goes further than EU single market rules. Given that the UK Government has said that the legislation is needed to address business uncertainty upon leaving the EU single market, it is unclear why the Act goes so much further in its blanket application and absence of exemptions than EU law. The common frameworks process was agreed to manage any regulatory gaps caused by leaving the EU. However, the Act was then introduced to manage things common frameworks cannot do.

116. Different standards have been applied across the UK for many years with no detriment to business or consumers. Instead, devolution has permitted variations in approach to reflect consumer preferences. The Act threatens to undermine how Scottish business can respond to consumer preferences. It also constrains recently devolved powers to support consumers in Scotland.⁴⁰

Case study: Market access principles & Minimum Unit Pricing

The issue: Alcohol use, particularly heavier consumption, has harmful consequences for individuals, families, friends and wider society in Scotland. On average, 20 people in Scotland died every week from illness caused by alcohol in 2019. Evidence shows that as alcohol becomes more affordable, drinking and alcohol-related harm increases, and that one of the best ways to reduce the amount of cheap alcohol drunk by people in any country is by making alcohol less affordable.

What Scotland can do: Public health is devolved and in 2012, the Scottish Parliament passed legislation to introduce a minimum price of 50 pence per unit of alcohol – this policy is known as minimum unit pricing (MUP). This measure aims to save lives, reduce hospital admissions, improve the lives of people affected by related secondary harms and, ultimately, have positive impacts across the whole health system and society.

What the Act means: As introduced, this public health measure would have been caught by the Act's mutual recognition principle. The UK Government amended the Bill to exclude "manner of sale" requirements from the mutual recognition principles. But MUP could still be caught by the Act's non-discrimination principles - if not by automatic application of these principles, then by private actors making challenges with reference to non-discrimination.

117. To deliver business certainty on the domestic front, the UK Government should have committed to completing UK common frameworks in good faith and to restoring cooperation in intergovernmental relations. The Act has moved the UK in the opposite direction.

118. The Act is damaging to businesses and consumers in Scotland and across the UK. Without the balance of EU single market regulation, the Act means losing the benefits of variations in approach to reflect consumer preferences, health and environmental considerations in Scotland, and the advantages of

⁴⁰ [Scotland Act 2016 \(legislation.gov.uk\)](https://legislation.gov.uk).

high-quality regulation of meat and fish products. In addition, the wider UK market will lose the policy innovation made possible by devolved parliaments and governments taking initiatives that are later adopted elsewhere in the UK.

119. Given the overwhelming support in Scotland for remaining in the EU, as discussed earlier, the Scottish Government introduced the UK Withdrawal from the European Union (Continuity) Bill (now Act), to enable Scottish law to continue to align with EU law where appropriate and within devolved competence. The Bill became an Act after receiving Royal Assent in January 2021. However, with the Internal Market Act in force, even where the Scottish Parliament and Scottish Ministers wish to maintain alignment with high EU standards, the UK Internal Market Act risks undermining those devolved policy choices, and could force us to accept lower standards set elsewhere.⁴¹
120. Scotland's food and drink trade benefits from the advantages of high-quality regulation. The Act's market access provisions of mutual recognition and non-discrimination will undercut goods produced to high quality standards because rather than enabling administrations to take the lead on advancing public health, social and environmental initiatives, mutual recognition in the form advanced in the Act enforces a lowest common denominator that undermines such initiatives. In the post-EU exit context of the UK urgently needing to enter into trade agreements with other countries, applying the principle of mutual recognition to the domestic market may make it easier for the UK to enter into agreements on standards for imported goods that would not be acceptable to devolved administrations - and for those to become the norm across the UK. Examples of this can be found in issues such as the specific objectives set out in the US Government's mandate for trade talks with the UK and the decision of the UK Government to block amendments to Brexit related legislation which would have protected food and animal welfare standards and the health service from any future trade deals.
121. Scotland's attempts to secure our high standards within the UK after EU exit have been resisted by the UK Government to date. This, combined with the effect of the Internal Market Act raise serious concerns about Scotland's ability to secure standards in devolved policy areas. For example, if the Scottish Parliament chose to maintain the ban on the sale of chlorinated chicken or hormone-fed beef in Scotland in response to the UK Government agreeing to regulatory equivalence measures as part of a trade deal that would facilitate such products being imported and sold in the UK, the Act has the effect of giving the UK Government power to undermine the decision of the Scottish Parliament and force their sale in Scotland.

⁴¹ Scottish Parliament Environment, Climate Change & Land Reform Committee, Stage 1 Report on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill, p8-10, [Stage 1 report on the UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Bill \(parliament.scot\)](#); Scottish Parliament Finance & Constitution Committee, Stage 1 Report on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill, p14-15, [Stage 1 Report on the UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Bill \(azureedge.net\)](#); same, letter to Duchy of Lancaster, 6 October 2020, [FOR ISSUE Internal Market Bill LCM report\(4\).pdf \(parliament.scot\)](#).

122. Scottish businesses want to compete on quality and provenance as well as cost, but Scotland's high food safety, animal welfare and environmental standards would be undermined by the requirement to accept lower standards set elsewhere. In addition, the Act could undermine the ability of consumers in Scotland to make informed food choices, as the Act prevents the Scottish Parliament from legislating to require appropriate labelling for all such products sold in Scotland. The reputation for quality that underpins our world-class food and drink industries, and the many thousands of jobs they support, could be undermined by the imposition of lower standards on Scotland.

Case study: Energy efficiency, zero and low emissions heating, and microgeneration skills

The issue: The energy efficiency, zero and low emissions heating and microgeneration supply chain is critical to the success of our ambitions for addressing greenhouse gas emissions from buildings and to address fuel poverty. Scottish Ministers are keen to ensure skills are at the heart of quality assurance for householders and businesses participating in the Heat in Buildings programme.

What Scotland can do: The promotion of energy efficiency, education and training are devolved matters. Scotland is developing a robust skills and training programme to ensure a high level of competency for energy efficiency, zero and low emissions heating and microgeneration. Transforming our buildings by making them more energy efficient and converting them to zero emissions has the potential to make a significant economic contribution and represents a sizeable opportunity for Scottish businesses.

Having worked with industry, the sector skills bodies and other key stakeholders in Scotland, we have developed installer skills requirements in support of our programmes which we plan to adopt and fully integrate into the British Standards Institution (BSI) and Microgeneration Certification Scheme (MCS) standards to reflect Scotland's skills needs. The Scottish Government works with skills agencies, including Skills Development Scotland, to develop qualifications in Scotland for installers and the other roles featured in the BSI standards where no qualifications currently exist in Scotland.

The establishment of these skill requirements also contributes greatly to both the capacity and capability of Scottish colleges by establishing the need for these skills, which in turn will help deliver on the skills funding announcements mentioned in our Programme for Government. Additionally, the skill requirements will go some way towards acting on the recommendations from the Committee on Climate Change and will form a crucial part of our Climate Emergency Skills Action Plan.

What the Act means: The British Standards Institution (BSI) is looking to develop similar skills requirements for the other nations, and Scotland is seen as a leader in this area. The Act's principle of non-discrimination, however, would mean that Scotland's skills requirements would need to show equivalence across the nations. Under the conditions of the Act, operatives from other UK nations would also not need to conform to Scotland's leading skills requirements in order to operate in Scotland, undermining and weakening Scotland's attempts to innovate in energy efficiency zero and low emissions heating and microgeneration skills to secure better climate and fuel poverty outcomes.

123. In addition to the risks to standards and businesses outlined above, people in Scotland will now live with a significantly constrained devolution settlement, with no vote being cast to mandate such constraint. The balance prior to the Act that aimed to ensure decisions are made as locally as possible to reflect local needs and factors; and that other policy goals can be pursued alongside pure market goals, is directly contradicted by the Act's market regime. This undermines Scotland's powers to deliver "a more successful country with opportunities for all of Scotland to flourish through increased wellbeing, and sustainable and inclusive economic growth" – as Scotland's National Performance Framework aims to do.
124. Furthermore, in relation to the spending powers given to the UK Government in the Act, the Scottish Council for Voluntary Organisations (SCVO) has highlighted the view of members that funding priorities should be set at a devolved level, tackling inequalities, enhancing human rights and promoting wellbeing "by linking outcomes with Scotland's National Performance Framework and other relevant policy frameworks". SCVO raises concerns over management of the Shared Prosperity Fund, which looks set to be managed centrally by the UK Government.⁴²

The effect of the Act on Scotland's role in international trade negotiations

125. The UK Government position is that internal market arrangements are a means of ensuring that a state's internal regulatory and market arrangements are aligned with its external trading relationships.⁴³ Constraining devolution may be seen as advantageous in the negotiation of trade deals. However, in addition to the risk to standards outlined above, it does not reflect the purpose of devolution, and further undermines the benefits of devolved nations' expertise, collaboration and trust in international negotiations.
126. The UK Internal Market Act means that Scotland's already limited ability to represent Scotland's interests in trade deals are compounded by having to accept whatever standards are imposed through the deals the UK strikes – even in devolved areas. While the negotiation of trade deals is an area reserved to the UK Parliament, the scope of modern trade agreements means that they often cover a range of reserved and devolved policy areas. The UK Internal Market Act means that the UK Government can more readily disregard the views and policies of devolved administrations in trade negotiations, as any outcomes of negotiations can be imposed across the UK through the Act's provisions.
127. In other states, sub-state administrations have a role in influencing and agreeing those new trading relationships. For example, the Canadian Provinces had a substantive role involved in developing Canada's mandate in

⁴² SCVO, 25 Jan 2021, [Scotland and the Shared Prosperity Fund – SCVO](#).

⁴³ Para 125, the UK Internal Market White Paper, [UK internal market \(publishing.service.gov.uk\)](#).

the negotiations with the EU that led to the Comprehensive Economic and Trade Agreement (CETA).

128. The full, formal and early involvement of the Scottish Government and Scottish Parliament is necessary to ensure the legitimacy, and effective implementation, of treaties. There are significant structural weaknesses in the oversight and scrutiny of the UK Government's approach to international negotiations. This is concerning not only for the devolved governments and parliaments, but also for Westminster.

Case study: The Circular Economy - resource efficiency and single-use plastic

The issue: Single-use plastic is harmful to the environment and wildlife. The Scottish Government has committed to action to reduce our reliance on single-use plastic. Our consultation on the introduction of market restrictions closed on 4 January 2021.

What Scotland can do: Climate change and the environment are devolved matters. Scotland is leading amongst UK nations in reducing the use of single-use plastics: by legislating to impose restrictions (bans) on the supply and manufacture of single-use plastic items. In 2019, Scotland became the first nation in the UK to ban plastic-stemmed cotton buds. Scotland intends to build on this and the voluntary steps already being taken by businesses and services across the country to switch to more sustainable products and phase out other single-use plastic items as per the requirements of the EU Single Use Plastics Directive. Currently we can impose market restrictions on products that have a known harm to the environment.

What the Act means: The Act may undermine these policy ambitions by limiting our ability to exercise devolved powers and impose bans on products we deem harmful to Scotland's environment. While we could ban or restrict supply or manufacture of locally produced single-use plastic items, if lesser standards apply elsewhere in the UK then the mutual recognition principle may impact on our ability to ban or restrict from the Scottish market the sale of such goods produced in other nations of the UK or from third countries imported under the terms of a future trade agreement. This would undermine our ability to act to protect our finite natural resources and to address the significant economic, social and environmental challenges associated with consumption and littering of single-use plastic items. Scotland's plans to prevent waste and develop a circular economy, which will benefit all nations of the UK, could be at risk.

129. The Scottish Government published detailed proposals designed to significantly enhance the role of devolved administrations in the development of future UK trade arrangements in 2018⁴⁴ and has argued the case ever since. The proposals are even more relevant in the context of the UK Internal Market Act. The Scottish Government's proposals are designed to ensure that Scotland's economic and other interests are identified, protected and promoted and that Scotland's voice is heard and respected. Some two years after the publication of the Scottish Government's proposals and, despite repeated and consistent argument in favour of an enhanced role, the

⁴⁴ www.gov.scot/publications/scotlands-role-development-future-uk-trade-arrangments/pages/1/.

engagement of the Scottish Government and other devolved administrations in the development of trade deals remains limited and patchy.

130. Such an enhanced role will be in everyone's interest. Domestically, it would ensure that negotiations are conducted on a proper understanding of the economic and other trade related issues for the devolved governments; that decisions would be taken closer to the people affected and have a greater transparency and legitimacy; and that any problematic issues would be surfaced and dealt with quickly. Implementing these proposals would also provide reassurance to the UK's future negotiating partners that negotiations are proceeding on consensus within the UK, and consequently that any agreements would endure.
131. Modern trade agreements cover a wide range of subjects which cut across devolved and reserved competence: the impact of one part of an agreement can be felt across the whole and will affect the economic and wider interests of Scotland. The Scottish Government made this case to the UK Government this year in detailed comments on issues arising during trade negotiations with Japan, the US, Australian and New Zealand. However, the UK Government has chosen to exclude the Scottish Government both from the talks and the development of the final negotiations mandate.
132. The UK Government has also voted down amendments to the Agriculture Bill and the Trade Bill that would have protected UK standards in future trade agreements and given devolved administrations a meaningful role in the development of future UK trade arrangements. This, combined with the effect of the Internal Market Act mean that Scotland's ability to influence and improve trade deals is severely limited, leaving the UK Government as the sole arbiter of standards across UK nations and policy areas - even where they are devolved to the legislature of Scotland.

The EU Trade and Cooperation Agreement

133. On 24 December 2020, the EU and UK reached an agreement on their future relationship: the Trade and Cooperation Agreement (TCA) took effect on 1 January 2021 upon the end of the transition period.⁴⁵ Despite the Scottish Government's repeated efforts to engage with the UK Government, including setting out compromise proposals, the free trade agreement negotiated as part of the TCA does not reflect Scottish Government views - instead providing the kind of "thin", or "low" deal that was opposed by numerous Scottish stakeholders.
134. The Scottish Government's preferred approach to trading with EU partners is, as the Continuity Act provides for, to remain aligned as closely as possible with EU standards. The interactions across the Continuity Act, TCA and Internal Market Act are untested, complex and potentially highly damaging. For example, the UK Government could decide to diverge from the EU in a manner which violates the terms of the TCA. Scotland's ability to maintain

⁴⁵ This is on a provisional basis on the EU side: pending ratification of the European Parliament.

alignment with EU could be undermined by the market access principles of the UK Internal Market Act. In such a case, would Scotland be forced into non-compliance with the terms of the TCA, and consequent tariffs for Scottish business, through the legal requirements of the Internal Market Act?

Part Six:

Conclusion

135. This paper details the Internal Market Act's unprecedented impact on devolution and the UK's constitutional rules and norms. It sets the Act within a wider pattern of developments since the 2016 referendum that bypasses and undermines devolution.
136. It demonstrates that the Act is unnecessary to fulfil its stated purpose of providing regulatory coherence, and clarity and certainty for businesses and consumers. Indeed, it will render these outcomes significantly harder to achieve.
137. The Act does not simply replicate market oversight arrangements common to other devolved and federal states (see Annex A), and is not comparable to the conception and operation of the market access principles in the European single market.
138. The Scottish Government agrees that EU exit, which people in Scotland decisively rejected in 2016, raises a series of complex questions for the UK's constitutional arrangements. However the Act offers, at every turn, the wrong answers to these questions.
139. The Act presents a prospectus for the unilateral exercise of power by UK Ministers that is not necessary, and is incompatible with the aims and purpose of devolution. Stakeholders across Scotland are clear that devolution works: that decisions on farming, the environment, on food standards, public health and many other matters should be made in Scotland, and reflect Scottish circumstances and priorities.

The need for change

140. The approach to devolution taken by successive UK Governments since 2016, and culminating in the Internal Market Act, is unsustainable. EU exit requires a fundamental shift in attitudes to where power lies and is best exercised in these islands, and there is a growing recognition that the status quo ante is not a viable option for future models of UK governance.
141. The scale of change required is significant:
 - There would have to be agreement between the UK's constituent parts to manage differences on the basis of equality and respect, not unilateral imposition.
 - The permanence of devolution in the UK's constitutional arrangements would need to be recognised, with justiciable protections in law for the powers of the devolved institutions, as is the case in other states. A new

legal framework should create these protections, and incentives to resolve any issues by agreement rather than by imposition from Westminster.

- Drawing on the EU model, the principles of subsidiarity and proportionality should apply to any market access rules and principles, where decisions are taken as locally as possible; and the needs of business are recognised, and balanced with those of consumers, citizens, and wider social, environmental and public health priorities.
- The outmoded doctrine of unlimited parliamentary sovereignty – that too often manifests as a presumption of unlimited and unaccountable executive power – should be replaced with a recognition of multiple legitimate centres of powers across these islands.
- There must be wider, meaningful reform to the system of intergovernmental relations in the UK. Current arrangements were widely, and correctly, seen as not fit for purpose long before 2016. Events since then have laid bare their inadequacies. Reform would include measures to manage policy divergence in a manner that prioritises agreement over vetoes, ensures equality between all actors in the system, and seeks to resolve and avoid disputes at the lowest possible level.

142. Unfortunately, as this paper has demonstrated, successive UK Governments have appeared unwilling to recognise the scale and urgency of the need for change. There is no indication that this, or any, UK Government, will be prepared to act in the ways required. Instead, we face the prospect of, at best, another round of inconclusive debates on a “quasi-federal” UK:⁴⁶ debates that are no more likely than their predecessors to address the profound structural challenges facing the UK after Brexit.

143. Events since the EU referendum are instructive. Detailed proposals to ensure an agreed and proportionate approach to EU exit, that recognised Scotland’s rejection of Brexit at the 2016 referendum and the need to protect and enhance devolution,⁴⁷ were not taken into account. Instead, a unilateral decision was taken to pursue a hard Brexit for which there was, and indeed is, no majority support in Scotland. The UK Internal Market Act is the crystallisation of this series of events since 2016: an attempt impose permanent institutional uniformity and centralised control.

144. These developments reinforce the Scottish Government’s belief that the best future for Scotland is to become an independent country. This would enable a new and better relationship with the rest of the UK on the basis of mutual respect and equal partnership.

⁴⁶ [Gordon Brown: Trust has broken down in way UK is run - BBC News](#); [Keir Starmer: only a federal UK 'can repair shattered trust in politics' | Politics | The Guardian](#).

⁴⁷ <https://www.gov.scot/publications/scotlands-place-europe/>.

ANNEX A: International examples of multi-level state market management

Measures to manage market oversight and ensure regulatory coherence are a common feature in most devolved or federal states, and the UK Government is correct when it argues that mutual recognition and non-discrimination are well understood principles that are applied in many other countries' internal market arrangements.⁴⁸

However, as this paper has considered, the Internal Market Act fails to address the constitutional and economic imbalances that are specific to the UK: unless these are acknowledged, the comparisons between the UK and other multi-level states' arrangements are invalid. As the examples below demonstrate, sub-state units in other devolved and federal states are able to a far greater degree to balance market access principles with other policy considerations, and enjoy justiciable rights and protections that offer safeguards against the kinds of unilateral and arbitrary imposition of rules that the Internal Market Act contains.

Canada⁴⁹

Canada is a decentralized federation in which the two main levels of government - federal and provincial - enjoy exclusive legislative authority in areas specified by the constitution. The operation of the internal market is largely the outcome of individual federal and provincial legislative decisions. Following the signing of the North American Free Trade Agreement (NAFTA) in 1994, "governments saw the need to further develop the internal market, having recognized that many barriers to the free movement of products, labour and capital existed, most of them due to government actions."

The 1994 Agreement on Internal Trade (AIT) created a framework for the internal market including the free movement of goods and services, mutual recognition of regulations and open procurement policies and included a dispute resolution mechanism. It was superseded when the Canada Free Trade Agreement (CFTA) was agreed in 2017.

The CFTA is intended to promote free trade in goods, services, labour and capital markets. It establishes processes for provinces to agree to either common regulations or mutual recognition and is intended to establish fair and open procurement policies. Federal and provincial governments are allowed to specify a list of exemptions to which the CFTA will not apply. This list can be reduced but not added to in the future. The CFTA was agreed on a voluntary, cooperative basis and there "was no sense that the federal government was imposing its will on the

⁴⁸ Para 10, the UK Internal Market White Paper, [UK internal market \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/84242/uk-internal-market-white-paper.pdf).

⁴⁹https://www.parliament.scot/S5_Finance/General%20Documents/Summary_of_Comparative_research.pdf.

provinces.”⁵⁰ Canadian provinces have powers to regulate labour, capital and product markets within their jurisdictions and all do so independently.

The CFTA recognizes the right of provinces to legislate in areas of provincial jurisdiction provided inter-provincial transactions are not unduly limited and non-residents are not discriminated against. More specifically, it protects the ability of provincial governments to legislate and regulate to achieve legitimate public policy objectives, such as protection of public health, social services, safety, consumer protection, cultural diversity, the environment and workers’ rights. Language regulations and public services are exempt from the agreement. Provinces also have limited powers to exempt certain goods from the Harmonised Sales Tax which combines a single federal tax rate with provincial rates on the sale of goods.

Switzerland

The Swiss Confederation has powers to enact “any federal law necessary to create a unified Swiss economic area” but has not used them. In the absence of such, private economic activities are regulated by cantonal law or municipal legislation. The federal government cannot undermine federal arrangements so attempts to provide for an internal market must leave space for different legislation at a local level. The internal market has been created through inter-cantonal agreements, promotion of mutual recognition of market access rights and top-down federal harmonisation in specific sectors. Cantons must comply with inter-cantonal agreements or federal laws which override contradictory cantonal or municipal law.

The Swiss Constitution states that the Confederation must allow cantons “all possible discretion to organise their own affairs and shall take account of cantonal particularities”. Whenever the Confederation exercises its legislative competences, the cantons have a constitutionally guaranteed right to participation; they must be informed and consulted whenever their interests are affected.

Spain

The Law on the Guarantee of Market Unity⁵¹ was passed in 2013 but remains controversial. The law introduced principle similar to those in the UK Act – mutual recognition, non-discrimination, freedom of establishment of business and circulation of goods. It also establishes a market oversight commission.

From the outset, some of Spain’s autonomous communities objected to the provisions, which they saw as primarily political rather than economic in character. Catalonia in particular objected to the extraterritorial application of laws that interfered in policy areas of devolved responsibility.

The Spanish Constitutional Court, in its Judgment 79/2017 dated 22 June 2017, declared unconstitutional, among others, articles 19 and 20 of Law 20/2013 of the

⁵⁰https://www.parliament.scot/S5_Finance/General%20Documents/201908_FINAL_Canadian_Interna_l_Market_Research.pdf.

⁵¹<https://www.boe.es/buscar/pdf/2013/BOE-A-2013-12888-consolidado.pdf>.

Market Unity Law. Both articles regulated the principle of national effectiveness, according to which,

“the relevant authority must assume the full validity of that established by the authority of origin both in terms of requirements for access to the activity as well as the circulation of goods. This recognition cannot be conditioned on the existence of any equivalence.”

In the words of the Constitutional Court, this principle involves forcing an autonomous community to accept a plurality of foreign policies within its territory, which clashes with the ability to develop its own public policies within the areas of its competence. It also allows the application of provisions adopted by a representative body in which the citizens of the territory in question are not represented.

Catalonia was able to do this because the Spanish Constitution affords justiciable rights and protections to Spain's 17 autonomous communities, providing balance and correction to any overly intrusive market unity measures. No such protections exist in the UK.

ANNEX B: The development of the UK's state and market architecture

The UK Government's White Paper on the Internal Market from July 2020 called the Acts' creation of a free market between Scotland and England "the bedrock of our shared prosperity".⁵² This broad statement does not accurately reflect the complex realities of the 1707 union, and its implications for the early modern states of Scotland and England.

The Parliament of England passed the Act of Settlement in 1701, which provided that only protestant heirs could ascend to the English throne. Scotland held, through the Succession Act of 1681, that any legitimate heir could ascend to the Scottish Crown regardless of their personal religion; the English Act of Settlement was not valid in Scotland, which retained its own legal system. Therefore, when Queen Anne succeeded William of Orange to the English and Scottish Crowns in 1702, a formal Union was considered imperative by English Parliamentarians to secure their preferred mechanisms of succession. As Queen Anne had no children, the English selected a distant relative – Sophia, Electress of Hanover – as heir to the crown without consulting the Scottish Parliament.

As a result, and after a failed attempt to negotiate a political, economic, religious and trade deal with their English neighbours to settle the matter, the Scottish Parliament passed the Act of Security in 1704, in which it decided that should the Queen die without direct descendants, then the Scottish Crown would go to a protestant heir from the lines of the Scottish Kings. The English response was to pass the Alien Act of 1705, in which Scottish nationals, merchants, and goods were declared "alien" in English territories, unsettling inheritance claims and resulting on embargoes on Scottish goods.

As much as Scotland needed a free trade agreement with England, England also needed one with Scotland. In the second half of the seventeenth-century, the English Government had entered British forces into the costly Anglo-Dutch Wars for control of trade and shipping routes. Similarly, ongoing disputes with the French – which would last well into the eighteenth-century – created geopolitical imperatives for English politicians to pursue a union. Furthermore, whilst the UK Government's White Paper is keen to highlight Scotland's present trade arrangements with UK nations – calling attention to Scotland's robust domestic trade – the paper has little to say about England's own trading stakes in Scotland, which included Scotland's garrisoning of British forces which English politico-military disputes (such as the Anglo-Dutch Wars) made use of throughout the seventeenth- and eighteenth-centuries.

The UK Government's Internal Market White Paper states that, as a result of "*the Act of Union*",⁵³ there was 'an immediate boost in Scottish trade, through increased links

⁵² Para 58, p28, [UK internal market \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk).

⁵³ For example, para 60, p28, *ibid*.

with the Baltic and elsewhere for Scottish merchants'.⁵⁴ Scotland had already been a well-connected trading nation prior to the Acts of Union, including having well-established links with the Baltic countries, which were interrupted by war.

Early modern mercantilism's economic nationalism had raised enormous tariffs on Scottish goods, impacting Scotland's continental trade. England thus became Scotland's primary trading partner, and this "growing dependence upon a single market meant that the Scots were increasingly vulnerable to the decisions made by the English, who were equally anxious to protect and develop their own economic interests; inevitably, Scotland suffered."⁵⁵ As such, when the English Parliament declared Scottish goods "alien" in 1705, enormous financial pressure was placed on Scottish trade – pressure, indeed, to acquiesce to a Union.

That Union was completed in 1707, after the English Parliament passed the Union with Scotland Act (1706) and the Scottish Parliament passed the Union with England Act (1707). Both countries had collaborated on a Treaty of Union in 1706, the articles of which ensured that all subjects of the new state, the Kingdom of Great Britain, could trade and navigate all dominions of that new Kingdom, and were to be treated as equals by all constituent nations. Importantly, Article 4 of the Treaty established a new Parliament of Great Britain, to unify the previous English and Scottish Parliaments into one legislative body representing both previously independent nations, and Welsh interests, as one unitary state.

Ireland was incorporated into the Union in 1801, after the Parliament of Great Britain and the Parliament of Ireland passed further Acts of Union in 1800; this created a new state of the United Kingdom of Great Britain and Ireland. Ireland established the Irish Free State in 1922 after a period of rebellion, war, civil war and political upheaval. Following this, the United Kingdom of Great Britain and Northern Ireland included, for much of the twentieth-century, a devolved legislature at Stormont.

Whilst this iteration of our constitutional settlement resulted in the joint Parliament of the United Kingdom, which was supposed to arbitrate and represent the economic interests of all constituent nations of the UK, in practice there have been enduring challenges in ensuring this, given the UK's inbuilt constitutional, economic and demographic imbalances. There are 650 parliamentary constituencies across the UK: of these, 59 are in Scotland, 40 are in Wales, and 18 are in Northern Ireland. Combined, these three nations return only 117 MPs to the House of Commons. England, on the other hand, has 533 constituencies, which means that English interests are almost five times more represented than the rest of the UK's nations *combined*. Unlike the devolved administrations, England does not have its own "English" parliament, because the Westminster Houses are in effect England's parliament. As one Scottish commentator wrote, whilst arguing for a free trade deal with England just at the cusp of the Union, "let us look forward and seriously

⁵⁴ *Ibid.*

⁵⁵ P174, Christopher Whatley, *Scots and the Union: Then and Now* (Edinburgh: Edinburgh University Press. 2nd edition, 2014).

consider what is to be done, to rectify the disorders that may have crept into the constitution, and put us out of the hazard of falling under arbitrary power.”⁵⁶

It would be inaccurate to portray the 1707 Union straightforwardly as a catalyst for a new dispensation of political harmony and ever-increasing prosperity. Indeed, there was little discernible improvement in Scotland’s economic fortunes in the first decades following 1707: it was the Seven Years’ War and the subsequent project of global empire that drove economic growth in Scotland during the nineteenth century.⁵⁷ This period coincides with the high water mark of what Colin Kidd has described as “banal unionism”⁵⁸: that far from a celebrated deliverance into prosperity, for most of its existence, the 1707 Union remained unquestioned and unexamined.

⁵⁶ Sir Archibald Sinclair, *The state of the nation enquir’d into, shewing, the necessity of laying hold of the present opportunity, to secure our laws and liberties, from English influence; and procure a free trade with that nation* (Edinburgh; n.d., ca. 1704).

⁵⁷ See T.M. Devine, *Scotland’s Empire 1600-1815*, London; 2003, c3; Linda Colley, *Britons: Forging the Nation 1707-1837*, London; 1992, P 117-145.

⁵⁸ Colin Kidd, *Union and Unionisms: Political Thought in Scotland 1500-2000*, Cambridge; 2008, p27.

ANNEX C: UK economic performance since devolution

The UK Government's approach in the Internal Market Act suggests a worldview that appears to regard difference as harmful, and uniformity and Westminster control as necessary to maintain prosperity across the UK. This is not supported by the facts. There is no evidence to suggest that policy divergence has inhibited economic performance. Scotland has performed well across a range of indicators since devolution and historic gaps between Scotland and other parts of the UK have been narrowed:

- Prior to 2008, Scotland's level of productivity was around 10% lower than the UK average. Latest data for 2018 show that the productivity gap is now around 1%.⁵⁹
- Since 2008, productivity has grown at an average annual rate of 0.9% per year, compared to the UK average of 0.4% over that period.⁶⁰
- Gross median weekly earnings for full-time employees in Scotland were £576.70 in 2020, broadly in line with the UK average.⁶¹
- Among the nations of the UK, long-term pay growth has been highest in Scotland since 1997.⁶²

Devolution has not inhibited economic performance nor has it inhibited the functioning of the UK economy.

Although the Scottish and rest of the UK economies are closely aligned there are differences in their industrial composition. Whilst both are largely service-based economies, the Scottish and rest of the UK economies have particular strengths in certain sectors. For example, Scotland relies more on Mining & Quarrying Sector (Oil & Gas), Construction and Transport & Storage whilst the rest of the UK had a relative advantage in a larger number of private-sector industries, with particular emphasis on Financial and Insurance activities. The composition of the labour market also differs. For example, Scotland has a greater proportion of employment in the public sector (around 20% vs around 16% in the UK). In part this reflects a deliberate policy choice to support public services.

Scotland has a distinct approach to economic strategy from the rest of the UK and this has enabled Scottish Government to pursue different economic objectives. As noted, the Scottish Government has set out its overall purpose and performance outcomes and indicators in the National Performance Framework.⁶³ Similarly, Scotland's economic Strategy⁶⁴ is predicated on the principle that promoting

⁵⁹ <https://www.gov.scot/collections/economy-statistics/#productivitystatistics>.

⁶⁰ *Ibid.*

⁶¹ [the Annual Survey of Hours and Earnings \(ASHE\)](#).

⁶² *Ibid.*

⁶³ [National Performance Framework | National Performance Framework](#).

⁶⁴ [Scotland's Economic Strategy - gov.scot \(www.gov.scot\)](#).

competitiveness and addressing inequality are important interdependent ambitions; reducing inequality in itself is beneficial for economic growth.

As the UK Government's UK Internal Market White Paper itself made clear, the UK market has not exhibited any evidence of increasing barriers to trade, or any decline in flows between the nations and regions of the UK.⁶⁵

Intra UK trade displays high levels of integration between nations and regions in the flows of goods, services, capital and people. There are no significant barriers to trade in goods and services between the constituent parts of the UK.

Barriers within the UK market are also low compared to international comparators. For example, barriers to trade between German regions are found to be higher than those between UK nations and regions. This has not impeded Germany from achieving a significantly higher GDP per capita and lower income inequality than the UK.⁶⁶

The United States of America (USA) offers another example of high levels of labour market mobility and a highly integrated internal market. Individual states nevertheless have the power to vary an additional rate of income and corporate tax over and above the federal rate. The USA internal market is also characterised by variation in the minimum wage and in the provision of welfare payments.

In Belgium, although corporation tax rates are set nationally, innovation policy is under the full authority of the regions who can offer grants, R&D tax credits, and payroll incentives.

Much has been made about the need for to operate to a common set of rules. Business already operates with differences across UK which reflect preferences in local markets or policy initiatives on health and environmental considerations pioneered by devolved administrations (for example, sugar tax, minimum alcohol pricing, ban on raw milk, plastic cotton buds, microbeads in cosmetics, recycling targets) – with no evidence that these differences have caused difficulties across the UK market.

⁶⁵ Annex A, [UK internal market \(publishing.service.gov.uk\)](https://publishing.service.gov.uk).

⁶⁶ [Germany - OECD Data](#); [United Kingdom - OECD Data](#).

ANNEX D: Overview of key exclusions to the UK Internal Market Act

Potential Exclusion	Explanation	Provision in the Act
Statutory provisions already in force	The market access principles concerning goods are limited in their application to new statutory provisions and not ones already on in force on 30 December 2020, although they will apply at the point of a substantive change to existing regulation. Broadly similar limitations apply to services restrictions.	Part 1; section 4 Part 1; section 9 Part 2, section 17(5)(c)
Sale of goods for purpose of performing a function of a public nature	For example, the supply of medication for prescriptions is excluded from the mutual access principles.	Part 1, section 15
Common frameworks: “certain cases, matters, requirements or provision” within a framework	UK Ministers may use the delegated powers to change what is in schedule 1 and schedule 2 to exclude specific parts of frameworks – only with agreement of all administrations; and ultimately UK Ministers can choose whether or not to exercise powers in this respect.	Part 1; section 10 Part 2; section 18
Public health emergency	The mutual recognition of authorisation requirements for services does not apply to the extent a requirement can be justified as a response to a public health emergency (for example COVID-19).	Part 2; section 19
Non-discrimination: legitimate aim	Indirect discrimination can be justified (in the case of goods) if it is necessary to achieve a legitimate aim: - the protection of the life or health of humans, animals or plants, or - the protection of public safety or security. Indirect discrimination can be justified (in the case of services) if it is necessary to achieve a legitimate aim: - the protection of the life or health of humans, animals or plants, - the protection of public safety or security, or - the efficient administration of justice.	Part 1; section 8 Part 2; section 21
Certain professions: school teaching; legal professions Statutory provisions already in force	“School teaching” is excluded from mutual recognition of professional qualifications (the automatic recognition principle). As too are certain “legal professions”. For Scotland, that means “the profession of advocate, solicitor, notary, conveyancing practitioner, executry practitioner or commercial attorney”; and across whole of the United Kingdom, “the profession of patent attorney or trade mark attorney.” Section 27(1) also contains a limitation for statutory provisions already in force that is broadly similar to the ones mentioned above.	Part 3; section 27

<p>Schedule 1: specific goods exclusions from market access principles</p>	<ul style="list-style-type: none"> • Threats to human, animal or plant health • Chemicals • Fertilisers and pesticides • Taxation <p><i>Threats to human, animal or plant health</i> Market access principles do not apply to legislation if it meets certain conditions:</p> <ul style="list-style-type: none"> - It has the aim of preventing or reducing the movement of a pest or disease where it is present in the affected part and is not present (or is less prevalent) in the restricting part. This is where the movement of the threat poses (without legislation) a serious threat to the health of humans, animal or plants in the restricting part. - It aims to prevent the movement of unsafe food or feed into the restricting part from the affected part, which poses a serious threat to humans or animals in the restricting part. <p>-Where discriminating against incoming goods can reasonably be justified as “a response to a public health emergency” (“an event or situation that is reasonably considered to pose an extraordinary threat to human health in the destination part”).</p> <p><i>Chemicals</i> Certain chemical regulations are excluded as per specific articles within REACH (The EU regulation adopted to improve protection of human health and the environment from risks posed by chemicals, while enhancing the competitiveness of the EU chemicals industry).</p> <p><i>Fertilisers and pesticides</i> Certain regulations are excluded relating to fertilisers and pesticides that fall within Article 15(1) of Regulation (EC) No 2003/2003 (retained law) or under section 74A(1) of the Agriculture Act 1970 so long as regulations can be justified as a risk to the health or safety of humans, animals, plants or the environment.</p> <p><i>Taxation</i> Legislation is excluded that relates to the imposition of, any tax, rate, duty or similar charge.</p>	<p>Schedule 1</p>
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<p>Schedule 2: specific services exclusions</p>	<p>Excluded from mutual recognition principle:</p> <ul style="list-style-type: none"> Audiovisual services Debt collection services Electronic communications services and networks, and associated facilities and services Financial services Gambling services Healthcare services Legal services Notarial services Private security services Services of temporary work agencies Services provided by a person exercising functions of a public nature or by a person acting on behalf of such a person in connection with the exercise of functions of a public nature Social services relating to social housing, childcare, adult social care and support of families and persons permanently or temporarily in need Transport services <p>Excluded from non-discrimination principle:</p> <ul style="list-style-type: none"> As above, except legal services, plus Postal services Services related to electricity production and supply Services related to natural gas production Waste services Water supply and sewerage <p>There are also specific exclusions related to taxation.</p>	<p>Schedule 2</p>
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