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Constitution, Europe, External Affairs and Culture Committee

UK Internal Market Inquiry

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Constitution, Europe, External Affairs and Culture Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) the Scottish Government's EU and external affairs policy;

(b) policy in relation to the UK's exit from the EU;

(c) the international activities of the Scottish Administration, including international development; and

(d) any other matter falling within the responsibility of the Cabinet Secretary for the Constitution, External Affairs and Culture and any matter relating to inter-governmental relations within the responsibility of the Deputy First Minister.


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Introduction

1. This report sets out the findings and recommendations of the Constitution, Europe, External Affairs and Culture Committee ("the Committee") following our inquiry on the UK internal market. The Committee published a call for views on 13 September 2021 and received 19 submissions which are available on our website [1] . The Committee thanks all those who provided written and oral evidence.

2. In our consideration of the UK internal market the Committee identified three significant and interrelated tensions arising from and/or exacerbated by the UK leaving the European Union (EU) –

   - First, tension between open trade and regulatory divergence;
   - Second, tension within the devolution settlement;
   - Third, tension in the balance of relations between the Executive and the Legislature.

3. The UK Internal Market Act (UKIMA) seeks to address the first tension. The UK Government in its white paper on the UK internal market stated that the market access principles within the Act "will not undermine devolution, they will simply prevent any part of the UK from blocking products or services from another part while protecting devolved powers to innovate." [2]

4. But UKIMA has increased tension within the devolution settlement arising from the UK leaving the EU. UKIMA has been rejected by the Scottish Government and the Welsh Government and by the Scottish Parliament, Welsh Senedd and Northern Ireland Assembly as imposing limitations on devolved competence without consent.

5. The Welsh Government sought a Judicial Review of the effect of UKIMA on devolved legislation. The Court of Appeal recently refused permission to bring that challenge [3] , on the basis that the Court would not consider the impact of UKIMA on competence in the abstract, in the absence of specific Senedd legislation in which the issue arose. The Scottish Government has indicated that it supports the legal challenge.

6. The Cabinet Secretary for the Constitution, External Affairs and Culture ("the Cabinet Secretary") told us that the Scottish Government "have argued from the outset that it represents a fundamental change to the devolution settlement." The Scottish Government's view is that "it is a change that was achieved by stealth, and that it is chipping away at the powers and responsibilities of the Scottish Parliament." [4]

7. The four governments of the UK agreed that it would be beneficial to manage divergence in some policy areas that were previously governed by EU law and are within devolved competence. Common Frameworks were the means agreed to achieve this. Common Frameworks thus have the potential to resolve the tensions within the devolved settlement through managing regulatory divergence on a consensual basis while facilitating open trade within the UK internal market. Common Frameworks apply to modifications of retained EU law and are much

narrower in scope than UKIMA, which applies to all devolved policy areas.

8. The Scottish Government defines frameworks as "arrangements across a range of policy areas to manage any policy divergence upon EU exit." However, "the incentive to agree ways of aligning and managing differences is fundamentally weakened", given UKIMA "require standards coming from other UK nations to be accepted across all nations."

9. The Cabinet Secretary told us that this raises "fundamental questions about the purpose or viability of the Common Frameworks" and it has "taken considerable time to work through the act's impact and develop mitigations." [5]

10. Agreement has been reached by the four governments within the UK for a process to consider exemptions to UKIMA for policy divergence agreed through frameworks. [6] But fundamental disagreements remain between the Scottish Government and the UK Government.

11. The Scottish Government "remains firmly of the view that the Act is an unnecessary and deliberate undermining of the devolution settlements." It also believes that providing UK Ministers alone with the final decision making on securing exemptions "is fundamentally inconsistent with the principles and practice of devolution." [7]

12. The Committee notes that the challenges in seeking inter-governmental agreement have resulted in delays in the frameworks programme, including in the publication of frameworks, despite these being operational since 1 January 2020. As we discuss below this has led to frustration and concern among stakeholders regarding transparency and opportunities to engage in the frameworks process.

13. There is a risk that the emphasis on managing regulatory divergence at an inter-governmental level leads to less transparency and Ministerial accountability and tension in the balance of relations between the Executive and the Legislature.

14. We examine these tensions in the evidence below.

Tensions Between Open Trade and Regulatory Divergence

15. One of the main themes of our inquiry is the tension which can exist between open trade and regulatory divergence within the constituent parts of an internal market. Professor Kenneth Armstrong states in his written submission that the "ambition to secure open trade between the constituent jurisdictions of an internal market is a perfectly acceptable ambition. But as in any internal market important balances need to be struck:

    - Between market liberalisation and market regulation;
    - Between centralised and decentralised decision-making;
    - Between uniformity and diversity;
    - Between regulatory competition and regulatory collaboration;
    - Between political and legal authority." [8]

16. Professor Stephen Weatherill told us that any "internal market is based on a fundamental problem, which is that constituent elements of the internal market might regulate trade differently, and that leads to obstacles to trade within that internal market." This means what "is important is determining which factors can be advanced to justify local rules, even in circumstances in which they obstruct cross-border trade within the internal market." [9]

17. CBI Scotland's view is that the UK internal Market "is the economic glue that binds our four nations" and is key in helping "to increase prosperity, raise living standards, and opportunities for people and businesses across all parts of the UK". CBI Scotland also suggest that the internal market "is critical to maintain attractiveness to foreign investment across the UK and to maximise opportunities from new trade deals as they are agreed." [10]

18. The Food and Drink Federation (FDF) continues to "advocate for the avoidance of barriers to trading within the UK as this is of critical importance to our members already disrupted supply chains." They told us it "is vital that the industry has a clear opportunity to access markets throughout the United Kingdom." [11] (see also paragraph 44)

19. NFU Scotland state that the UK internal market "is critical to the interests of Scottish agriculture and the vitally important food and drinks sector it underpins" and supports the intention to ensure that it "continues to operate as it does now – with free movement of goods and services produced to the same basic regulatory standards." [12] (see also paragraph's 75 and 82).

Economic Benefits

20. A number of our witnesses also emphasised the economic benefits of the UK

internal market for Scottish businesses and consumers. CBI Scotland point out that the UK "is a highly integrated market, and we know the importance of this for firms, particularly in Scotland, where 21% of domestic expenditure is on goods that originated in another part of the UK." [13]

21. NFU Scotland in their written submission state that it "is self-evident that the UK internal market is by far the most significant market for Scottish agricultural produce." [14] They highlight the Scottish Government's 2018 export statistics which include agricultural exports worth £855 million to the UK market in 2018 which equates to almost 60% of the total value for Scottish agricultural exports of £1.5 billion.

22. NFU Scotland also point out that four "times as much trade in value terms goes to other parts of the UK than to the EU" and over "the past 15 years, Scottish trade with the UK has grown by 74 per cent from £28.6 billion to £49.8 billion, as trade with the EU has increased by 8 per cent from £11.4 billion to £12.3 billion."

23. The FDF and the Northern Ireland Food and Drink Association (NIFDA) state in their joint submission that the "food and drink manufacturing industry is a hugely important part of Scotland, England, Wales and Northern Ireland's economy, turning over £105bn in 2019." [15] They point out that "existing supply chains are highly integrated across the four nations, with ingredients and products potentially crossing borders multiple times including in Northern Ireland (NI) with the Republic of Ireland." [16]

Policy Innovation

24. Policy innovation arising from regulatory divergence was emphasised by a number of our witnesses. Professor Nicola McEwen, Professor Aileen McHarg, Professor Jo Hunt and Professor Michael Dougan emphasise that all internal markets "have to strike a balance between regulatory divergence and economic unity" and how "that balance is struck is a matter of political choice." In their view "devolution prioritized political autonomy and the ability to do things differently." [17]

25. They suggest this approach has a number of benefits of including the "ability to spark policy innovation - new ideas introduced in one territory might be picked up by, and/or adapted to, other territories within and beyond the state." In a similar vein the Institute of Government (IfG) states that devolution "allows ministers in each administration to tailor policy interventions to the needs of their local population" and "to pursue their political priorities based on their specific democratic mandate." [18]

26. In this way divergence "can also act as a 'policy laboratory', allowing different parts of the UK to introduce different policies, evaluate their successes and learn from each other." The IfG provide examples such as the indoor smoking ban and the introduction of the plastic carrier bag charge which, having been successfully introduced in one part of the UK, led to them being adopted across the rest of the UK.

27. Professor Weatherilll told us that in principle "the idea of having regulatory

experimentation, regulatory learning and regulatory emulation within an internal market is attractive." In his view if "you allow different constituent elements to do different things, one constituent element might find the best way to solve a particular problem and that understanding can be shared directly or indirectly with the other constituent elements, which might follow suit." [19]

28. Fidra, an environment charity, while supporting the implementation of environmental policy across the UK, also believe it is "vital that devolved administrations retain the ability to champion new and progressive legislation within their own areas of responsibility." [20] They highlight the ban on plastic stemmed cotton buds and the single use carrier bag charge as two useful examples of policy being developed and implemented at a devolved level and then subsequently implemented across the UK.

29. Scottish Environment Link's view is that "a success of devolution has been the ability of each UK nation to choose to respond in different ways to shared issues. This has allowed countries to be innovative: for example, Scotland introducing the indoor smoking ban in 2006 and Wales introducing the successful 5p plastic bag charge to reduce waste in 2011." They suggest that the market access principles "could limit the opportunity for different parts of the UK to test out different approaches and, in the long term, stifle creativity." [21]

30. However, both the IfG and Professor McEwen and colleagues also recognise that there are challenges in pursuing policy innovation through regulatory divergence. The IfG point out that "when devising regulatory policies, the benefits of divergence must also be weighed against potential challenges divergence may create" [22] including the costs to businesses and barriers to trade.

31. Professor McEwen and colleagues point out that policy divergence can "produce effects that may be regarded as adverse." [23] These effects can include distortions of competition and barriers to trade and mobility and increased burdens, in the form of higher taxes or regulatory standards, which could put some businesses at a competitive disadvantage, increasing their compliance costs. Divergence may also make it more difficult to strike external trade deals if the central government is unable to commit to trade rules that will apply throughout the state.

32. The IfG also suggest that "some policies may also be less effective or ineffective if implemented in only one part of the UK rather than on a UK-wide basis. In these cases, divergence risks creating additional costs for Scottish businesses without a significant policy return." [24] They provide the recent example of a UK-wide policy requiring the addition of folic acid to prevent birth defects which was initially considered on a Scotland-only basis in 2017. However, the IfG point out that Food Standards Scotland advised against it due to the fully integrated nature of the bread and flour sector in the UK.

33. The Scottish Government's view is that devolution in Scotland, while the UK was a Member State of the EU, allowed for a strategic policy approach that balances sustainable economic growth with wider social and environmental goals. This is a consequence of the importance placed on pursuing local social policy objectives alongside economic growth within the EU which has "led to policy innovation across the UK, with real value generated by diversity in policy making across the devolved

legislatures."[25]

34. The Scottish Government's position is that 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.[26]

35. The Scottish Government states that an internal market can "therefore be seen to encompass many, if not almost all, areas of government and parliamentary activity, and public policy considerations." [27] In its view an internal market is not just about trade. Rather, 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."[28]

36. The UK Government's position is that "maintaining frictionless trade across the UK will be essential as we look to take advantage of the opportunities presented by leaving the EU." In its view outside the EU "there is a danger of regulatory barriers emerging" and these "could block or inhibit trade in goods across the UK, and services could be significantly and detrimentally impacted." At the same time the UK Government also states that the new powers transferred from the EU to the UK Government and devolved governments will enhance "different levels of Government's ability to regulate in accordance with the needs of their local populations, in areas such as agriculture and food standards, amongst others."[29]

37. **The Committee recognises that there are significant challenges in managing the tension which exists in any internal market between open trade and**

regulatory divergence. Within the context of the UK internal market the Committee's view is that in resolving this tension it is essential that the fundamental principles which underpin devolution are not undermined.

38. **The Committee believes it would be regrettable if one of the consequences of the UK leaving the EU is any dilution in the regulatory autonomy and opportunities for policy innovation which has been one of the successes of devolution. It is essential as recognised by the Joint Ministerial Council (JMC) in 2017 that devolution outwith the EU continues to provide "as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules."[30]**

39. **At the same time the Committee recognises the significant economic benefits of the UK internal market and open trade. It is therefore critical that the inter-governmental process for managing the tension between regulatory divergence and open trade includes transparent opportunities for public engagement with businesses, consumers and other stakeholders.**

International Obligations

40. The requirement to comply with international obligations will also have significant implications for the operation of the UK internal market. Our Adviser, Professor Keating, points out that that such obligations may arise from international treaties, especially in trade but also in environmental and other matters. Such agreements might include a commitment to common regulatory standards, which foreign partners would expect to apply across the United Kingdom (or Great Britain). That, in turn, could impinge upon the degree of divergence allowed in Common Frameworks. Such issues might also arise in other areas not covered by Common Frameworks because they do not involve retained EU competences. One of the key purposes of establishing Common Frameworks was to ensure the UK could comply with its international obligations and negotiate new trade agreements.[31]

41. Professor McEwen and her colleagues point out that "one reason for concern about internal regulatory divergence is its impact on the ability of the UK Government to strike trade deals with the EU and other trade partners." [32] The market access principles apply to imported goods as well as to goods produced within the UK. As pointed out by Professor McEwen and her colleagues this "facilitates the striking of new trade deals" because these principles "apply not only to goods produced in other parts of the UK, but also to goods imported into other parts of the UK."

42. The IfG point out that "mutual recognition will apply to any goods imported into the UK provided it complies with the relevant rules in the part of the UK in which it first arrives."[33]

43. Professor Hunt told us that UKIMA "was introduced very much as an insurance policy relating to what might be needed to manage international trade negotiations." In her view if "the potential for policy divergence across the UK that might exist under the Common Frameworks were to stand in the way of international trade agreements, the internal market act provides the tools to deal with that."[34]

44. The Food and Drink Federation Scotland (FDFS) raised the question of trade deals with a country that has lower regulatory standards. They raised concerns that if "products from that country can be imported into any part of the UK and passed across the whole UK," this might, for example, "undermine our high production standards in Scotland and in other parts of the UK." [35]

Trade and Co-operation Agreement

45. The EU-UK Trade and Co-operation Agreement (TCA) was incorporated into domestic law via the European Union (Future Relationship) Act 2020 which was enacted in the face of refusal of devolved consent from all three devolved legislatures.

46. The TCA includes commitments to ensure that the overall level of protection provided by the standards which currently apply in the areas of labour and social standards, environment, and climate cannot be lowered (so-called non-regression) by either the UK (including by the devolved authorities) or the EU in a way which impacts on trade and investment. In this way the TCA seeks to establish a level playing field between the EU and the UK.

47. Professor McEwen and her colleagues point out that given the TCA is not based on regulatory alignment between the EU and the UK, there are hardly any requirements for specific regulatory standards to be enacted across the UK. [36] Going forward, other trade deals negotiated by the UK Government may include commitments to specific regulatory standards.

48. However, although there is no mutual recognition of standards within the TCA, the level playing field provisions may act to ensure continued close convergence between UK and EU law post Brexit. If this is the case it is likely to limit the ability of both the UK Government and the Devolved Governments to legislate in a way which introduces major divergence with the EU. In the event of continued convergence with EU law, it is likely that opportunities for divergence between the nations of the UK are limited.

49. As part of the TCA's governance arrangements, the Partnership Council (which is jointly chaired by the EU and the UK Government) and a number of Specialised Committees have oversight of the operation of the agreement. Article 7 of the TCA gives the Partnership Council wide-ranging powers to adopt decisions relating to how the Agreement operates and allows it to make binding decisions including to amend the terms of the Agreement (with the exception of amendment of Title III of Part 1 which provides the institutional framework for oversight and implementation of the Agreement).

50. Article 10 of the Agreement sets out that decisions adopted by the Partnership Council, or, as the case may be, by a Specialised Committee, shall be binding. This means in some areas the Partnership Council's powers enable the UK Government and EU to agree between them to change the original terms of the TCA. These decisions could make changes in and impact on devolved policy areas.

51. **The Committee notes that where UK ministers consider that a UK-wide approach is necessary to uphold international agreements and obligations, the Scotland Act 1998 already provides scope to UK ministers to ensure compliance. For example, by enabling the Secretary of State to prohibit the**

Presiding Officer from submitting Bills for Royal Assent which contain provisions which are incompatible with international obligations.[37] Section 58 of the 1998 Act also provides the Secretary of State with a power to prevent or require action by the Scottish Government to secure compliance with international obligations.

52. **The Committee also notes that one of the purposes of Common Frameworks is to ensure compliance with international obligations and to support the UK's ability to negotiate, enter into and ratify trade and other international agreements. The Committee notes that text covering international trade issues impacting on frameworks is expected to be included in the published frameworks.**

Subsidy Control Bill

53. Novel constitutional issues related to the internal market arise in the Subsidy Control Bill, a UK Government Bill which is [in its final stages] at Westminster and replaces the EU "state aid" rules. The EU rules applied to subsidies that were capable of affecting competition between Member States. Unlike the EU regime, the Bill also regulates subsidies which affect the UK's internal market.

54. The subject area of subsidy control was explicitly reserved by UKIMA.[38] The devolved legislatures' consent is nonetheless being sought, because the Bill contains provisions that alter the competence of the devolved administrations. The Economy and Fair Work Committee published its report on the legislative consent memorandum for the Bill on 9 February 2022. They noted that the Bill "raises new and important constitutional considerations" and agreed to draw these to our attention. [39]

55. Our Adviser, Dr Chris McCorkindale points out in his briefing for the Committee that "it is a novel feature" of the Bill that "it creates a new route to challenge, and ground(s) of challenge to, the validity" of an Act of the Scottish Parliament that "is… not made by amendment to the Scotland Act." [40] In his view there are "good constitutional reasons - not least, the intelligibility of the devolution scheme as a whole - why limits to the validity of devolved primary legislation should be contained within the Scotland Act itself."

56. Dr McCorkindale also highlights an issue raised by George Peretz QC, in relation to the grounds on which these challenges can be brought:

> "Despite being placed right at the end of the Bill, these provisions of Schedule 3 are, constitutionally, quite significant. That is because they represent a significant departure from the general position, set out in *AXA General Insurance v Lord Advocate* [2011] UKSC 46, that judicial review of devolved legislation is not generally possible on the general common law grounds of irrationality, unreasonableness, or arbitrariness."[41]

57. Primary legislation of the UK Parliament is not subject to judicial review under the Bill, and Dr McCorkindale notes that, while this is "consistent with UK constitutional principle", it creates "a legislative opportunity (whether taken or not) for the UK

Parliament to shield anti-competitive subsidies… from strong-form review… and in a way that (whether exercised or not) advantages one constituent part of the UK over the others."

58. In relation to executive competence, Dr McCorkindale suggests that two important constitutional considerations arise from the Bill. First, "there are additional powers by which the UK Government might intervene with regard to the exercise of executive power by Scottish Ministers", for example by calling-in subsidies or referring them to the Competition and Markets Authority, but the Scottish Ministers (and the other devolved administrations) do not have equivalent powers in relation to subsidies impacting in their part of the UK which are granted elsewhere in the UK. Dr McCorkindale suggests "these asymmetries seem to defeat rather than reinforce the policy objective of creating a level playing field across the UK."

59. Second, is the extent to which the Bill constrains the scope of existing and future devolved executive power. Dr McCorkindale points out that the Bill requires the Scottish Ministers, the Scottish Parliament and devolved public authorities to "consider the impact of subsidies on and across the constituent parts of the UK". Furthermore, clause 1(7) requires that all (past and future) Scottish primary and secondary legislation (but not UK Parliament primary legislation in which a contrary intention is expressed) is "to be read as being subject to the subsidy control requirements contained in the Bill." Dr McCorkindale concludes therefore that the Bill "cuts across devolved competence in significant ways."

60. NFU Scotland told us that "the internal market act and what will be the Subsidy Control Bill overlap and interrelate quite significantly when it comes to the agricultural support element." [42] They have concerns that the Subsidy Control Bill "can be used as a tool to say that the Scottish Government has to stop giving" more advantageous support to farmers and crofters in Scotland "because it is not the same type of support that is being received in other parts of the UK."

UK Internal Market Act (UKIMA)

61. In order to ensure that "seamless trade across the UK's Internal Market is maintained" the UK Government has put the internal market on a statutory footing including "providing a Market Access Commitment to all businesses and citizens across the UK." [43]

62. The UK Government's intention as set out on its UKIM white paper is that -

> "the UK will continue to operate as a coherent Internal Market. A Market Access Commitment will guarantee UK companies can trade unhindered in every part of the United Kingdom – ensuring the continued prosperity and wellbeing of people and businesses across all four nations. At the same time, we will maintain our high standards for consumers and workers." [44]

Market Access Principles

63. UKIMA creates two market access principles: the mutual recognition principle and the non-discrimination principle. All devolved policy areas are potentially impacted

by the market access principles although some exemptions are provided in the Act. For example, neither of the market access principles currently applies to healthcare services, social services or transport services.

64. Both principles can be applied to relevant requirements in respect of the sale of goods or the provision of services. These principles serve to disapply relevant requirements in one part of the UK when goods or services are lawfully provided in another part of the UK. This means that goods and services which originate elsewhere in the UK (or are imported into another part of the UK) under different regulatory conditions will have access to the Scottish market while goods and services originating in Scotland would have to comply with Scottish standards.

Mutual Recognition - goods

65. The mutual recognition principle for goods [45] in the Act allows any good that meets relevant regulatory requirements relating to sale in the part of the UK it is produced in or first imported into to be sold in any other part of the UK without having to adhere to relevant regulatory requirements in that other part.

66. The Environmental Protection (Single-use Plastic Products) (Scotland) Regulations 2021 provide a useful example of how the mutual recognition principle works. A summary is provided in **Annexe A**.

67. A number of our witnesses highlighted the extent to which the principle of mutual recognition within UKIMA differs from the principle of mutual recognition within the EU Single Market. Professor Armstrong's written submission states that the "legal discipline which the Act imposes is different in important respects from that applicable to the EU Internal Market [46] ."

68. In his view the Act "applies a strong and blunt variant of the mutual recognition principle in ways which give extraterritorial effect within a jurisdiction to rules promulgated in another jurisdiction (home country control)." As such, the Act "places too much emphasis on market liberalisation over local rights to regulate. It provides a legal framework for regulatory competition that is in tension with the collaborative intergovernmental approach to managing regulatory diversity."

69. A key difference is the list of exclusions on public interest grounds from the application of the principle are much narrower within UKIMA. Within the EU the local jurisdiction can seek to demonstrate a legitimate public interest justification for the proportionate application of local rules on the basis of public interest grounds such as public health, environmental protection and the protection of consumers and workers. The IfG points out that UKIMA "has fewer and much more narrowly defined exemptions, and therefore places new constraints on the governments of the UK." [47]

70. Professor McEwen and colleagues explain that within the mutual recognition principle for goods there "are very few permissible exceptions to the application of the market access principles and these relate to highly specific problems i.e. combating the spread of pests, diseases or unsafe foodstuffs, and even then, only under strictly controlled conditions." [48]

71. Professor Hunt told us that while there are similar free movement market access principles within the EU Single Market "they come with a much more developed set

of grounds for justification as to why local choices might be able to be sustained within a wider market."[49] Professor Weatherill explained that the "core point is that the EU is more generous than the UK in accepting possible justification for local rules that obstruct trade."[50]

72. The environment charity, Fidra, state that the market access principles "must include a provision that enables positive divergence for the public interest."[51] In their view UKIMA "must not remove the opportunity for devolved administrations to make progressive environmental policy that serves as a case-study to drive up standards across the whole of the UK." Scottish Environment Link state that "LINK Members have previously argued that the market access principles must be qualified to permit essential regulation in public interest, including to protect and improve the environment."[52]

73. Alcohol Focus Scotland (AFS), ASH Scotland (ASHS) and Obesity Action Scotland (OAS) "have serious concerns that the effect of the mutual recognition principle for goods will be to significantly reduce the benefits of introducing new devolved measures to protect public health."[53] In their view the "net effect is likely to be to stifle policy innovation" and to disincentivise improvements to pre-existing requirements "as any substantive update to such requirements may bring them within the scope of the legislation."

74. The FDFS told us that it "is not concerned about anything as far as mutual recognition is concerned." In their view the "issue might become more about divergence or differences between regulation" if consequently "goods were not allowed to be placed in the market in England, that would be of significant concern to the Scottish food industry."[54]

75. NFU Scotland's view is that the market access principles "could in fact have adverse impacts for the competitiveness of Scottish agricultural producers."[55] They provide an example related to divergence in the regulation of Plant Protection Products (PPPs) in Scotland and in England. The mutual recognition principle "could potentially create the situation where producers elsewhere in the UK who have access to a particular PPP could sell product treated with the PPP in Scotland, to the competitive disadvantage of Scottish producers who were banned from using that PPP."

Non-Discrimination - goods

76. The non-discrimination principle is defined in section 5(1) of UKIMA as the principle that the sale of goods in one part of the United Kingdom should not be affected by relevant requirements that directly or indirectly discriminate against goods that have a relevant connection with another part of the United Kingdom.

77. Professor McEwen and colleagues explain that the non-discrimination principle for goods "applies to selling arrangements – such as advertising regulations, shop opening restrictions or licensing requirements, as well as mandatory conditions relating to circumstances of sale covering issues like conditions of storage or transportation."[56] They highlight the proposed Fireworks and Pyrotechnics Bill, as well as the Fireworks (Scotland) Amendment Regulations 2021, as including

regulations concerning the conditions of sale of Fireworks as examples of legislation which is subject to the principle of non-discrimination.

78. A measure is directly discriminatory under UKIMA if it applies to incoming goods in a way which does not apply to local goods, and puts them at a disadvantage compared to local goods, making it in any way more difficult or less attractive to buy or sell them (section 7). If a measure is within the scope of the non-discrimination principle but there is no direct discrimination, a measure has to be assessed for indirect discrimination (section 8) in terms of whether it –

- puts incoming goods at a disadvantage, and
- it has an adverse market effect (defined as a significant adverse effect on competition), and
- does not pursue a legitimate aim within the meaning of the Act.

79. There are exclusions within the Act from the non-discrimination principle. The exclusions are for requirements that are *directly discriminatory* but a response to a public health emergency or requirements which are *indirectly discriminatory* and are a necessary means of achieving a legitimate aim of the protection of the life or health of humans, animals or plants, or the protection of public safety or security. Professor McEwen and colleagues explain that permissible exceptions in the case of direct discrimination "are again narrowly drawn" but indirect discrimination against other UK goods may be justified "according to a lower threshold." [57]

80. Professor Armstrong points out that there "is a higher threshold to be crossed under the Act in terms of the need to demonstrate 'a significant adverse effect on competition.'" Compared to EU law there is a greater onus on the claimant to demonstrate an adverse effect on competition in the first place. Professor Armstrong's view is that within the EU "there is a lower threshold to trigger the application of the free movement principles but this is balanced by the open-ended scope of legitimate aims which a local jurisdiction can claim to be protecting providing the interference with trade is proportionate to the regulatory aim." [58]

81. Professor Armstrong suggests that if the non-discrimination principle "is triggered it is far more speculative whether the result would be the disapplication of Scottish rules." [59] Professor McEwen told us that "there is a lot of uncertainty about the effect" of UKIMA "which might in itself be introducing delays in the policy-making process, if not putting things into a long-term chill." [60]

82. NFU Scotland provided us with an example of how the non-discrimination principle may constrain public policy in Scotland. They told us that if the Scottish Parliament were to "legislate on local procurement and the intention to buy local, the non-discrimination element of the internal market act might say that we cannot do that and that we simply have to allow products to be allowed to compete on price in the market for public procurement rather than being exclusive about it." [61] NFU Scotland contends that "there must be exceptions in place that allow, say, Scottish public bodies looking to procure local produce to do so outside of the scope of the non-discrimination principle." [62]

83. AFS, ASHS and OAS suggest that the non-discrimination principle for goods "could

also impede the ability of devolved administrations to legislate for public health." This is because in their view the "public health grounds for justification for measures deemed discriminatory seem a very challenging bar." [63]

84. They point out that measures that "directly discriminate can only be justified as a response to a public health emergency" and in their view this definition "is far too narrow to enable measures to be taken on public health protection grounds." In their view, for example, "if the Scottish Parliament legislated to impose new advertising restrictions on alcoholic drinks in a way that disadvantaged English imports and adversely affected competition on the relevant UK market, Scotland would need to justify the application of those rules to English goods on public health grounds." But they suggest that this "necessity test is strict and difficult to fulfil because it requires that there is no other less restrictive way of achieving the aim."

85. The UK Government state that UKIMA "will provide certainty and clarity for businesses" [64] and a coherent approach to market access will drive efficient supply chains and opportunities for business growth and ensure fair price distribution for consumers. The Scottish Government's position is that "far from ensuring clarity for business and consumers, the Act provides conditions for regulatory incoherence, business uncertainty and consumer confusion." [65]

Office for the Internal Market (OIM)

86. The OIM defines its role as "to assist governments and other key stakeholders in understanding how effectively companies are able to sell their products and services across the four nations of the UK, and the impact of regulatory provisions on this, including the impact on competition and consumer choice." [66] It is not the regulator of the internal market, has no enforcement role and its reports are non-binding. It must have regard to the need to act even-handedly in relation to the relevant national authorities.

87. The OIM's main functions fall into the following two categories:

- monitoring and reporting on the operation of the UK internal market: this includes publishing annual and five-yearly reports, as well as undertaking discretionary reviews on any matter that the OIM considers relevant to assessing or promoting the effective operation of the internal market in the UK and/or provisions of Parts 1 to 3 of UKIMA.

- providing reports or advice on specific regulatory provisions upon the request of a relevant national authority, that is the UK Government, the Scottish Government, the Welsh Government and a Northern Ireland Department.

88. The OIM told us "we are looking to ensure that trade is effective across different parts of the UK and to identify any subsequent issues that barriers to trade might create for competition, innovation and perhaps investment, leading into what effects there might be for consumers in terms of prices and choice." [67]

89. The IfG point out that while the OIM "will assess the economic impact of future regulatory divergence, the operation of the Common Frameworks" and UKIMA "it is

not clear who will assess the policy impact." Professor Hunt told us that "we are less clear" whether the reports and/or advice requested by a relevant national authority "will be more generally shared in a transparent way or whether there will be a closed process." [68]

90. Scottish Health Action on Alcohol Problems (SHAAP) raise concerns that the OIM's functions "may affect areas of competence within the Scottish Parliament such as alcohol control policies designed to improve public health." While acknowledging that the OIM's role is focused on trade "it may be difficult to separate the analysis of this mainly economic impact from an examination of the implications that these differentiated regimes have for the attainment of the policy objectives to which they aim." SHAPP are therefore concerned that this "might create uncertainty around the assessment of the "strict necessity" of a devolved measure affecting trade vis-à-vis the fulfilment of one of the legitimate aims listed in Section 8(6) of the Act." [69]

91. **The Committee recognises that UKIMA market access principles do not introduce any new statutory limitations on the competence of the Scottish Parliament or Scottish Ministers. However, they can automatically disapply Scottish legislation [70] . While UKIMA may not affect the Scottish Parliament's ability to pass a law, it may have an impact on whether that law is effective in relation to goods and services which come from another part of the UK.**

92. **In particular, given the size of the English population and economy relative to the three other nations within the UK, the Scottish Government will need to take account of market forces when considering regulatory divergence. It is unlikely that the devolved governments will want to put their own economies at a competitive disadvantage with the much larger English economy by introducing higher regulatory standards which imports from other parts of the UK do not need to comply with.**

93. **The Committee also recognises that there are significant differences between the market access principles within UKIMA and within the EU Single Market. In particular, the list of exclusions on public interest grounds from the application of the mutual recognition principle are much narrower within UKIMA.**

94. **There is a clear consensus within the evidence which the Committee received that UKIMA places more emphasis on open trade than regulatory autonomy compared to the EU Single Market. We discuss the impact of this shift in the balance between open trade and regulatory autonomy on devolution below.**

Tensions within Devolution

95. The Committee has sought in this inquiry to examine the complex challenges which exist in resolving the tension which can exist between open trade and regulatory divergence within the constituent parts of an internal market. The evidence which we have considered suggests that UKIMA in seeking to resolve this tension has shifted the balance with the devolution settlement away from regulatory autonomy through privileging market access. But at the same time the Committee recognises that the Common Frameworks programme provides an opportunity to manage the tension between regulatory divergence and open trade on a consensual basis.

96. Professor Nicola McEwen and colleagues state in their joint submission that UKIMA "prioritises unfettered market access over the law-making autonomy of the UK's political institutions" and this "could have a profound effect on devolution and the ability of the devolved institutions to set their own regulatory standards in pursuit of their own policy goals."[71] Professor Weatherill's view is that UKIMA "contains a structural bias in favour of market access, and against local regulatory culture."[72]

97. As discussed above one of the strengths of devolution highlighted by witnesses has been policy innovation and regulatory learning across each of the four parts of the UK. But Professor Weatherill points out that there "is a dynamic in the UK internal market that is antagonistic to regulatory learning." [73] Professor McEwen and colleagues suggest that UKIMA "arguably creates a powerful disincentive to engage in legal reform or policy innovation, in response to changing social and economic" preferences.

98. The animal protection charity, Onekind, state that UKIMA "undermines devolution and will limit the ability of the Scottish Parliament and Government to improve farmed animal welfare standards." [74] In their view the "Scottish Parliament cannot make legislation on animal welfare if goods can then come in that undermine them."

99. SHAAP believes UKIMA "could create risks for the integrity of the existing devolution settlement and in particular for the integrity of the regulatory prerogatives that the Scottish authorities enjoy, in accordance with the Scotland Act 2016, in the area of public health and especially alcohol control policy."[75]

100. AFS, ASHS and OAS believe UKIMA's "placement of economic interests above those of the public is likely to undermine devolved regulatory autonomy." [76] Professor Jo Hunt told us that UKIMA "views devolution and the potential for divergence as an obstacle and a potential irritant to the economic integration of the UK, which is prioritised and privileged through the market access principles."[77]

101. The Committee notes that the above concerns are similar to concerns raised during the passage of the UKIM Bill. The session five Finance and Constitution Committee, for example, in its report on the Legislative Consent Memorandum stated that the "Bill, and the market access principles in particular, undermine the whole basis of devolution." It stated that "it is unacceptable that the UK Government should seek to effectively impose new reservations on the devolved competences through this Bill." [78]

102. The session five Culture, Tourism, Europe and External Affairs Committee stated that "the Bill provides for new constraints on the devolution settlement to be applied, via the market access principles, which would significantly constrain the exercise of current devolved competences." [79]

103. The House of Lords Select Committee on the Constitution stated that the Bill "adopts an unnecessarily heavy-handed approach to reconciling the demands of free trade within the UK and the need to respect the role and responsibilities of devolved institutions." Consequently the proposals risked "de-stabilising this integral part of the UK's constitutional arrangements—at a time when it has never been more important for central and devolved governments to work together effectively." [80]

104. The Welsh Senedd's Legislation, Justice and Constitution Committee stated in its report on Welsh Government's LCM that it agreed "with the Counsel General and the Scottish Parliament's Finance and Constitution Committee that the scope of the provisions in the Bill go beyond the restrictions currently in place on devolved legislatures under the rules governing the EU's single market." In its view the Bill as introduced represents "a new restriction on the ability of devolved legislatures to effectively implement new laws in areas of devolved competence." [81]

105. The Scottish Government stated in its response to the Finance and Constitution Committee's LCM report that "the Bill's actual, as opposed to stated purpose is to radically undermine devolved autonomy and decision-making powers." [82]

106. The Committee recognises that the UK Government did make some concessions in response to concerns raised during the passage of the Bill. As noted by Professor Armstrong the Bill "underwent noteworthy amendments during its legislative passage." [83] These included –

- Altering the scope of the 'relevant requirements' subject to the mutual recognition principle with a view to taking pricing controls outside the scope of that principle;
- Limiting the ability of UK ministers to amend the scope of the Act via statutory instruments and making remaining powers subject to new devolved consent requirements;
- Acknowledgement of the potential impact of the Act on the outcomes of Common Frameworks processes by conferring a discretionary power on UK ministers to exclude such outcomes from the scope of the Act;
- Elaborating on the role of the OIM in monitoring the functioning of the internal market and requiring it to lay reports before the devolved legislatures.

107. The Act was passed notwithstanding that legislative consent was withheld by the Scottish Parliament and the Welsh Senedd. The Welsh Government is seeking a judicial review with a view to obtaining a declaration that the powers conferred by the Act cannot be exercised incompatibly with the constitutional status of the devolution statutes.

108. In a letter to the Committee dated 2 December 2021 the Cabinet Secretary

reaffirmed the Scottish Government's view that UKIMA "is an unnecessary and deliberate undermining of the devolution settlements" and it "is essential that the UK Government recognises the damage caused by the Act." [84]

109. **The Committee invites the UK Minister for Intergovernmental Relations to respond to the weight of evidence in this report which suggests that UKIMA undermines the devolution settlement. Specifically, the Committee would welcome the Minister's response both in writing and then in oral evidence to the following [i] –**

- **The clear consensus within the evidence which the Committee received that UKIMA places more emphasis on open trade than regulatory autonomy compared to the EU single market;**
- **The animal protection charity, Onekind's view that UKIMA "undermines devolution and will limit the ability to the Scottish Parliament and Government to improve farmed animal welfare standards";**
- **Scottish Health Action on Alcohol Problems' view that UKIMA "could create risks for the integrity of the existing devolution settlement";**
- **Professor Armstrong's view that the Act "places too much emphasis on market liberalisation over local rights to regulate";**
- **The IfG's view that UKIMA "has fewer and much more narrowly defined exemptions, and therefore places new constraints on the governments of the UK";**
- **Professor Weatherill's view that UKIMA "contains a structural bias in favour of market access, and against local regulatory culture";**
- **Professor McEwen and colleagues' view that UKIMA "arguably creates a powerful disincentive to engage in legal reform or policy innovation, in response to changing social and economic" preferences;**
- **Dr McCorkindale's view that the Subsidy Control Bill "cuts across devolved competence in significant ways".**

Common Frameworks

110. Despite the disagreement between the devolved governments and the UK Government over UKIMA some progress continues to be made in relation to Common Frameworks. Both the Welsh and Scottish Governments argue that UKIMA is unnecessary as Common Frameworks can fulfil the same objectives in guaranteeing market access across the UK. A definition and set of principles for Common Frameworks were agreed by the Joint Ministerial Committee (JMC) in October 2017. [85]

111. Common Frameworks were defined as setting "out a common UK, or GB, approach and how it will be operated and governed. This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual

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i Donald Cameron MSP and Maurice Golden MSP dissented from this paragraph

recognition, depending on the policy area and the objectives being pursued." [86]

112. The set of principles included the establishment of frameworks where they are necessary in order to -

- enable the functioning of the UK internal market, while acknowledging policy divergence;
- ensure compliance with international obligations;
- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties.

113. The agreement also stated that frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore –

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

114. As at 10 February 2022, the Committee understands 26 Common Frameworks will apply to Scotland [87] . Of these:

- 4 have been published and scrutinised by parliament (3 in session 5, 1 in session 6)
- 2 have been published and scrutiny is in progress
- 12 have been published but scrutiny on them has not yet started
- 8 are yet to be published (one has previously been published, but an updated version is expected to be published).

115. The UK Government reported in May 2021 that these "frameworks have been operating on an interim basis across the UK at official level while their provisional confirmation is awaited." [88]

116. A number of our witnesses emphasised the consensual agreement of Common Frameworks as an effective way of managing regulatory divergence while respecting the devolution settlement. The NFU Scotland, for example, suggest that frameworks provide "a more effective alternative to manage divergence, whilst respecting devolution, and so enable the UK Internal Market to operate without friction or distortion." But in their view the market access principles "pose a significant threat to the development of Common Frameworks and to devolved policy" and "raise the potential for Common Frameworks to be rendered meaningless."

117. Scottish Environment LINK told us "we are clear that we need strong Common

Frameworks." AHS agree that "Common Frameworks are the key opportunity for us to try to manage and limit the impact" of UKIMA. However, they nevertheless feel that UKIMA "severely curtails the Parliament's opportunity to make progress" on the public health issues they are seeking to address.

Managing Regulatory Divergence

118. Professor Armstrong highlights the distinction between an approach which seeks to manage divergence before regulations are adopted and after regulations are adopted. This is shown in Table 1 below.

Table 1: Managing Divergence

Techniques that manage divergence before regulations adopted	Techniques that manage divergence after regulations adopted
• Pre-legislative notification and consultation about planned regulatory changes to allow for the representation of external interests in local regulatory policymaking (e.g. 'notice and comment' processes may attach to local rulemaking); • Authorization processes to allow for regulatory divergences where other jurisdictions within the internal market are willing to accept divergence; • A stand-still that prevents adoption of draft rules pending the outcome of notice and comment processes.	• Disapplication of regulations that inhibit cross-border movement of goods or provision of services; • Coordination of regulation through active consideration of the equivalence of different regimes; • Review clauses and sunset clauses to allow for further information to be gained about the experience of regulatory divergence and for the reconsideration of decisions in light of new knowledge.

119. Professor Armstrong notes that "the techniques noted in the left-hand column of the table above do not form part of the statutory UK internal market."[89] This means that the mechanisms "of notification of draft regulations – and the standstill procedures that apply to notified drafts – that feature prominently in EU law" are not reproduced in UKIMA.

120. Within the EU, Member States are required to inform the European Commission of any new technical regulations and technical standards whilst they are in draft and before they are adopted in national law. Once notified, the measure enters a standstill period that usually lasts for 3 months, during which the measure cannot be laid. The standstill period enables the Commission and other Member States to raise any concerns about whether the proposed measure is a potential barrier to trade.

121. Guidance published by the Department for Business Innovation and Skills while the UK was a Member State of the EU stated that "notifications are made via the Commission's Technical Regulations Information System (TRIS) database" in accordance with Directive 2015/1535. The guidance noted that that this "helps make the notification process more transparent and allows public access to some of the details that are being notified."

122. The TRIS website states that it –

- helps you to be informed about new draft technical regulations; and
- allows you to participate in the 2015/1535 procedure.

123. The process is therefore "also a tool of dialogue between the Commission and Member States in which your voice can be heard." [90]

124. Professor Weatherill explained that potential divergence within the EU is "managed through a process in which a state that proposes to introduce a new technical regulation that might impede trade must notify it to the European Commission in advance of bringing it into force." Professor Weatherill also points out that the standstill period allows an opportunity "for views to be put forward by other member states so that an assessment can be made of whether the regulation should be treated as justified or not." [91]

125. In Professor Weatherill's view "all that management system is missing from" UKIMA. The written submission identifies the need for "a better and firmer management system" and most of all "there should be a pre-notification system so that proposed new regulations that might impede trade within the United Kingdom can be considered and assessed for their worth in advance of their introduction." [92]

Exclusions from the Market Access Principles

126. Professor McEwen points out that the Common Frameworks process provides "scope for permitting divergence to occur" and in particular "where there is scope for Common Framework agreements to be excluded from those market access commitments." [93] Professor Armstrong points out that unlike UKIMA "the Common Frameworks programme is a means of managing divergences before new rules are adopted." However, "unlike EU techniques for managing new draft regulatory requirements which legally mandate notification and stand-still obligations, the cooperation envisaged under Common Frameworks do not take binding legal form."

127. Delegated powers under sections 10 and 18 of UKIMA allow changes to be made to the exclusions from the application of the market access principles. There is a statutory requirement in UKIMA that the UK Government seeks the consent of the devolved governments before using the powers to change what is excluded, but the UK Government can proceed in the absence of consent if it is not given within one month (sections 10(9)-(11) and 18(8)-(10)).

128. The UK Government and the three devolved governments have agreed a process for the consideration of exclusions from UKIMA in areas where a Common Framework agreement exists between the UK Government and one or more of the devolved governments. [94] The agreement provides each of the four governments with an opportunity to propose exclusions consistent with the established processes as set out in the relevant Common Framework. This includes providing an assessment of direct and indirect economic impacts.

129. The process also states that each government should consult and seek agreement *internally* on their position before seeking to formally agree the position within the relevant Common Frameworks forum. There is no mention of any requirement for public consultation or parliamentary scrutiny of the process for seeking an exclusion.

130. Following agreement of the exclusions process the Cabinet Secretary wrote to the Committee. He told us that "while the proposed process for excluding policy issues covered by a common framework should be adopted it does nothing to lessen the

Scottish Government's opposition to the Act." He also emphasised that "final decision-making lies with UK Ministers alone" which in his view "is fundamentally inconsistent with the principles and practice of devolution."

131. **The Committee welcomes the inter-governmental agreement on a process for seeking exclusions from the market access principles. The Committee notes, however, that there is very little detail in the public domain in relation to how this will work. The Committee recommends the need for clarity in the following areas –**

- **Is the process intended as a means of managing policy divergence before regulations are adopted?**
- **What criteria will be used in assessing exclusions and how will this balance the priority within devolution for regulatory autonomy with open trade?**
- **If an exclusion cannot be agreed whether the matter may then be resolved through the IGR dispute resolution process?**
- **How the process will provide certainty and clarity for businesses and consumers?**

132. **The Committee also notes that there is no mention of any requirement for public consultation or parliamentary scrutiny of the process for seeking an exclusion. Neither is there any requirement for proposed exclusions to be made public. In contrast at an EU level there is a public consultation on notifications by a Member State of draft proposals for regulatory divergence during a standstill period (usually 3 months).**

133. **It is essential that the Common Frameworks process builds in formal structures which allow for public consultation where an exclusion from the market access principles is sought on significant policy areas. Such a consultation may need to be UK or GB wide given an exclusion may impact on businesses and consumers across the UK or GB. This could be conducted simultaneously by the respective governments involved. The relevant committee in each legislature should also be notified of any request for an exclusion on significant policy areas.**

Minimum Standards

134. Within the EU single market there 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. UKIMA does not provide for any basic or minimum standards nor does it provide a mechanism for agreeing these across the four parts of the UK.

135. Scottish Environment LINK suggest that if "strong Common Frameworks are agreed collaboratively by the four governments of the UK, there is an opportunity to agree new minimum standards for the environment." They told us that "would help to

clarify some of the uncertainty that exists at the moment." [95] In their view setting "a new baseline for standards of air, water, soil quality amongst many others, would reduce the risk of deregulation as part of a race to the bottom." Their concern is that "if one part of the UK was to decide to lower its standards—there is nothing to prevent that from happening—it might make the other nations feel that they also have to lower their standards to maintain a competitive advantage." [96]

136. Scottish Environment LINK has highlighted how the previous arrangements under the EU created conditions that encouraged the raising of environmental standards. With minimum EU environmental standards being required of all member states, UK nations could participate in a 'race to the top' and innovate to set higher standards.

137. NFU Scotland suggest that the "successful delivery of Common Frameworks, as intended, could ensure that the UK Internal Market effectively continues to operate as it does now – providing a level playing field of minimum regulatory standards to enable the free movement of goods and services without unfair distortion."

138. Dr Araujo notes that the Protocol on Ireland/Northern Ireland might "undermine the development of UK-wide minimum standards to the extent that it ties NI to the EU regulatory framework in relation to trade in goods" and given that Common Frameworks "will only apply in NI to the extent that they do not conflict with applicable EU law."

139. The Scottish Government's view is that Common Frameworks "will, in effect, provide for minimum standards across the UK, while allowing for those standards to be built on" where "appropriate or necessary in different parts of the UK." [97] In contrast the Scottish Government sees UKIMA as having "no mechanism to agree minimum standards and the potential for regulators having to work to – and enforce – four sets of incompatible standards in each part of the UK." In its view this "is the very opposite of providing clarity and certainty for businesses and consumers". [98]

140. Analysis by our Adviser, Professor Michael Keating, suggests that the published Common Frameworks are much more limited in scope and generally do not consist of common goals or minimum or maximum standards [99] . The focus has "been on process rather than policy substance." Some suggest that minimum standards and/ or joint policy-making might be possible. But "most Frameworks are about the management of divergence" with a "strong emphasis on technical issues, to be resolved among officials and a search for practical accommodation, rather than on high politics." [100]

141. Professor McEwen and colleagues suggest that Common Frameworks are best understood as processes of intergovernmental cooperation. As such, they "are not policy documents or regulatory rulebooks, nor do they appear to set out common policy approaches." Instead, "they establish principles of engagement and ways of working that might lead to common approaches."

142. **The Committee notes that the published Common Frameworks do not generally provide for minimum standards or for common approaches as set out in the JMC principles and reaffirmed in November 2021 in the UK Government Frameworks Analysis [101]. Rather they appear to be technical documents which provide for ways of working for government officials which might include agreeing UK or GB wide minimum standards or a common**

approach.

143. **The published documents are therefore limited in improving public awareness and understanding of policy areas where a UK or GB wide approach is likely. They are also limited in providing information on minimum standards. The Committee is concerned, therefore, that the published documents have not provided the certainty and clarity which businesses, consumers and other stakeholders which frameworks were anticipated to provide.**

Ireland/Northern Ireland Protocol

144. The Protocol on Ireland/Northern Ireland was signed as part of the UK-EU Withdrawal Agreement and ratified in UK law by the EU (Withdrawal Agreement) Act (2020). Our Adviser Professor Katy Hayward highlights four main respects in which the Protocol impacts on UKIM –

- Trade with Northern Ireland from Great Britain, which is now affected by the application of customs formalities and regulatory checks and controls, as if those goods were in effect entering the EU's customs union and single market;
- Regulatory frameworks enacted in the UK, for which Northern Ireland is definitively aligned with the EU on over 300 legislative acts;
- The role of the UK-EU Joint Committee for the Withdrawal Agreement which has scope to make significant decisions over the Protocol, including as it affects UKIM;
- UK-EU tension and talks over the Protocol, which could potentially result in further trade barriers (including non-tariff barriers) on UK-EU trade if the Trade and Cooperation Agreement is suspended in part or in full.[102]

145. As noted above the UK Government's intention as set out in the UKIM white paper was that the market access principles "will guarantee UK companies can trade unhindered in every part of the United Kingdom." However, Professor Hayward points out that UKIMA "cannot guarantee that trade can continue unhindered across the UK as it did before Brexit because of the Protocol."

146. While s.47 of UKIMA provides for unfettered access to the UK internal market for NI goods, s.11 (1) provides for the market access principles for goods to –

> "apply, in relation to the sale of goods in a part of the United Kingdom **other than Northern Ireland** [ii], with the following modifications. (For provision affecting the application of those principles in relation to the sale of goods in Northern Ireland, see, in particular, the Northern Ireland Protocol and sections 7A, 7C and 8C of the European Union (Withdrawal) Act 2018)."[103]

147. Dr Billy Melo Araujo explains that "for goods that come into Northern Ireland from GB" UKIMA "is, frankly, irrelevant."[104] Given NI is subject to EU internal market

ii Emphasis added

rules and EU customs rules, GB goods "will be subject to obstacles to trade." [105] In contrast UKIMA provides for unrestricted access for 'qualifying goods' moving from NI to GB.

148. Professor Hayward's view is that UKIMA "does nothing to minimize the frictions on GB to NI movement; indeed, by not containing measures to prevent a 'race to the bottom', it allows for increased GB to NI friction in trade." Dr Araujo suggests that the "dynamic alignment arising from the Protocol could be used to strengthen the argument for Scotland to "keep pace" with EU rules." [106]

149. Dr Araujo identifies some risks arising from the Protocol for Scottish businesses and the Scottish economy. These include a likely loss of market share in NI as a result of increased barriers to trade in the shape of customs checks, regulatory checks and, in some cases tariffs. In his view the Protocol may also lead to a reduction of the flow of goods in Scottish ports given that "third-country goods that would have previously transited through Scotland on their way to NI may opt to enter NI directly to avoid being subject to dual customs and regulatory checks." [107]

150. Logistics UK told us that freight "volumes going from Scotland to Northern Ireland through the port of Cairnryan are up 16.9 per cent for the first six months of this year" and that it "has seen quite an increase in freight volumes going through the port" which "could be down to healthy imports coming from GB to Northern Ireland." But they also explained that this could be "because we have grace periods for goods coming into Northern Ireland" from GB [108] and "logistics operators avoiding Dublin Port which is now implementing full third country import controls on GB arrivals." [109]

151. The FDF and the Northern Ireland Food and Drink Association (NIFDA) state that the "continued lack of certainty around GB-NI trade is destabilising." Their "latest survey shows GB sales into NI are already down 15% and this will get worse if there is no long term solution or if that solution results in an increase in trade barriers." [110] They also suggest that "the complexity arising from regional divergence in standards creates confusion." As a result of the Protocol they "are seeing businesses in GB misinterpreting the NI position, refusing to trade as a consequence and refusing to accept the NI business explanations." [111]

152. Professor McEwen and colleagues state that the Protocol is expected to affect trade between Scotland and Northern Ireland, "but the precise nature and extent of these effects will only become clearer over the coming months and years." [112] The combined effects of the Protocol and UKIMA in relation to trading with NI "suggests goods from NI could have an apparent asymmetrical advantage over Scottish and other UK goods."

153. The Committee also discussed with our witnesses what impact the Scottish Government's commitment to align with EU law would have on Scottish businesses selling goods in NI. Dr Araujo explained that "the fact that you have the same rules does not mean that the regulatory compliance checks do not take place" and businesses will "still have to prove that their goods are compliant with EU rules."

154. As the IfG note this will mean "additional administration costs for Scottish producers who will need to provide new paperwork" to access the NI market." They point out

that the UK Government "has committed to meet some of these costs through the Trader Support Service for customs declarations, and the Movement Assistance scheme for agri-food certification."[113]

155. Dr Araujo acknowledges however that delivery of the Scottish Government's commitment to align with EU law would mean that "the regulatory burden on Scottish traders is reduced, because they do not have to comply with two different sets of regulations to have access to the EU and Northern Ireland markets."[114] The IfG's view is that alignment with EU law in Scotland would mean that "in practice, the impact of dual compliance is likely to be limited."[115]

156. Some of our witnesses also raised a potential risk that goods which do not originate from Northern Ireland could nevertheless have unfettered access to Scotland in line with the market access principles. Logistics UK asked, for example, "how do we ensure that only Northern Ireland produce that is destined for the GB market has unfettered access to the GB market?" and how "do we differentiate between Northern Ireland goods and Republic of Ireland goods?"[116]

157. Professor Hayward notes that NI "is the part of the UK most affected by Common Frameworks" but they can only operate in NI "if they do not conflict with the EU law that applies in the same area through the Protocol."[117] Some of the EU legislative instruments applying in NI through the Protocol fall within areas that are covered by Common Frameworks, for example, food and feed safety and hygiene. Dr Araujo suggests that Common Frameworks "should be used as a platform to facilitate dialogue on areas where regulatory divergence between NI and GB emerge and assess what steps can be taken to minimise such divergence."

158. **The Committee notes that one effect of the Protocol is that UKIMA does not apply to goods moving from GB to NI. It is not clear therefore how UKIMA "will guarantee UK companies can trade unhindered in every part of the United Kingdom" as stated in the UK Government's white paper on the internal market.**

159. **The Committee's view is that it would be possible to design a UK internal market which accommodates the possibility of regulatory divergence within each of the four parts of the UK, given that the Protocol provides such an arrangement for Northern Ireland.**

160. **The Committee notes that Scottish businesses seeking to trade with NI may need to comply with different regulatory standards. The Scottish Government and Scottish Parliament in considering new regulatory proposals will therefore need to take account of the impact of the Protocol.**

161. **The Committee would welcome clarity on the extent to which Common Frameworks are intended to manage policy divergence within the context of the Protocol.**

162. **The Committee recognises that the operation of the Protocol has a significant impact on Scotland and we will continue to monitor developments in relation to how it is working.**

Tensions in relations between the Executive and the Legislature

163. One of the key issues which emerged from our inquiry is the extent to which there is a risk that the increasing shift towards inter-governmental working, as a consequence of the UK leaving the EU, may result in reduced democratic oversight of the Executive and a less consultative policy-making process. The primary risk for the Scottish Parliament arising from the impact of post-EU constitutional change is that the level of transparency and Ministerial accountability which existed while the UK was a Member State of the EU is either intentionally and/or unintentionally diluted post-exit.

164. As highlighted by the session five Finance and Constitution Committee legacy expert panel there is a risk of a "shift in the balance of power between Scotland's political institutions away from the Parliament and towards various levels of government (UK and Scottish Government and UK and Scottish non-departmental bodies) allowing the executive to operate with reduced effective democratic oversight."[118]

165. In this section of the report the Committee examines the extent of this risk in the following areas –

- Inter-governmental governance;
- Common Frameworks;
- The implementation of the TCA;
- The role of the OIM;
- Impact of the UK internal market on the legislative process.

166. The Committee has also previously highlighted the need for increased transparency and Ministerial accountability in relation to the Scottish Government's policy commitment to align with EU law. In our report on the on the draft policy statement and the draft annual report which the Scottish Government is required to lay before Parliament by the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 we raised concerns about the narrow scope of the documents. We said that the draft documents currently provide limited information to aid scrutiny of the Scottish Government's commitment to continued EU alignment and consideration should be given to providing a fuller picture.[119]

167. The Committee's view is that it is helpful to consider these concerns within the context of the Parliament's founding principles –

- the Scottish Parliament should embody and reflect the sharing of power between the people of Scotland, the legislators and the Scottish Executive;
- the Scottish Executive should be accountable to the Scottish Parliament and the Parliament and Executive should be accountable to the people of Scotland;

- the Scottish Parliament should be accessible, open, responsive, and develop procedures which make possible a participative approach to the development, consideration and scrutiny of policy and legislation;

- the Scottish Parliament in its operation and its appointments should recognise the need to promote equal opportunities for all.

Inter-governmental Governance

168. Our Adviser, Professor Keating, notes that "it is commonly found that when policy issues are taken into intergovernmental forums, there is a loss of transparency and scrutiny." Professor Hunt told us that in the operation of the UK internal market "there are multiple points at which concerns arise about transparency and the scrutiny opportunities." [120]

169. The IfG state in their written submission that the increase in inter-governmental working needed to manage the UK internal market "poses challenges for legislatures aiming to hold their governments to account." This is because "the lack of transparency over the content of the discussions and negotiations between the government means fewer opportunities for influence."

170. The IfG told us that because inter-governmental working involves Governments negotiating with each other "they have less latitude to negotiate with their own legislatures or with civil society groups, for example." In their view the "best way to address that is by all the legislatures and civil society groups trying to put pressure on the intergovernmental agreement process and to put pressure on their respective Governments." [121]

171. The Law Society of Scotland in their written submission refer to a SPICe briefing paper [122] on Common Frameworks which addresses the question of *what new governance arrangements will be needed to make Common Frameworks work?* The paper states that "when more decisions are taken through intergovernmental forums, as in some federal systems, accountability and parliamentary scrutiny can suffer." Consequently, this increases "the importance of ensuring that intergovernmental bodies are transparent and accountable." [123]

172. The Law Society of Scotland's view is that the current arrangements for inter-governmental working "lack sufficient transparency and accountability." They point out that communiques following JMC meetings "are frequently commented upon for their lack of detail." They recommend that Ministers in all legislatures should "provide an oral report (which goes beyond the relatively uninformative published communiques) soon after any JMC or specialised JMC meeting."

173. The Committee also notes that the Smith Commission reported in 2015 that "the issue of weak inter-governmental working was repeatedly raised as a problem" during its inquiry. The Commission recognised that in response to an increase in devolved powers and a more complex devolution settlement "the problem needs to be fixed" and Governments "need to work together to create a more productive, visible and transparent relationship." It recommended that IGR should be "underpinned by much stronger and more transparent parliamentary scrutiny." [124]

174. In response to the Commission's report a Written Agreement on IGR was agreed by the Scottish Parliament and the Scottish Government in 2016. The Agreement sets out details of the information that the Scottish Government will provide the Parliament "with regard to its own participation in formal, ministerial-level inter-governmental meetings, concordats, agreements and memorandums of understanding." [125] The Agreement recognises the "increased complexity and 'shared' space between the Scottish and UK Governments that the powers proposed for devolution entail." It also recognises that "the increased interdependence between devolved and reserved competences will be managed mainly in inter-governmental relations."

175. Following a lengthy review of inter-governmental relations by the UK and devolved Governments the UK Government has published a document setting out "new structures and ways of working." [126] This includes a section on transparency and parliamentary accountability which states that all "governments commit to increased transparency of intergovernmental relations through enhanced reporting to their respective legislatures." It also states that all "intergovernmental forums will be encouraged to produce communiqués on their meetings and activities and publish these online" including the date, location, Chair and list of participants and a summary of discussion points.

176. However, the document also states that intergovernmental relations "are best facilitated by effective sharing of information and respecting confidentiality of the content of the discussions." The Law Society of Scotland state that this means that "discussions between the Governments are not subjected to proper scrutiny by the Parliament or the public." They told us "the tension that is created between the confidentiality of the discussions and the transparency of the decision-making process is a difficult circle to square" but generally "the communiqués from the joint ministerial committees are not very communicative." [127]

177. In their view the "question to be asked is where does the Parliament (or any legislature in the UK) stand in relation to such matters?" They suggest that an agreement is "needed between the Governments and Legislatures across the UK which will allow for transparency, scrutiny and openness so that the Legislatures can perform their functions of holding Governments to account."

178. Professor McEwen notes that "parliamentary committees in every UK legislature have called for greater transparency and greater oversight of IGR, not least in light of its increased importance in the context of both Brexit and Covid." But in Professor McEwen's view the outcome of the IGR review "offers very little" in addressing these concerns and note that "there is no reference to parliamentary oversight or a requirement to engage the parliaments." While she acknowledges that the Scottish Government has sought to enhance transparency through reporting on formal IGR meetings in her view "these changes were from a woefully low base, and there remains considerable room for a more meaningful parliamentary role." [128]

Inter-Parliamentary Working

179. The Committee notes that the Inter-Parliamentary Forum on Brexit (IPF) was established in 2017 "to provide a mechanism for dialogue and cooperation between parliamentarians from all the UK Parliaments" and to "consider a number of scrutiny challenges arising from the new constitutional arrangements which will be required

post-Brexit."

180. One of the key purposes of the IPF was to improve the scrutiny of inter-governmental relations. In particular, the IPF sought to influence the IGR review through correspondence with the Minister for the Cabinet Office. The IPF recommended that the final IGR agreement should explicitly recognises the core principles of respect for confidentiality, transparency and accountability and explicitly commit to providing timely information to the UK and Devolved Parliaments on IGR meetings, decisions and the content of agreements.[129]

181. In its report on the UK internal market the IfG recommend that to "most effectively scrutinise intergovernmental working the four legislatures should work together to share information and highlight common recommendations." They point out that "the devolved legislatures will face the same transparency problems as those in the UK parliament" and that "common recommendations may help put pressure on the governments to collectively agree to greater transparency." [130] For example, in relation to decisions taken in common framework forums.

182. The IfG recommend improved inter-parliamentary relations including –

- Information sharing at official level;
- Policy-specific chairs' forums to mirror ministerial groups;
- Interparliamentary forum(s)on the , building on the model established by the interparliamentary forum on Brexit;
- Joint evidence sessions and reports;
- Interparliamentary body for the UK with a standing membership, a small joint secretariat and similar powers to the select committees.

183. **The Committee is very supportive of inter-parliamentary working and agrees that it is essential in developing more effective scrutiny of IGR. The Committee notes that COVID combined with recent parliamentary elections have restricted opportunities for inter-parliamentary working over the past two years. The Committee welcomes plans to refresh the Inter-Parliamentary Forum and notes that the first meeting is scheduled for 25 February 2022.**

184. **The Committee recognises as discussed by the Law Society of Scotland that transparency and confidentiality is a difficult circle to square when seeking to improve the scrutiny of inter-governmental relations. While recognising the challenge involved the Committee nevertheless agrees with Professor McEwen that the IGR review offers very little in improving transparency.**

185. **The Committee's view is that there is a need to re-examine the UK's approach to IGR within the context of Common Frameworks. As noted above these frameworks may set out a common UK or GB approach, or at the least a forum for decision making on what approach should be taken. Given that frameworks require the four governments of the UK to discuss and agree approaches they may act as a practical constraint on the exercise of Ministers' powers and on the legislative programme a government may pursue.**

186. **The Committee is, therefore, concerned that if the operation of these frameworks is viewed as being solely inter-governmental this may undermine the Scottish Parliament's commitment to being accessible, open and responsive. It may also undermine its ability to develop procedures which make possible a participative approach to the development, consideration and scrutiny of policy and legislation.**

187. **The Committee recommends that to address these concerns consideration needs to be given to opening up the Common Frameworks process to allow opportunity for public consultation and parliamentary scrutiny in significant policy areas prior to inter-governmental decisions being made. We discuss this in more detail below.**

Common Frameworks

188. A recurring theme throughout our inquiry was the lack of transparency and consultation in relation to Common Frameworks. Scottish Environment LINK state in their written submission that "there has been little to no stakeholder engagement on any environmental Common Frameworks." They told us that they "have not received much in the way of public update in the past year or so about their development" [131] and "what is taking place is pretty opaque to us." [132]

189. AFS told us that a major concern for them is the "issue of the transparency of the Common Frameworks and the ability of civil society organisations and the voluntary sector to scrutinise and input into that process." They view frameworks as being "really opaque" which makes it "extremely challenging for a third sector organisation to engage with" and these "concerns are shared by other third sector public health organisations." [133]

190. NFU Scotland told us that they have not "been entirely sighted" on Common Frameworks "because that work was done by Governments and their officials, overseen by the JMC." They referred to a working group established by the Department for Environment, Food and Rural Affairs to consider agricultural support frameworks. The group is intended to "bring together the devolved Administrations and key stakeholders such as ourselves to look at how agriculture is supported in different parts of the UK to ensure that there is no significant divergence that affords a competitive advantage or disadvantage." But NFU Scotland told us the group "has not met yet, despite our pressing for it to be up and running so that Governments and key stakeholders can feed into the process." [134]

191. The Health and Sport (H&S) Committee considered two provisional Common Frameworks in Session 5. In its scrutiny of the Nutrition Labelling, Composition and Standards provisional framework they raised concerns that stakeholders "referred to frameworks as having been 'invisible' and 'under the radar'" and those who had been consulted "suggested this had been at an introductory stage and wasn't extensive." [135]

192. The H&S Committee subsequently considered the Food and Feed Safety and Hygiene provisional framework and again raised concerns about the lack of stakeholder engagement. They stated that their scrutiny "has again shown concerns

from stakeholders about who has been consulted on the framework and the extent of the scrutiny conducted."[136]

193. Professor Keating's view is that Common Frameworks are "essentially agreements between governments on how to manage technical issues" and to the extent that they "are used to develop common policies, the problem of parliamentary scrutiny and accountability is exacerbated as the process is conducted largely at official level and in intergovernmental forums."[137] Professor McEwen told us that the Common Frameworks process "all seems to be in a sort of political executive domain, which makes it difficult for Parliaments to scrutinise effectively."[138]

194. Concern has also been raised across the other legislatures within the UK regarding a lack of transparency and consultation in developing frameworks. The Food and Drink Federation told the House of Lords Common Frameworks Scrutiny Committee that "much of the development of Common Frameworks has been done behind closed doors for most of the time period."[139]

195. In oral evidence to the Common Frameworks Scrutiny Committee, the Chair of the Public Administration and Constitutional Affairs Committee in the House of Commons, the Chair of the External Affairs and Additional Legislation Committee in the Welsh Senedd, the Chair of the Committee for the Executive Office in the Northern Ireland Assembly all raised concerns in relation to the lack of engagement with external stakeholders.

196. The Convener of the Environment, Climate Change and Land Reform Committee in Session 5 told the Common Frameworks Scrutiny Committee that four UK Governments are making regulations "in a locked cupboard … that will affect people who are standing outside that cupboard. In that way chaos will lie" [140] .

197. The House of Lords Common Frameworks Scrutiny Committee's view is that Frameworks "are weakened by the lack of inclusion of external stakeholders and should have been transparent from their inception." They recommend that future "reviews of the frameworks should include an open and well-publicised stakeholder consultation process that reaches beyond the small number of stakeholders previously consulted."[141]

Constraints on the exercise of devolved competence

198. Some of our witnesses pointed out that Common Frameworks could in some cases constrain the exercise of devolved competence. Professor McEwen and colleagues suggest that frameworks "could commit the Scottish Government to "shared or minimal standards and rules, potentially limiting the scope for action of the Scottish Parliament."[142]

199. Our Adviser, Dr McCorkindale, states that the "continuing and private nature of inter-governmental negotiations about Common Frameworks" and how they interact with UKIMA and UK trade agreements "obscures the true extent of the freedom Scottish Ministers will in fact have to align with EU law where the UK diverges from EU law and regulatory standards."[143]

200. The IfG's view is that Common Frameworks "place some voluntary constraints" on

the exercise of devolved powers, "effectively creating a category of 'shared competencies'." [144] They point out that the Scottish Government "will need to inform relevant parties of regulatory proposals within the scope" of Common Frameworks and "enter into intergovernmental discussions, and where necessary reach agreement as to how to manage potential divergence." [145]

201. The Finance and Constitution Committee noted in Session 5 that while Common Frameworks "may not alter devolution they may nevertheless constrain, albeit voluntarily and subject to continued agreement, the Scottish Government's options for policy divergence in certain policy areas." It recommended that "it is essential that this is done transparently and with an opportunity for parliamentary and stakeholder engagement." [146]

202. **The Committee's view is that any proposal for a UK or GB wide policy approach within a common framework that constrains, albeit on a voluntary basis, the exercise of devolved competence , should require the approval of the Scottish Parliament.**

Dispute Resolution

203. The UK Government has published a document setting out new structures and ways of working for inter-governmental relations following a review. It states that all "governments are committed to promoting collaboration and the avoidance of disagreements, facilitated by the new intergovernmental machinery in which engagement will normally take place at the lowest appropriate level possible." [147]

204. The new structures and ways of working include provision for the oversight of the Common Frameworks programme including consideration of individual frameworks where necessary. The new dispute avoidance and resolution process within the document also forms part of the dispute resolution process set out in to Common Frameworks.

205. As our Adviser Professor Keating points out in relation to Common Frameworks, this means that matters are addressed at the lowest level first, only escalating to senior ministers if no agreement has been reached. In his view "this has clear advantages but depoliticization may not always be appropriate or possible should issues arise in which there is a wider interest among stakeholders or the general public." [148]

206. Any government may refer a disagreement to the IGR Secretariat as a dispute. Professor McEwen notes that the secretariat will operate "'outside' of any one government despite being hosted in the Cabinet Office, will serve all of the administrations and be accountable to the Council." [149]

207. SPICe notes that the secretariat "will decide whether a disagreement is to enter the formal dispute resolution process, based on clear criteria, such as whether the disagreement has previously been discussed by officials and whether it has implications beyond its policy area." [150] Professor McEwen points out that this means whereas previously "the UK government could deny the existence of a dispute, now any administration can escalate a disagreement to a formal dispute."

In her view the days "when the UK government could act as the accused, the judge and the jury appear to be over".[151]

208. NFU Scotland told us that that "Common Frameworks, if constituted correctly, would allow for dispute resolution and for things to be resolved more constructively." [152] In their view, "when devolved decisions across the UK can cause some sort of tension or potential trade distortion or a competitive advantage or disadvantage, that is when Common Frameworks processes for dispute resolution need to kick in." [153] Professor Weatherill's view is that dispute resolution would benefit from a pre-notification system based on the approach taken by the EU including a pre-defined standstill period as discussed above.

Operation and Reporting

209. The Common Frameworks delivery plan includes a post-implementation phase which includes "regular cycles of review and, if appropriate, amendment." [154] Unlike the previous phases of the delivery plan which recognises the need for parliamentary scrutiny of the development of frameworks there is no reference to the role of parliament(s) during post-implementation. However, the Welsh Government explained in a letter to the Senedd's Legislation, Justice and Constitution Committee that the four UK Governments have "committed to future reporting on the frameworks as part of the process for the oversight of the frameworks within the Intergovernmental Relations Review."[155]

210. The House of Lords Common Frameworks Committee has written to the UK Government raising concern that "no thought appears to be being given to the future coordination" of Common Frameworks. In their view "central coordination from the Cabinet Office needs to be continued given the great uncertainty, and the fragmentation of the Programme in terms of standards, communications, engagement, effectiveness, and future parliamentary scrutiny."

211. While scrutiny procedures have been agreed for the development of frameworks there has not yet been any agreement of scrutiny procedures for the operation of frameworks including reporting mechanisms. Professor Hunt states that there "will need to be on-going engagement with and accountability to Parliaments for the decisions that are made under the frameworks."[156]

212. The session five Finance and Constitution Committee recommended in its report on Common Frameworks in 2019 that each framework should include a mechanism "for monitoring, reviewing and amending frameworks including an opportunity for Parliamentary scrutiny and agreement."

213. The OIM has a statutory requirement to consider Common Frameworks as part of its five-yearly monitoring of the internal market including –

- any interaction between the operation of Parts 1 to 3 of UKIMA and common framework agreements; and
- the impact of common framework agreements on the operation and development of the internal market in the UK.

214. The first five-yearly report is due by March 2023 and must be laid before the legislatures in each of the UK nations. In addition the OIM have informed us that where their "reports or reviews relate to sectors where a common framework has been agreed" they "may consider the effects of this framework and its interaction with regulatory provisions as part of its findings."

215. Professor McEwen told us that that the Parliament should have "access to the kinds of negotiations that would potentially lead to common framework agreements being exempt" from the market access principles. [157] Professor McEwen suggested that the Scottish Parliament "should engage with the other legislatures across the UK" in order "to enhance and perhaps boost the limited capacity that you all have for scrutiny." [158]

216. Professor Hunt told us that it "is important to ensure that steps are built into how those frameworks work that enable the on-going oversight and engagement of Parliaments" on the basis that each "framework should be an on-going, living constitutional document." [159]

217. The House of Lords Common Frameworks Scrutiny Committee recommends that parliamentary scrutiny of Frameworks will need to "ensure that important policy decisions are made transparently" and committees "will need to have information on how the individual frameworks are operating in their respective policy areas." They recommend that, "to facilitate this, the four administrations should provide regular updates to their legislatures." [160]

218. The Committee notes that the Resource and Waste Common Framework provides a useful example of the lack of transparency in relation to the frameworks process. As noted in Annexe A the Scottish Government regulations banning the use of single-use plastics and has indicated that it will aim to manage policy divergence with the other parts of the UK through the resource and waste framework.

219. At a meeting of the Inter-Ministerial Group for Environment, Food and Rural Affairs (IMG EFRA) on 6 December 2021, the Scottish Government sought the option for as broad an exclusion as possible from the operation of the market access principles for policy areas under the Resources and Waste Common Framework. DEFRA Ministers have indicated they want "to examine the potential options, including further collaboration that might avoid the need for an exclusion." [161]

220. **The Committee notes, however, that the Resource and Waste Common Framework and a number of other Frameworks have not yet been published and the Parliament has not seen or had an opportunity to scrutinise these. This lack of transparency raises questions of clarity and certainty for businesses, consumers and the wider public. The Committee recognise the need for confidentiality in inter-governmental discussions under the auspices of Common Frameworks but believes that stakeholders and the Parliament must be involved at appropriate points in order to facilitate proper policy making and robust scrutiny.**

221. **In order to provide clarity and certainty there needs to be a formal agreement with the four legislatures across the UK that each government will provide detailed information on the outcome of common framework discussions which impact on significant policy areas, such as single-use plastics. This**

should include clarity in relation to –

- **The exclusions process including details of why any request for an exclusion was not agreed;**
- **The potential impact of the market access principles;**
- **Any advice and/or report provided by the OIM;**
- **Any agreement to postpone the date for regulations to come into force to allow a UK-wide or GB-wide approach to occur simultaneously;**
- **The outcome of any disputes within frameworks, including those resolved at official and senior official level and the intergovernmental dispute resolution mechanisms**;
- **The impact of any other factors including the Protocol, TCA and other international obligations.**

222. **The Committee is strongly of the view that it would be highly unfortunate if, having left the EU, there was a decrease in public access for businesses and citizens to influence regulatory policy.**

223. **As part of the Common Frameworks process there is an agreement between the UK, Scottish and Welsh Governments to "maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules." The Committee recommends that there should be a similar agreement between the Scottish Government and Scottish Parliament that, as a minimum, there should be no dilution of public consultation or of parliamentary scrutiny.**

Implementation of the TCA

224. A further area of inter-governmental working where there is a risk of a lack of transparency and Ministerial accountability is the operation of the TCA including the EU-UK Partnership Council (PC) and the Specialised Committees (SCs).

225. The UK Government has indicated that where matters within devolved competence are on the agenda for the PC or any SCs that the devolved governments will be invited to attend at the appropriate level. The devolved governments will also be invited to attend pre-meetings to prepare for the PC or any SCs where matters within devolved competence are likely to be discussed.[162]

226. The Minister for Culture, Europe and International Development wrote to us following the first meeting of the PC on 9 June 2021. The Minister noted that the UK Government refused the Scottish Government a speaking role at the meeting of the PC. The Cabinet Secretary stated in a letter to us dated 3 November that for the SC meetings "held to date, Scottish Government officials have held pre-meets with the UKG delegations to these committees in order to put forward Scottish interests." [163] The Cabinet Secretary noted that at the Sanitary and Phytosanitary SC, Scottish Government officials requested and secured a speaking role but at the other

meetings officials have been invited as observers. The Cabinet Secretary also noted that officials have had the opportunity to see and comment on draft UK Government positions.

227. The Cabinet Secretary also stated that the Scottish Government will continue to press, at ministerial and official level, for devolved government involvement in all of the TCA governance committees in order that Scottish interests are properly reflected in the UK Government positions.

228. Lord Frost in correspondence with the devolved governments dated 27 May 2021 in relation to the implementation of the TCA stated that "it is the relationship between the devolved administrations and the UK Government, not the EU institutions, that is crucial in setting UK policy and hence outcomes." [164]

Parliamentary Partnership Assembly

229. The TCA's governance infrastructure includes a Parliamentary Partnership Assembly (PPA) which consists of a delegation of 35 Members each from the European Parliament and the UK Parliament. Its role as set out on the TCA is that –

- It may request relevant information regarding the implementation of this Agreement and any supplementing agreement from the Partnership Council, which shall then supply that Assembly with the requested information;
- Shall be informed of the decisions and recommendations of the Partnership Council; and
- May make recommendations to the Partnership Council.

230. The House of Lords has stated that it "is anticipated that observers from the devolved legislatures will also be invited to attend, subject to the agreement of the European Parliament." [165] It is also anticipated that the devolved legislatures will have a role in relation to meetings of the UK delegation prior to the PPA.

231. **The Committee's view is that the Parliament's scrutiny of the implementation of the TCA requires transparency in relation to the Scottish Government's position in areas of devolved competence considered by the Partnership Council and the Specialised Committees. The Committee notes that awareness of the Scottish Government's position will also be essential in order for the Scottish Parliament to meaningfully contribute to the work of the PPA.**

232. **The Committee will invite the appropriate Scottish Government Minister to give evidence after each meeting of the Partnership Council. This will allow the Committee to hear an update on the Scottish Government's policy approach in discussions with the UK Government ahead of the Partnership Council and to provide details of the discussions at the meeting of the Partnership Council. The Committee also recommends that a formal parliamentary process needs to be developed in relation to the communication to the relevant subject committee of binding decisions of the Partnership Council and the Specialised Committees which relate to matters within devolved competence.**

233. **The Committee notes that there is a lack of clarity in relation to how the Common Frameworks process will work in relation to the implementation of the TCA. The Committee asks the Scottish Government to provide details of the role of Common Frameworks in relation to the TCA including whether they could provide a forum –**

- **to agree a UK position in advance of meetings of the Partnership Council and Specialised Committee;**
- **to address the implementation of binding decision of the TCA.**

Role of the OIM

234. The OIM told us that their "ambition is to be transparent as possible but there may be occasions where we are asked to comment on something that is not yet in the public domain." They explained that "the only area where we are not required to be transparent is for what are termed our section 34 pieces of advice, which are about regulatory provisions before they are passed or made."[166]

235. This means that where a government in one part of the UK requests "advice" from the OIM on a regulatory proposal it is not required to publish that "advice".[iii] The OIM's view is that "advice" is most likely to be appropriate at an early stage of the policy/legislative development process where the proposed regulation is not yet in the public domain.

236. **The Committee recognises that it would be inappropriate for the OIM to publish advice on a regulatory proposal not yet in the public domain. The Committee notes, however, that while UKIMA does not impose a requirement on the OIM for advice provided under section 34 to be published, neither does it preclude it. On this basis, it is essential that at the point where regulatory proposals on which advice is sought enter the public domain (either in draft form as part of a public consultation or when legislation is introduced) the advice is published. The Committee will invite the OIM to respond but would also welcome the view of the Scottish Government.**

Impact on Parliamentary Scrutiny and the Legislative Process

237. The above findings illustrate the complexity of the regulatory environment within Scotland. This presents a huge challenge for policy-makers, legislators and those seeking to influence the policy-making and legislative process. To do so will now

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iii This sentence was amended on 2 March 2022 as follows – 'This means that where a government in one part of the UK requests "advice" from the OIM on a regulatory proposal ~~being considered by a government in another part of the UK~~ it is not required to publish that "advice".' Guidance on the role of the OIM including the provision of advice under section 34 of UKIMA is available here: Guidance on the Operation of the CMA's UK Internal Market Functions - GOV.UK (www.gov.uk)"

require knowledge of an intricate web of interrelated factors including the impact in Scotland of –

- Policy and legislative developments in the EU and the other three parts of the UK;
- UKIMA, including the impact of the market access principles;
- Common Frameworks including exclusions from the market access principles;
- The Scottish Government's policy commitment to continue to align, where appropriate, with EU law;
- The Ireland/Northern Ireland Protocol;
- International obligations including the TCA and other trade agreements;
- The role of the Partnership Council and the Specialised Committees including binding decisions which apply in devolved areas;
- Reports and advice of the OIM.

Legislative Scrutiny

238. The report of the session five Finance and Constitution Committee's legacy expert panel provided some useful examples of the type of questions which the Parliament will need to consider in carrying out legislative scrutiny within the context of the UK Internal Market. These are attached at **Annexe B**.

239. Given that the market access principles apply across all areas of devolved competence an understanding of how UKIMA impacts on policy and legislation needs to be embedded within the Scottish Parliament's scrutiny processes and procedures. Equally, while only applying to areas formerly governed by EU law an understanding of how Common Frameworks impact on policy and legislation is essential.

240. The Parliament will need to be cognisant of the regulatory environment in each of Wales, Northern Ireland and England when considering the impact of regulatory change in Scotland especially where there is regulatory divergence. This will include the impact of the Ireland/Northern Ireland protocol.

241. For example, a lead committee in carrying out scrutiny of a Bill at Stage 1 will need to be aware of any impact of the market access principles on the legislative proposals. Especially where the effect of the Bill would be to introduce higher regulatory standards than exist in other parts of the UK.

242. Equally, a lead committee may need to be aware of inter-governmental agreements on regulatory divergence within a common framework. For example, a common framework may constrain, albeit voluntarily and subject to continued agreement, the Scottish Government's policy options in introducing the Bill.

243. Members may also need to be aware of these issues in relation to Members' Bills and Secondary Legislation. For example, the impact of the market access principles on regulatory proposals within a Members' Bill or on regulations within a SSI that

comes before the Parliament for scrutiny.

244. **The Committee recommends that further consideration is given by Scottish Government and Scottish Parliament officials to the level of information which the Scottish Government is required to provide in supporting documents published alongside primary and secondary legislation relating to any consideration of the impact of –**

- **The market access principles;**
- **Common Frameworks;**
- **The Ireland/Northern Ireland Protocol;**
- **The TCA including binding decisions of the Partnership Council and the Specialised Committees;**
- **Other international obligations and international trade agreements;**
- **Reports and advice of the OIM.**

Consent to secondary legislation in devolved areas

245. One of the constitutional consequences of the post-EU legislative arrangements is that the UK Government has many new secondary powers to make statutory instruments that include provisions within the legislative competence of the Scottish Parliament. For many (but not all) of these powers, the UK Government must obtain the consent of the Scottish Government before including devolved provisions in a statutory instrument. The Scottish Parliament and the Scottish Government agreed a protocol, Statutory Instrument Protocol 2 (SIP 2), in Session 5 which recognises that "the Parliament should be able to exercise effective scrutiny in relation to consent by the Scottish Ministers to such provisions, which may make significant changes to the post-Brexit devolved legislative landscape."[167]

246. SIP 2 requires a description of the relationship of the proposed regulatory provision(s) to any actual or proposed Common Frameworks. However, there is a lack of clarity in relation to how the Common Frameworks process interacts with SIP 2 in two primary respects –

- First, where a UK or GB wide approach has previously been agreed in a devolved policy area within a common framework and this is achieved through a UK SI;
- Second, where an exclusion to the market access principles has been agreed through the exclusion process.

247. With regards to the first aspect this could mean that the Scottish Parliament is invited to consider whether or not Scottish Ministers should consent to the UK Government legislating in a devolved area *after* an inter-governmental decision has already been made through the Common Frameworks process. That prior process having been gone through may reduce the scope for the Scottish Parliament to influence the decision to consent.

248. With regards to the second aspect, where agreement to such an exclusion is reached within the exclusions process the UK Government will introduce a draft SI in the UK Parliament. The Secretary of State must then seek the consent of the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland before regulations are made under sections 10 and 18 of UKIMA.

249. Under SIP 2 the Scottish Ministers would then require to seek the views of the Scottish Parliament prior to any consent decision. However, given there is now a prior process to agree an exclusion the consent process in relation to the subsequent regulations may become a formality.

250. **The Committee recommends that further consideration is given by Scottish Parliament and Scottish Government officials to how the Common Frameworks process interacts with the SIP 2 consent process.**

Conclusion

251. **In this report we have identified three significant and interrelated tensions arising from and/or exacerbated by the UK leaving the EU –**

- **First, tension between open trade and regulatory divergence;**
- **Second, tension within the devolution settlement;**
- **Third, tension in the balance of relations between the Executive and the Legislature.**

252. **The Committee recognises, in relation to the first of these tensions, the economic benefits for businesses and consumers in ensuring open trade across the UK.**

253. **But equally we recognise that the fundamental basis of devolution is to decentralise power so as to allow policy and legislation to be tailored to meet local needs and circumstances.**

254. **The Committee believes that policy innovation and regulatory learning are one of the key successes of devolution.**

255. **Our view is that it is essential, as recognised by the Joint Ministerial Council (JMC) in 2017** [168] **, that devolution, outside the EU, continues to provide "as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules."** [169]

256. **The Committee recognises that UKIMA seeks to address the first tension.**

257. **But from the clear consensus in the evidence we received it is the Committee's view that UKIMA places more emphasis on open trade than regulatory autonomy compared to the EU Single Market.**

258. **It is also the Committee's view that this has led to tensions within the devolved settlement.**

259. **On this basis the Committee invites the UK Government to explain how in its view UKIMA will provide "as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules."**

260. **The four governments of the UK agreed that it would be beneficial to manage divergence in some policy areas that were previously governed by EU law and are within devolved competence. The Committee recognises that Common Frameworks thus have the potential to resolve the tensions within the devolved settlement through managing regulatory divergence on a consensual basis while facilitating open trade within the UK internal market.**

261. **But the Committee believes there is a risk that the emphasis on manging regulatory divergence at an inter-governmental level may lead to less transparency and Ministerial accountability and tension in the balance of**

relations between the Executive and the Legislature.

262. **The Committee is concerned that this may result in reduced democratic oversight of the Executive and a less consultative policy-making process.**

263. **Our view is that there is a need for a much wider public debate with regards to how to deliver appropriate levels of parliamentary scrutiny and public and stakeholder engagement at an inter-governmental level especially in relation to the operation of common frameworks.**

264. **We believe that resolving this tension should be an immediate priority for the refreshed inter-parliamentary forum and we highlight the findings of this report to our colleagues on the relevant committees in the House of Commons, House of Lords, Welsh Senedd and Northern Ireland Assembly.**

265. **The Committee also invites the views of both the Scottish Government and the UK Government on how to resolve this tension and ensure appropriate levels of public and stakeholder engagement and parliamentary scrutiny of inter-governmental working especially in relation to the operation of common frameworks.**

266. **Finally, we will give further consideration as part of our work programme planning to addressing in more detail some of the fundamental issues raised in this report.**

Annexe A

The Environmental Protection (Single-use Plastic Products) (Scotland) Regulations 2021

What does this SSI do?

The SSI makes it an offence to supply certain single-use plastic products (called "plastics" for short here). The aim is to reduce the environmental impact of these products.

The SSI bans the supply, in the course of a business, of the following plastics:

- expanded polystyrene beverage cups, beverage containers and food containers;
- plastic cutlery, plates and beverage stirrers; and
- (subject to exemptions) plastic straws and plastic balloon sticks.

The SSI also bans the manufacture in Scotland of the first two groups of plastics above.

Breaching the ban will be an offence, and local authorities are given power to enforce the ban.

The SSI was made on 9 November 2021 but it does not come into force until 1 June 2022.

How will this be affected by the UK Internal Market Act 2020?

This SSI will be affected by the market access principles in the UK Internal Market Act 2020 (UKIMA), which came into force on 31 December 2020.

In the absence of UKIMA, the SSI would have been effective in banning the sale of these plastics in Scotland regardless of whether they had been produced in Scotland or elsewhere.

However, the "mutual recognition" principle, in section 2 of UKIMA, requires that goods which have been lawfully produced in (or imported into) one part of the UK can be sold in any other part of the UK whether or not the goods meet the legal requirements of the destination part. UKIMA achieves this by automatically disapplying the different statutory requirements of the destination part in relation to the sale of incoming goods (section 2(3) of UKIMA).

The result is that the Scottish ban will apply to products which are produced in (or imported into) Scotland, but it will not apply to products which were produced in another part of the UK where they are not banned, then sold in Scotland.

Similarly, the ban will not apply to imported products which were first imported into a part of the UK where they are not banned, and are then sold in Scotland.

What will be the end result?

Currently, two of these types of plastics are also banned in England: straws and stirrers.[iv] However, there is not currently a ban in England on the other six types.

There is not currently a ban in Wales or Northern Ireland on any of the plastics covered by the SSI.

If this remains the position, the impact of UKIMA on the SSI will be as follows:

- Scottish products: the SSI is effective in banning the manufacture and sale in Scotland of products which originate in Scotland, or were imported directly into Scotland from abroad.

- Welsh and Northern Irish products: all eight of these plastics can continue to be sold in Scotland if they were produced in, or first imported into, Wales or Northern Ireland.

- English products: six of these plastics can still be sold in Scotland if they were produced or first imported into England (plastic cups, containers, cutlery, plates and balloon sticks), but not plastic straws or stirrers because they are also banned in England.

Whether this will in fact be the position when the SSI comes into force in June will depend on whether there is an equivalent ban in the other three parts of the UK at that time. Similarly, the position could change from that point onwards as the legislation in another part of the UK changes.

Could this change through a Common Framework?

The position could also change if the UK Government exercises its power under UKIMA to change what is excluded from the market access principles. The UK Government can do so in order to give effect to a new exclusion that is agreed in a Common Framework. There is, however, no obligation on it to do so.

The Scottish Government's Policy Note , which is published alongside the SSI, refers to a Common Framework. It states that "Scottish Government is in discussion with the UK Government and other devolved administrations through the Resources & Waste Common Framework to explore how best to manage policy divergence in this area, including how the Internal Market Act impacts on this."[v] At a meeting of the Inter-Ministerial Group for Environment, Food and Rural Affairs (IMG EFRA) on 6 December 2021, the Scottish Government sought the option for as broad an exclusion as possible from the operation of the market access principles for policy areas under the Resources and Waste Common Framework. DEFRA Ministers have indicated they want "to examine the potential options, including further celebration that might avoid the need for an exclusion." The IMG EFRA agreed to revisit the issue at its next meeting.

At the time of writing, the content of the Resource and Waste Common Framework is unknown outside of government as it has not yet been published and has not yet been made available for scrutiny by the Scottish Parliament and (as far as we are aware) by the other UK legislatures.

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iv under the Environmental Protection (Plastic Straws, Cotton Buds and Stirrers) (England) Regulations 2020, which came into force in October 2020

v https://www.gov.uk/government/publications/communique-from-the-inter-ministerial-group-for-environment-food-and-rural-affairs/inter-ministerial-group-for-environment-food-and-rural-affairs-img-efra-communique-6-december-2021

Annexe B

Legislation that could affect the sale of goods/services

Example: scrutinising legislation for a new measure requiring a food product to conform to a new standard in Scotland.

Previous position: Can SP legislate for this? Answer: consider (a) Scotland Act 1998 and (b) EU law.

New position: In the new devolution landscape, in order for its scrutiny to be effective, the Parliament may now need to be informed about and to consider the following additional matters:

- Does this relate to a common framework(s)? Is the proposal consistent with the common framework?
- Is it consistent with the market access principles in UKIMA? Could it be disapplied by the operation of UKIMA in relation to goods imported from other parts of the UK?
- Does it rely on one of the exclusions in UKIMA (e.g. if the measure indirectly discriminates against goods from another part of the UK but for the legitimate aim of health protection)? If so, what is the evidence justifying this? Was its subject to the exclusions process?
- What are the equivalent rules in each of the other parts of the UK, and are any changes to them in prospect? (In order to assess the measure against UKIMA.)
- Has the measure (or a similar measure in this or another part of the UK) been considered by the new Office of the Internal Market ("OIM")?
- Has the OIM produced a report or advice on the measure (or similar measures)?
- Can evidence be taken from the following new bodies: OIM; Trade Remedies Authority, Trade and Agriculture Commission (if relevant)?
- What is the equivalent EU law position?
- Is the measure consistent with the requirements of the TCA?
- Are there any relevant decisions/subsequent agreements by the Partnership Council that change or expand on the position in the TCA as initially agreed?
- Are any related matters currently under consideration by the Partnership Council and the relevant committees that sit under it?
- How does the TCA work (for example, could the EU take retaliatory action under the TCA if this measure breaches the TCA)?
- Is the measure consistent with any other relevant international obligations (e.g. in trade agreements with other countries)?
- Could there be a particular impact on Northern Ireland?

- Are the requirements in the Ireland/Northern Ireland Protocol satisfied in this regard?
- Are the requirements of UKIMA satisfied in this regard? Specifically, does the measure conform with the legal requirement on Scottish Ministers (1) to have "special regard" to Northern Ireland's place in the UK's Internal Market and (2) not to exercise any function in a way that would result in new checks/ controls/ administrative processes for NI goods?

Legislation affecting farmers/fisheries

Example: scrutinising legislation affecting farmers/fisheries

Previous position: what are the limits of the Scottish Parliament's power to do this? Answer: see Scotland Act 1998 and EU law on CAP/CFP.

New position: in the new devolution landscape, in order for its scrutiny to be effective, the Parliament may now need to be informed about and to consider the following additional matters:

- Does this relate to one of the (forthcoming) UK Common Frameworks on fisheries/ aspects of agriculture?
- How does it relate to the TCA? For example, could it be construed as a "subsidy"? Are there other "level playing field" considerations? Any potential impact on UK-EU trade? Could it result in retaliation by the EU under the TCA? (See also other TCA and Partnership Council considerations above.)
- Is it consistent with any other relevant international obligations?
- Could it impact on the sale of goods/services within the UK? (=> consider UKIMA (see above))
- What are the implications for Northern Ireland? (=> consider NIP and UKIMA (see above))

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2 UK Internal Market (publishing.service.gov.uk)

3 Judgment of the Court of Appeal, 9 February 2022, in *Counsel General for Wales v The Secretary of State for Business, Energy and Industrial Strategy* , [2022] EWCA Civ 118

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5 Official Report (parliament.scot) Col.5

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10 The UK Internal Market | Scottish Parliament Website

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26 After Brexit: The UK Internal Market Act and devolution - gov.scot (www.gov.scot)

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31 These purposes are among the principles agreed in the Joint Ministerial Committee (JMC(EN)) communique, October 2017 , to guide the work on Common Frameworks. Subsequent updates on the Common Frameworks process have reaffirmed that these principles continued to guide all discussions on Common Frameworks (UK Government Frameworks Analysis, November 2021)

32 Response 17405563 to The UK Internal Market - Scottish Parliament - Citizen Space

33 Response 138291443 to The UK Internal Market - Scottish Parliament - Citizen Space

34 Official Report (parliament.scot) Col.41

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36 The UK Internal Market | Scottish Parliament Website

37 Scotland Act 1998, section 35

38 Section 52 of UKIMA inserted a new reservation into each of the devolution statutes, of "[r]egulation of the provision of subsidies which are or may be distortive or harmful by a public authority to persons supplying goods or services in the course of a business."

39 Report on the Legislative Consent Memorandum for the Subsidy Control Bill (azureedge.net)

40 Briefing paper to the Committee, 23 November 2021

41 The Subsidy Control Bill and devolution: a balanced regime? – EU Relations Law, 15 July 2021

42 Official Report (parliament.scot) Col. 9

43 UK Internal Market (publishing.service.gov.uk) paragraph 12

44 UK Internal Market (publishing.service.gov.uk)

45 The effect of UKIMA in relation to services is broadly the same as in relation to goods: service providers who are authorised to provide services in one part of the UK must be allowed to provide services in all parts; and authorities must not discriminate against service providers from another part of the UK. More details of how the market access principles operate in relation to services, and the differences between the regimes for goods and services are available here: internal-market-act.pdf (instituteforgovernment.org.uk)

46 The UK Internal Market | Scottish Parliament Website

47 The UK Internal Market | Scottish Parliament Website

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66 1977 (parliament.scot)

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69 Response 412847304 to The UK Internal Market - Scottish Parliament - Citizen Space

70 This happens because, under UKIMA, legal requirements which breach of the market access principles simply “do not apply” [in relation to the mutual recognition principle, section 2(3) for goods and 19(1) for services] and “are of no effect” [in relation to the non-discrimination principle, section 5(3) and 21(1) for services].

71 Response 17405563 to The UK Internal Market - Scottish Parliament - Citizen Space

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75 The UK Internal Market | Scottish Parliament Website

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77 Official Report (parliament.scot) Col.19

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81 The Welsh Government's Legislative Consent Memorandum on the United Kingdom Internal Market Bill (senedd.wales)

82 Letter template Michael Russell (parliament.scot)

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93 Official Report (parliament.scot) Col.23

94 Process for considering UK Internal Market Act exclusions in Common Framework areas - GOV.UK (www.gov.uk)

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96 Official Report (parliament.scot) Col.7

97 Letter template Michael Russell (parliament.scot)

98 Letter template Michael Russell (parliament.scot)

99 There are some exceptions, for example, the radioactive substances framework which states a core principle of the framework is "the standards of radiological protection in force upon the UK's exit from Euratom should at least maintain, or exceed EU standards."

100 Common Frameworks after Brexit | Scottish Parliament Website

101 UK Government Frameworks Analysis, November 2021

102 The Protocol on Ireland and Northern Ireland | Scottish Parliament Website

103 United Kingdom Internal Market Act 2020 (legislation.gov.uk)

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114 Official Report (parliament.scot) Col.9

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133 Official Report (parliament.scot) Col. 10-11

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168 These purposes are among the principles agreed in the Joint Ministerial Committee (JMC(EN)) communique, October 2017, to guide the work on Common Frameworks. Subsequent updates on the Common Frameworks process have reaffirmed that these principles continued to guide all discussions on Common Frameworks (UK Government Frameworks Analysis, November 2021)

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