



Law Society  
of Scotland

# The Law Society of Scotland Response

United Kingdom Internal Market Bill Second Reading  
Briefing House of Lords

October 2020



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession. We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership. Our Constitutional Law and Obligations Law Sub-Committees, Trade Policy and Post-Brexit Working Parties (the Committees) welcome the opportunity to consider and respond to the United Kingdom Internal Market Bill at Second Reading in the House of Lords. The Committees have the following comments to put forward for consideration.

## General Comments

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### Preliminary Comment

#### Rule of Law issues

The bill has attracted considerable attention because of clauses 42-47 in respect of those provisions which will be inconsistent or incompatible with international or other domestic law. The bill should, as a matter of principle, comply with public international law and the rule of international law as provided for in the Vienna Convention on the Law of Treaties Art 26, *pacta sunt servanda* (agreements are to be kept) should be honoured. Article 26 states "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". Adherence to the rule of law such as that expressed in Article 26 underpins our democracy, confidence in our constitutional arrangements and our society. It should not be knowingly put to one side.

We believe that knowingly to break with the UK's reputation for following public international law could have far-reaching economic, legal and political consequences and should not be taken. Amendments were made to the bill in the House of Commons following protest from backbench MPs. These amendments are incorporated in the bill at clause 56(4) and relate to the commencement of clauses 44,45 and 47. This amendment is effectively a procedural device and does not affect the question of principle raised by the inclusion of these clauses in the bill. Under international law, it will not matter by what procedure Parliament has brought into force these provisions. The Government, accordingly, should reflect further on these Clauses and ensure either their amendment or removal to prevent any possibility of the UK being in breach of international law, including acting otherwise than in good faith in the performance of its international obligations.

## Devolution issues

Aspects of the bill, where it impacts on the legislative or executive competences of the Devolved Legislatures or Administrations will engage the Legislative Consent Convention and in relation to the Scottish Parliament and Scottish Ministers Section 28(8) of the Scotland Act 1998 which recognises 'that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament 'will apply. The Scottish Government lodged a legislative consent memorandum relating to the bill in the Scottish Parliament on 28 September 2020. This was debated on 7 October and the Scottish Parliament withheld consent to the bill.

## **PART 1 UK MARKET ACCESS: GOODS**

### **Introductory**

#### **1. Purpose of Part 1**

##### **Our Comment**

Part 1 aims to create the UK market access principles of mutual recognition (MRP) and nondiscrimination (NDP). Clauses 2-15 provide further detail on these principles and their application to the free movement of goods within the United Kingdom. In this respect the clauses approximate to but importantly differ in a number of respects from rules of EU law found in articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (which prohibit quantitative restrictions on imports and exports between Member States), Regulation 2019/515 on the mutual recognition of goods lawfully marketed in another Member State and decisions of the European Court of Justice (CJEU).

The EU law on mutual recognition provides that a product lawfully marketed in one part of the EU should, in principle, be accepted for marketing in any other part of the EU unless the particular conditions listed in Article 36 TFEU are present. In practice, it has been quite usual for one country to restrict market access to products which are feared do not meet their own legal requirements. New procedures have been set out in Regulation 2019/515, which has only recently entered into force. The Regulation recognizes the difficulties in the working of mutual recognition as a principle in the EU, because of the wish for countries to satisfy themselves that a product is suitable to be marketed on their territory. This situation clearly can give rise to unjustified barriers to trade. To remedy this, the Regulation is based on clear assessment procedures and administrative cooperation between different authorities.

Within the UK, at least the same system of safeguards should be considered, to ensure that the different agencies are able to satisfy themselves as to products which are to be put on the market in their jurisdiction.

## *Mutual recognition: goods*

### **2. The mutual recognition principle for goods**

We refer to our comments in relation to clause 1. Clause 2 applies the MRP to goods which have been produced in or imported into one part of the UK and comply with any relevant statutory requirements so they can be sold in that part can then be sold in any other part of the UK without compliance with (in the words of the bill “free from”) any statutory requirements which apply in that other part.

### **3. Relevant requirements for the purposes of section 2**

Clause 3 defines “relevant requirement” for the purposes of the MRP as it applies to the sale of goods in the UK. It also includes a prohibition on the sale of goods. These requirements, if complied with in the part of the UK where the goods were produced or imported into, do not then need to be complied with when they are sold in another part of the UK. Clause 3(7) empowers the Secretary of State to amend (by adding to varying or removing any aspect of) clause 3(4) which provides detail about statutory requirements in the scope of MRP. Clause 3 (4) includes statutory requirements regarding the characteristics of the goods, their presentation, production, identification or tracing, inspection and registration, documentation and any other requirements not otherwise referred to.

#### **Our Comment**

This is a very wide power (see for example the “catch-all” provision at clause 3(3)(g) which lacks clarity due to its breadth) and regulations are subject to affirmative resolution procedure.

The Secretary of State must consult the Devolved Administrations before making such regulations (clause 3 (10)). We are concerned at the level of Parliamentary scrutiny applicable to regulations under clause 3. Changing the scope of the mutual recognition principle may have significant consequences and we believe that the appropriate procedure should be super affirmative resolution procedure which enables longer consultation and for the views of stakeholders to be taken into account. The obligation on the Secretary of State to consult with the Devolved Administrations is welcome but the clause lacks a) detail about the timescale for consultation and b) any obligation on the Secretary of State to report the outcome of the consultation with reasons for the decision. The Government should make clear what the consequences will be if a Devolved Administration does not agree with the outcome of the consultation.

### **4. Exclusion of certain requirements existing before commencement**

Clause 4 excludes existing requirements from the scope of the MRP in areas where different regulatory requirements exist in different parts of the UK before clause 4 comes into force.

#### **Our Comment**

This provides a significant degree of clarity and certainty about the law and how the bill will affect the sale of goods across the UK. Future changes to existing statutory requirements (other than re-enactment without substantive change) will be subject to the MRP.

We note that “substantive” is not defined in clause 4. The Government should explain what it interprets as “substantive change” during the bill’s passage.

Clause 4 purports to mean that certain regulatory divergences which currently exist and will continue to be able to be enforced against goods produced in, or imported into, other parts of the UK would not be able to be so enforced were they introduced after the MRP comes into force.

However, we note that in order for ‘a statutory requirement in a part of the United Kingdom’ not to be a relevant requirement for the purposes of the MRP, the conditions in subsection (2) must be met. There are two conditions in subsection (2) and our comment relates to subsection (2)(b). Subsection (2)(b) provides: ‘(2) The conditions are that ,on the relevant day... (b) there was no corresponding requirement in force in each of the other parts of the United Kingdom’

We question what provisions will be captured by the terms of clause 4. For example, Food and Feed law is mainly derived from EU law and in terms of the EU (Withdrawal) Act 2018 this body of law is retained EU law, implemented throughout the UK. Are Scottish Food and Feed Regulations (and by implication all retained EU law) excluded or not from the application of the mutual recognition principle because there are corresponding requirements implementing the same EU obligation (albeit in slightly different terms to fit into the relevant law) in each of the other parts of the UK? How does the MRP relate to Common Frameworks?

### ***Non-discrimination: goods***

#### **5. The non-discrimination principle for goods**

Clause 5 makes provision for the NDP, that the sale of goods in one part of the UK should not be affected by directly or indirectly discriminatory relevant requirements due to a relevant connection that the goods have with another part of the UK. This reflects aspects of CJEU jurisprudence and identifies parts of the UK as “originating” or “destination” according to their relationship to “incoming goods”. Clause 5(3) makes clear that a relevant (statutory) requirement (see clause 6) is of no effect if it directly or indirectly discriminates against incoming goods.

#### **Our Comment**

It would appear that the effect of clause 5(3) will be to render a statutory provision in devolved legislation of “no effect” but to make this clear there should be an amendment to section 29 of the Scotland Act 1998 and the corresponding provisions relating to Wales and Northern Ireland. It is also not clear what is the application, if any, of clause 5(3) if the statutory provision is in an Act of Parliament which applies to England only. These matters should be clarified.

We take the view these statutory provisions could be challenged by private parties. It will presumably also be a basis for challenging devolved legislation (assuming the inability to modify the bill under clause 54, will in all cases prohibit legislation that is contrary to its principles – presumably that is the intention but it is not the clearest way that outcome could have been achieved).

However, what is the effect of clause 5(3) in relation to an Act of Parliament? The Government should state how a statutory requirement contained in an Act of Parliament under clause 6 is affected by this subsection.

## **6. Relevant requirements for the purposes of the non-discrimination principle**

Clause 6 defines “relevant requirement” for the purposes of the NDP.

Clause 6(5) empowers the Secretary of State to amend (by adding to varying or removing any aspect of) clause 6(3) which provides detail about statutory provisions in the scope of NDP. Clause 6(3) includes statutory provisions regarding the circumstances of the sale of goods, their transportation storage etc., inspection and registration etc., and conduct or regulation of businesses that engage in the sale of certain goods.

### **Our Comment**

This is a very wide power and regulations are subject to affirmative resolution procedure. The Secretary of State must consult the Devolved Administrations before making such regulations.

We are concerned at the level of Parliamentary scrutiny applicable to clause 6 regulations. Changing the scope of the mutual recognition principle may have significant consequences and we believe that the appropriate procedure should be super affirmative resolution procedure which enables longer consultation and for the views of stakeholders to be considered.

The obligation on the Secretary of State to consult with the Devolved Administrations is welcome but the clause lacks a) detail about the timescale for consultation and b) any obligation on the Secretary of State to report the outcome of the consultation with reasons for the decision.

## **7. The non-discrimination principle: direct discrimination**

Clause 7 explains “direct discrimination” for the purposes of clause 5. Direct discrimination occurs where relevant requirements apply to incoming goods in a way that they do not apply, or would not apply, to local goods putting incoming goods at a disadvantage.

### **Our Comment**

The non-discrimination provisions for goods and services require clarification in regard to their application to devolved legislation. We have concerns about the definition of “local goods” which for the purposes of clause 7 include “actual or hypothetical goods”. There is no definition of “hypothetical goods”. The Government should explain what it means by using this term.

## **8. The non-discrimination principle: indirect discrimination**

Clause 8 provides for the principle of indirect discrimination.

## Our Comment

Our comment on articles 34–36 TFEU in relation to clause 1 has relevance to clause 8.

Clause 8(1)(d) excludes from relevant requirements a statutory provision which is a necessary means of achieving a legitimate aim. This has to be read with clause 8(9) “with regard in particular to (a) the effects of the requirement in all the circumstances and (b) the availability of alternative means of achieving the aim in question”.

## Our Comment

The list of legitimate aims defined in clause 8(6) is shorter than those in Article 36 TFEU. Clause 8(6) defines a “legitimate aim” as “(a) the protection of life or health of humans, animals or plants or (b) the protection of public safety or security”.

Article 36, on the other hand allows additional prohibitions or restrictions on the grounds of “public morality”, “public policy”, “protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property”. We suggest that clause 8 is amended accordingly.

Clause 8(7) empowers the Secretary of State to amend (by adding to varying or removing an aim) clause 8(6). This is a very wide power and regulations are subject to affirmative resolution procedure. Unlike other order making powers earlier in the bill the Secretary of State is under no obligation to consult the Devolved Administrations before making such regulations. The Government should explain why clause 8 adopts a different approach to the earlier clauses in this respect.

We are concerned at the level of Parliamentary scrutiny applicable to clause 8 regulations. Changing the definition of “legitimate aim” may have significant consequences. We believe that the appropriate procedure should be super affirmative resolution procedure which enables longer consultation and for the views of stakeholders to be considered. The Government should explain why it excluded the other “legitimate aims” found in article 36.

## 9. Exclusion of certain provision existing before commencement

Clause 9 excludes existing requirements from the scope of the NDP in areas where different regulatory requirements exist in different parts of the UK before clause 9 comes into force.

## Our Comment

This provides a significant degree of clarity and certainty about the law and how the bill will affect the sale of goods across the UK. Future changes to existing statutory requirements (other than re-enactment without substantive change) will be subject to the NDP. As with the provisions of clause 4 we note that “substantive” is not defined in clause 9. The Government should explain what it interprets as “substantive change”. Our comments to clause 4 also have relevance to this clause.



## *Exclusions from market access principles*

### **10. Further exclusions from market access principles**

Clause 10 (2) provides that the Secretary of State may by regulations amend schedule 1 of the bill.

#### **Our Comment**

This is a very wide power and regulations are subject to affirmative resolution procedure. Unlike other order making powers earlier in the bill the Secretary of State is under no obligation to consult the Devolved Administrations before making such regulations. The Government should explain why clause 10 adopts a different approach to earlier clauses in this respect.

### **11. Modifications in connection with the Northern Ireland Protocol**

We have no comments to make.

### **12. Guidance relating to Part 1**

This new clause empowers the Secretary of State to issue guidance relating to the operation of the UK market access principles.

#### **Our comments**

The Secretary of State should be under an obligation to consult on the terms of the guidance prior to issuing it. This obligation should extend to the revisal or withdrawal of the guidance under clause 12(4).

### **13. Sale of goods complying with local law**

We agree with clause 13 which respects the legal regimes in each part of the UK.

### **14. Interpretation of references to “sale” in Part 1**

Clause 14 interprets references to “sale” in part 1. Paragraph clause 14 (4) defines “sale” as

- (a) agreement to sell,
- (b) offering or exposing for sale, or
- (c) having in possession or holding for sale.

#### **Our Comment**

The Sale of Goods Act 1979 defines a contract for sale as “a contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price” and further defines “agreement to sell” as a contract of sale “for the transfer of the property in the goods is to take place at a future time or subject to some conditions later to be fulfilled”.



The introduction of a new definition of “sale” in the bill without reference to the Sale of Goods Act 1979 could produce confusion and lack of clarity. The Government should explain the reasons for departing from the definitions in the Sale of Goods Act 1979.

Furthermore, clause 14(5) Part 1 applies to other means of transferring possession or property which are unrelated to sale including barter for exchange leasing or hiring and gift. The Government should explain the reasons for extending the bill to such transactions.

## **15. Interpretation of other expressions used in Part 1**

We have no comments to make.

## **PART 2**

### **UK MARKET ACCESS: SERVICES**

#### **16. Services: overview**

##### **Our Comment**

The bill introduces a system for the recognition of professional qualifications across the UK. The EU Single Market Regulated Professions Database lists 550 professions covering many occupations: <https://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=professions> . Part 2 of the bill allows professionals qualified in one UK nation to access the same profession in another nation without requalification in much the same way as the EU provisions for Mutual Recognition of qualifications applies at present.

Clause 16(5)(c) excludes existing legislative requirements from the scope of authorisation or regulatory requirements where those requirements are in force before clause 16 comes into effect.

This provides a significant degree of clarity and certainty about the law and how the bill will affect regulation of services across the UK. Future changes to existing statutory requirements (other than reenactment without substantive change) will be subject to the bill. We note that “substantive” is not defined in clause 16. The Government should explain what it interprets as “substantive change” during the bill’s passage.

#### **17. Services: exclusions**

Clause 17 sets out the exclusions of certain services (including legal services) from the bill with reference to schedule 2.

Clause 17(2) requires the Secretary of State to keep schedule 2 under review. It also provides that the Secretary of State may by regulations amend schedule 2 by removing, amending and adding entries to the schedule.

## Our Comment

The regulations are subject to affirmative resolution procedure. Unlike some other order making powers earlier in the bill the Secretary of State is under no obligation to consult the Devolved Administrations before making such regulations. The Government should explain why clause 17 adopts a different approach to earlier clauses in this respect.

We also note that 17(4) provides that for the first three months following part two coming into force the Secretary of State may make regulations subject to made affirmative resolution procedure.

Made affirmative procedure is a procedure for subordinate legislation, which needs to be carefully scrutinised. The House of Lords Constitution Committee, in its “Fast-track Legislation: Constitutional Implications and Safeguards” report, said:

“The made affirmative procedure is often used in Acts where the intention is to allow significant powers to be exercised quickly. It is a kind of ‘fast-track’ secondary legislation. If the made affirmative procedure is used, then the instrument is effective immediately.”

The report went on to say:

“Instruments laid as made instruments almost inevitably place a serious time pressure on those drafting them. The JCSI’s 8th report of this session drew the special attention of both Houses to three statutory instruments which had been laid as made affirmatives ... ‘revisions were being made to the terms of the instruments down to the moment that they were made’”, and there had been “serious time pressure” in the making of the instruments”. Parliamentary counsel and the solicitors in Government Departments are expert in drawing up instruments and rarely make mistakes but policies which require speed of scrutiny require those carrying out that scrutiny to be additionally careful about the legislation they are considering.

Why is there no requirement on the Secretary of State to consult the Devolved Administrations when proposing to change schedule 2?

## 18. Services: mutual recognition of authorisation requirements

Clause 18 establishes a system of mutual recognition of authorisation requirements in the UK.

We have no comments to make.

## 19. Direct discrimination in the regulation of services

Clause 19(1) prohibits direct discrimination by a regulator against the service provided by ensuring that a regulatory requirement that discriminates is of no effect.

## Our Comment

It would appear that the effect of clause 19(1) will be to render a statutory provision in devolved legislation of “no effect” but to make this clear there should be an amendment to this effect to section 29 of the

Scotland Act 1998. It is also not clear what is the effect, if any, of section 19(1) if the statutory provision is in an Act of Parliament. The Government should state how a statutory requirement contained in an Act of Parliament is affected by this subsection.

We take the view these statutory provisions could be challenged by private parties. It will presumably also be a basis for challenging devolved legislation (assuming the inability to modify the bill under clause 50, will in all cases prohibit legislation that is contrary to its principles – presumably that is the intention but it is not the clearest way that outcome could have been achieved).

## **20. Indirect discrimination in the regulation of services**

Clause 20 prohibits indirect discrimination by ensuring that the regulatory requirement that indirectly discriminates against the service provider is of no effect.

### **Our Comment**

Our comments in respect of clause 19(1) apply equally in relation to clause 20(1).

Clause 20(2)(d) excludes from relevant requirements a regulatory requirement which is a necessary means of achieving a legitimate aim.

The list of legitimate aims defined in clause 20(6) defines a “legitimate aim” as “(a) the protection of life or health of humans, animals or plants, (b) the protection of public safety or security (c) the efficient administration of justice”.

Clause 20(7) empowers the Secretary of State to amend clause 20(6) (by adding, varying or removing an aim). This is a very wide power and regulations are subject to affirmative resolution procedure. Unlike other order making powers earlier in the bill the Secretary of State is under no obligation to consult the Devolved Administrations before making such regulations. The Government should explain why clause 20 adopts a different approach to the earlier clauses in this respect particularly as devolved ministers are defined as regulators under clause 21(2) (b), (c) and (d)?

## **21. Interpretation of Part 2**

We have no comments to make.

## **PART 3**

## **PROFESSIONAL QUALIFICATIONS AND REGULATION**

### **22. Access to professions on grounds of qualifications or experience**

Clause 22 provides when a professional UK resident qualified in one part of the UK is to be treated as professionally qualified in another part of the UK.

## **Our Comment**

We note the terms of clause 22(2) provides that a qualified UK resident is to be treated for the purposes of Part 3 as if the qualified UK resident had the qualifications or experience required to be able to practice the profession.

### **23. Meaning of “qualified” UK resident**

In relation to clause 23(7) “mainly” in 23(7)(b) requires further definition.

### **24. Exception from section 22 where individual assessment offered**

We have no comments to make.

### **25. Other exceptions from section 22**

#### **Our Comment**

Clause 25(1) provides that section 22 does not apply to existing provisions but to those future provisions referred to in clause 25(3).

Clause 25(5) disapplies clause 22(2) in relation to provisions which limit the ability to practice in the legal profession. We agree with this provision as it will ensure that those who provide legal advice and litigation services to clients in each jurisdiction in the UK will be properly qualified in the law of that jurisdiction.

### **26. Professional regulation not within section 22: equal treatment**

#### **Our Comment**

Whilst we support the provision of equal treatment generally, we have no further comment on clause 26.

### **27. Interpretation of Part 3**

We have no comments to make.

## **PART 4**

### **INDEPENDENT ADVICE ON AND MONITORING OF UK INTERNAL MARKET**

*General provision about functions under Part 4*

### **28. Functions of the CMA under Part 4: general provision**

The Competition and Markets Authority (CMA) is an independent non-Ministerial government department established under the Enterprise and Regulatory Reform Act 2013 (2013 Act) and is the UK’s competition and consumer authority.

The CMA's statutory duty is to promote competition, both within and outside the UK. for the benefit of consumers, and its mission is to make markets work well for consumers, businesses and the economy.

The CMA's functions include:

- Investigating mergers that may lead to a substantial lessening of competition;
- Conducting studies, investigations or other work into markets where there are suspected competition and consumer problems;
- Investigating businesses and individuals to determine whether they have breached UK (and EU) competition law and if so, to end and deter such breaches, and pursue individuals who commit the criminal cartel offence;
- Enforcing a range of consumer protection legislation, tackling issues which suggest a systemic market problem, or which affect consumers 'ability to make choices;
- Promoting stronger competition in regulated industries (gas, electricity, water, aviation, rail, communications and health), working with the sector regulators;
- Conducting regulatory appeals and references in relation to price controls, terms of licences or other regulatory arrangements under sector-specific legislation;
- Giving information or advice in respect of matters relating to any of the CMA's functions to the public, policy makers and to Ministers.

## Our Comment

In our response to the Internal Market White Paper we recommended some precedents which could serve as models to provide oversight and monitoring: for example the National Audit Office established under the Budget Responsibility and National Audit Act 2011 or the Climate Change Committee established under the Climate Change Act 2008.

We envisaged:

- i. a bespoke statutory Internal Market Independent Monitoring and Advisory Committee,
- ii. members will be selected by the National Authorities (such as the Secretary of State, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive),
- iii. appointed by Her Majesty The Queen after an open competition,
- iv. with accountability to Parliament and the devolved legislatures

The CMA meets some of these criteria but not all. The new role in relation to the UK Internal Market will require greater engagement with the devolved legislatures and administrations.

## **29. Objective and general functions**

We have no comment to make.

## **30. Office for the Internal Market panel and task groups**

This clause gives power to the CMA to authorise an Office for the Internal Market (OIM) task group and introduces schedule three relating to the OIM and task groups.

We have no comment to make.

## **31. Monitoring and reporting on the operation of the UK internal market**

### **Our Comment**

With regard to clause 31(1) we believe that reviews should take place on a more regular basis than from “time to time”.

With regard to clause 31(2) we believe that there should be further definition about how the CMA may receive and consider proposals.

With regard to clause 31(7) the obligation to report to all legislatures in the UK will help keep elected members across the legislatures informed. The CMA should be under an obligation to provide any further information on the operation of the CMA or the Office for the Internal Market to a legislature upon request.

## **32. Advising etc. on proposed regulatory provisions on request**

### **Our Comment**

We note that the Secretary of State may request the CMA to provide a report for any part of the United Kingdom under clause 32(11)(d) but not apparently for the whole of the UK.

## **33. Provision of report on request after regulatory provision is passed or made**

### **Our Comment**

Our comment on clause 32(11)(d) applies equally to clause 33(7)(d).

## **34. Report on request on provision considered to have detrimental effects**

We have no comments to make.

## **35. Statements on reports under section 34**

We have no comments to make.

## **36. Reports under Part 4**

We have no comments to make.

### **37. General advice and information with regard to exercise of functions**

#### **Our Comment**

We believe that the CMA should consult generally on the preparation of the general advice and information and about how it expects to exercise of its functions under clauses 28–36 of the bill. The CMA should also consult on any revision or new advice or information before publication.

### **38. Information-gathering powers**

#### **Our Comment**

We acknowledge that a notice under clause 38(8) may not require a “person to produce or provide any document or information which the person cannot be compelled on to produce, or giving evidence, in civil proceedings before the court”. This provision does not refer to legal professional privilege which would be appropriate for the purposes of clarity and consistency with other legislation.

### **39. Enforcement**

We have no comments to make.

### **40. Penalties**

We have no comments to make.

Interpretation

### **41. Interpretation of Part 4**

We have no comments to make.

## **PART 5**

### **NORTHERN IRELAND PROTOCOL**

*Northern Ireland's place in the UK internal market and customs territory*

### **42. Northern Ireland's place in the UK internal market and customs territory**

We have no comments to make.

*Unfettered access*

### **43. Unfettered access to UK internal market for Northern Ireland goods**

Clause 43 of the Bill provides for unfettered access to the UK internal market for Northern Ireland goods. It prohibits any additional checks on goods between Northern Ireland and Great Britain.



#### **44. Power to disapply or modify export declarations and other exit procedures**

Clause 44 provides Ministers with the power to "disapply or modify" export declarations and exit procedures, including those set out in the Protocol where Ministers consider there is a need to ensure that Northern Ireland goods should have unfettered access to the UK and there is a need to maintain the UK internal market.

Clause 44(5) provides that the regulations under subsection (1) 'may include provision for rights, powers, liabilities, obligations, restrictions, remedies and procedures that would otherwise apply, as a result of relevant international or domestic law, not to be recognised, available, enforced, allowed or followed.'

#### **Our Comment**

Clause 44 sets out the initial provisions which could, if enacted, result in the non-recognition of domestic and international rights and breach of the Withdrawal Agreement. This is a significant disapplication of the law and is defined in extremely broad terms. It also attempts to make regulations under clause 44 practically unchallengeable. We take the view that the Government should amend or remove clause 44 from the bill.

*Notifications under Article 10 of the Northern Ireland Protocol*

#### **45. Regulations about Article 10 of the Northern Ireland Protocol**

#### **46. Notification of State aid for the purposes of the Northern Ireland Protocol**

#### **47. Further provision related to sections 44 and 45 etc.**

*Certain provisions to have effect notwithstanding inconsistency or incompatibility with international or other domestic law.*

#### **Our Comment**

The EU-UK Withdrawal Agreement entered into force on 1 February 2020. The Northern Ireland Protocol (the "Protocol") formed part of the Agreement. The Protocol applies a number of EU laws, including customs and state aid law, to the trade and regulatory regime for goods in Northern Ireland in order to retain frictionless trade between Northern Ireland and the Republic of Ireland with no customs infrastructure between the two.

The Protocol has effect from 31 December 2020 (the end of the transition/ implementation period).

We have the following comments in relation to clauses 42–47: If passed, these clauses would empower Ministers to make regulations that are contrary to the Withdrawal Agreement (Articles 4 and 5).

There are a number of views on these provisions but we take the view that, if enacted, these clauses would breach the Withdrawal Agreement, by authorising such a breach (clause 45) and precluding challenge in the UK courts (clause 47).

Clause 45 would if enacted expressly authorise the Secretary of State to make regulations which could disapply Article 10 of the Northern Ireland Protocol in violation of the Withdrawal Agreement. We have already stated our position on breach of the Withdrawal Agreement and believe that the Government should amend the bill by removing this clause from the bill.

Clause 47 is very concerning in terms of access to justice and compliance with the rule of law.

Clause 47(1) states the intention behind the approach to international or domestic law by declaring that sections 44 and 45 and any pursuant regulations have effect 'notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent...'.

We take the view that the approach in 47(1) is sufficient to warrant that the Government should amend or remove clause 47 from the bill.

Clause 47(4), (6) and (8) also impact access to justice and undermine the rule of law.

Article 4 of the Withdrawal Agreement provides for the "direct effect" of the Agreement. This means that the rights and obligations set out in the Agreement (including the Protocol) could be enforced in domestic courts across the UK jurisdictions. This provision was given effect in UK law by the European Union (Withdrawal) Act 2018 Section 7A:

*"7A(1) Subsection (2) applies to—(a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement, as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.*

*(2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—(a) recognised and available in domestic law, and (b) enforced, allowed and followed accordingly".*

The ouster provision in clause 47(4) excludes access to any court or tribunal and clause 47(6) significantly limits judicial review by reference to clause 47(1) and (2). Clause 47(4) provides:

*"(4) No court or tribunal may entertain any proceedings for questioning the validity or lawfulness of regulations under section 44(1) or 45(1) other than proceedings on a relevant claim or application".*

*Under 47 (8) A relevant claim or application" means— (a) a claim for judicial review in relation to England and Wales, (b) an application to the supervisory jurisdiction of the Court of Session in relation to Scotland, or (c) an application for judicial review in relation to Northern Ireland, Where the claim or application is for the purpose of questioning the validity or lawfulness of regulations under section 44(1) or 45(1);*

These provisions undermine not only the Withdrawal Agreement, the EU (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020 but also the Human Rights Act 1998 (HRA) (47(2)(a)). Furthermore, regulations under clauses 44 or 45 are to be considered as primary legislation under the HRA and therefore section 6(1) HRA that 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right' does not apply.

The Government should, as a matter of principle comply with public international law and the rule of international law under Article 26 of the Vienna Convention of the law of the Treaty, *pacta sunt servanda* (agreements are to be kept) should be honoured. Adherence to the rule of law underpins our democracy and our society. Given the acknowledgement by Northern Ireland Secretary, Brandon Lewis MP that parts of the bill "break international law in a very specific and limited way". We believe that to knowingly break with the UK's reputation for following public international law could have far-reaching economic, legal and political consequences and should not be taken lightly. Although amendments were made to the ensuring that the House of Commons will have a vote on the commencement of clauses 44, 45 and 47 the issues of principle raised by those clauses have not been addressed in the bill.

Under international law, it will not matter by what procedure Parliament has brought into force these provisions. The Government, accordingly, should reflect further on these Clauses and ensure either their amendment or removal to prevent any possibility of the UK being in breach of international law, including acting otherwise than in good faith in the performance of its international obligations.

## **PART 6**

### **FINANCIAL ASSISTANCE POWERS**

#### **48. Power to provide financial assistance for economic development etc.**

#### **49. Financial assistance: supplementary**

We have no comments to make.

## **PART 7**

### **FINAL PROVISIONS**

#### **50. Regulation of distortive or harmful subsidies**

#### **Our Comment**

Paragraphs 55, 56 and 168-174 of the White Paper set out the UK Government's proposals to "work with the Devolved Administrations to determine how subsidies should be given in a coherent way across the UK". The Government's objectives are to protect the coherence of the Internal Market, and to ensure the Devolved Administrations can continue to control their own spending decisions. The Government's view is that this should be reserved (or excepted, in Northern Ireland) which will be achieved by clause 50.

Paragraph 175 stated “The devolved administrations will remain responsible for their own spending decisions on subsidies (how much, to whom and for what) within the architecture of any future subsidy control mechanism. We will continue to work closely with all the devolved administrations to seek to agree the shape of a UK-wide domestic subsidy control regime”.

In January 2019, the previous Government published the draft State Aid (EU Exit) Regulations <https://www.legislation.gov.uk/ukdsi/2019/9780111178768> which would have established a domestic regime to be in place in the event that the UK left the EU without a Withdrawal Agreement being in place. The Regulations sought to transpose existing EU State aid legislation into UK legislation and would have created a domestic State aid regime consistent with the EU State aid regime.

Although the Regulations were debated in both Houses, they were not enacted. There was some debate about whether State Aid is a reserved or a devolved matter and the UK and Scottish Governments do not agree with each other on this point. The White Paper in paragraph 173 made it clear that the Government intended to legislate to reserve this area of the law and place the matter beyond debate so as to “guarantee that a single, unified subsidy control regime could be legislated for in the future”.

The White Paper states in paragraph 171 that the Government will move “away from the EU’s State Aid rules to create our own, sovereign subsidy control regime. This will build on our obligations under the WTO and other trade agreements”.

Paragraph 172 stated that the Government will set out their “policy for this new domestic regime separately in due course, but remain committed to developing an open, fair, and transparent subsidy control mechanism”.

Clause 50 generates the following questions:

1. As the EU State aid rules have a significant body of detailed EU State aid [jurisprudence]/[ case law] developed by the EU courts, why not codify and replicate them as UK national law, redirected to: [see TFEU article 107] “.....in so far as it affects trade between different parts of the United Kingdom or trade between the United Kingdom and member states of the European Union or between the United Kingdom and contracting parties to the Agreement on the European Economic Area.” This should achieve de facto similarity.
2. Why adopt the WTO anti-subsidy rules as the jurisprudence under the WTO anti-subsidy rules remains relatively undeveloped?

## **51. Protection of Act against modification**

### **Our Comment**

It is clear that this provision would prevent the Scottish Parliament from seeking to modify the bill but it is not clear whether this would prevent the Scottish Parliament from legislating to enact something which the bill provides is of “no effect” as in clause 5(3).

## 52 Further provision in connection with the Northern Ireland Protocol

We have no comments to make.

## 53. Regulations: general

## 54. Regulations: references to parliamentary procedures

We have stated consistently throughout the bill that we believe more use should be made of super affirmative procedure to enhance stakeholder engagement and Parliamentary scrutiny.

## 55. Interpretation: general

We have no comments to make.

## 56. Extent, commencement and short title

### Clause 56(4) provides:

*A statutory instrument containing regulations under subsection (3) may not appoint a day for the commencement of section 44, 45 or 47 unless—*

*(a) a Minister of the Crown has moved a motion in the House of Commons to the effect that sections 44, 45 or 47 may be commenced on or after a day specified in the motion ( the specified day”),*

*(b) the motion has been approved by a resolution of that House,*

*(c) a motion to the effect that the House of Lords takes note of the specified day (or the day which is proposed to be the specified day) has been tabled in the House of Lords by a Minister of the Crown, and*

*(d) the day appointed by the regulations is the same as or is after the specified day.*

### Our Comment

These provisions were added to the bill during the House of Commons passage in order to provide Parliamentary scrutiny of the decision to commence the sections which will be in breach of international law.

Clause 56(4) reduces questions of principle to matters of process and at the same time, by reducing the role of the House of Lords to one of taking note of the commencement order, effectively ensures that the Government majority in the House of Commons will be able to pass the order into law. See our comments on clauses 42-47 above.

## Schedules

### Schedule 1 — Exclusions from market access principles

We have no comments to make.

## **Schedule 2 — Services exclusions**

### **Our Comment**

The exclusion of “legal services” is limited to Part 1 - “provision of legal advice, litigation services”. The impact of this on conveyancing and executry would appear to depend upon whether “those services” in clause 17 is to be interpreted as treating the presentation of an application for Confirmation as the same service as the presentation of an application for Probate. The Government should confirm whether this interpretation is correct.

## **Schedule 3 — Constitution etc. of Office for the Internal Market panel and task groups**

We have no comments to make.



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