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UK Internal Market Act 2020

Research Briefing

August 2021

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1. Introduction

The UK Government laid the **United Kingdom Internal Market Bill (284KB)** on 9 September 2020. This followed a **four week consultation** on the Bill between July and August 2020.

The Bill received Royal Assent on 18 December 2020. A number of amendments were made to the Bill during its passage through the House of Lords. The Senedd and the Scottish Parliament did not give their legislative consent to the Bill.

The **Act** includes provisions:

- that set new rules on how legislatures and governments in the UK can legislate to regulate goods and services in future;
- on the regulation of professional qualifications in the UK;
- on the implementation of the Protocol on Ireland-Northern Ireland;
- to give UK Ministers new spending powers in devolved areas;
- and to reserve powers related to subsidy control.

This briefing summarises the main provisions in each part of the Act and provides hypothetical examples of how the Act is likely to work in practice.

2. Part 1: UK Market Access - Goods

2.1. Summary of main provisions

Part 1 of the Act establishes market access principles for goods. The principles are:

- the mutual recognition principle for goods,
- the non-discrimination principle for goods.

2.2. Mutual Recognition Principle for Goods

The **mutual recognition principle** for goods is set out in section 2. The principle means that goods made, or imported into, one part of the United Kingdom that **comply** with relevant legislative requirements in **that part**, can be sold in the **other** parts of the United Kingdom, **without having to comply** with any relevant legislative requirements in those other parts.

In addition, if **one** part of the United Kingdom has **no** relevant legislative requirements that apply to the goods produced or imported there (i.e. they are unregulated) then the goods can still be sold in the **other** parts of the United Kingdom, **without having to comply** with any relevant legislative requirements that apply to the goods in those other parts of the United Kingdom.

The relevant legislative requirements are called "**relevant requirements**" in the Act. Section 3 defines these as any legislation which prohibits the sale of goods by reference to:

a. the characteristics of the goods (such as their composition, age or quality);

b. the presentation of the goods (such as packaging or labelling);

c. the production of the goods (such as the place where they were produced, including the rearing, keeping or slaughtering of animals);

d. the identification or tracing of an animal (such as tagging or micro-chipping);

e. the inspection, assessment, registration, certification, approval or authorisation of the goods;

f. the documentation or information that must be kept or must accompany the goods; or

g. anything else which must, or must not be done, in relation to the goods before they can be sold.

Sections 3(4) – 3(6) provide that any '**manner of sale requirement',** which is a statutory requirement relating to the manner in which goods are sold (i.e. where they are sold, to whom and their price), are excluded from the mutual recognition principle, unless they are 'designed artificially' to avoid the operation of the mutual recognition principle.

The inclusion of "price" as a manner of sale requirement means that the sale of goods by reference to price (such as minimum unit pricing legislation) should be outside the scope of the mutual recognition principle. However, they may still be caught by the non-discrimination principle.

Hypothetical example 1: **Genetically Modified Crops**

Legislation in England allowed the sale of food made using genetically modified crops, provided the food has been certified.

Legislation in Wales prohibits the sale of food made using genetically modified crops.

Could a manufacturer based in England sell food made using genetically modified crops in Wales, provided it has been certified? Let's consider the following example:

- The food is made in one part of the United Kingdom (England).
- The food can lawfully be sold in England because it complies with the relevant requirement that it has been certified.
- The mutual recognition principle applies. The legislation in Wales prohibiting the sale does not apply and the food can be sold in Wales. .

What if the Welsh Government was able to prove that the food was unsafe and posed a serious threat to the health of humans? If so, it could be excluded from the mutual recognition principle under Schedule 1 to the Act – but Schedule 1 sets out several conditions that must be met before such an exclusion would apply.

Section 4 excludes certain things from the mutual recognition principle. If, the day before section 4 came into force, **one** part of the United Kingdom had a relevant requirement that was not replicated in **each** of the other three parts of the United Kingdom (i.e. the relevant requirement is something unique to one part of the United Kingdom), then the mutual recognition principle does not apply. However, if the unique requirement is subsequently **changed substantively**, the mutual recognition principle will apply.

Hypothetical example 2: **Content of soft drink**

Legislation in Scotland prohibits more than 0.5g of sugar from being included in a litre of soft drinks. The legislation is in force the day before section 4 comes into force.

The sugar content of the bottle of soft drinks in England, Wales and Northern Ireland is unregulated.

Could soft drinks manufactured abroad be imported into England and sold in Scotland despite its sugar content being greater than 0.5g?

- The soft drinks has been imported into one part of the United Kingdom (England)
- The soft drinks can be sold lawfully in England because there are no relevant requirements to be complied with (sugar content of soft drinks is unregulated in England)
- But the Scottish legislation on sugar content is a unique relevant requirement that is in force before section 4 comes into force. The mutual recognition principle does not apply and the bottle of soft drinks can't be sold in Scotland because its sugar content is higher than 0.5g.

After section 4 came into force, Scotland amends the relevant legislation to reduce the amount of sugar that can be included in a bottle of soft drink to 0.2g. Following this change, could a soft drinks manufactured abroad and imported into England be sold in Scotland despite its sugar content being higher than 0.2g?

- The soft drinks has been imported into one part of the United Kingdom (England)
- The soft drinks can be sold lawfully in England because there are no relevant requirements to be complied with (sugar content of soft drinks is unregulated in England)
- The change in maximum sugar content requirement in Scottish legislation is likely to amount to a substantive change. The mutual recognition principle may now apply and soft drinks containing more than 0.2g of sugar can be sold in Scotland, even though the Scottish Parliament has legislated to reduce the sugar content of soft drinks.

Sales made for the purpose of a **public function** are not captured by the principle of mutual recognition.

Hypothetical example 3: **NHS Prescription**

(Example taken from the Bill's Explanatory Notes)

The supply of medication by the NHS to a patient through a prescription would not be covered as it is a sale made by a public authority fulfilling a public function.

2.3. Non-discrimination Principle for Goods

The **non-discrimination principle** for goods is set out in section 5. The non-discrimination principle means that direct or indirect discrimination based on **differential treatment** of local and incoming goods is prohibited.

The differential treatment would have to arise out of a "relevant requirement". Section 6 defines a "relevant requirement" of a part of the United Kingdom as any legislation that applies to goods sold in that part and includes:

a. the circumstances or manner in which goods are sold (for example, when, by whom, to whom or the terms on what they may be sold);

b. the transportation, storage, handling or display of goods;

c. the inspection, approval or authorisation of goods;

d. the regulation of businesses that engage in the sale of certain goods.

The full list of the kind of legislation within the scope of the non-discrimination principle is in section 6(3) of the Act.

Direct discrimination is defined in section 7. If a relevant requirement applies to incoming goods but does not apply to local goods, and the relevant requirement puts incoming goods at a disadvantage compared to local goods, then it is direct discrimination and is not allowed.

Hypothetical example 4: **Sale of bicycles**

Scottish legislation says that bicycles made in Wales must be displayed in Scottish shops in a less prominent manner than bicycles made in Scotland. Is this direct discrimination?

- The Scotland legislation does not apply to local goods (bicycles made in Scotland).
- The Scotland legislation puts incoming goods (bicycles made in Wales) at a disadvantage compared to the local goods.
- This Scottish legislation is directly discriminatory and is not permitted under the Act

Indirect discrimination is defined in section 8. If a relevant requirement does not amount to direct discrimination, but:

- still puts incoming goods at a **disadvantage**,
- causes a **significant adverse effect on the competition** in the market for the goods in the United Kingdom and
- cannot reasonably be considered a **necessary means of achieving a legitimate aim**,

then it is indirect discrimination and will not be allowed.

Section 8(6) says that the legitimate aims are:

a) the protection of the life or health of humans, animals or plants;

b) the protection of public safety or security.

The Secretary of State has a power under section 8(7) of the Act to vary this list and add or remove legitimate aims, subject to seeking consent from the devolved governments. If consent is not given within a month of it being requested the Secretary of State can make the regulations without having received consent but must publish a statement explaining why they decided to do so.

Hypothetical example 5: **Transport of Live Animals**

Legislation in Northern Ireland says that live animals arriving in markets for sale in Northern Ireland must not have travelled more than 110 miles from where they were last reared.

Does this indirectly discriminate against farmers who wish to transport live animals from England to Northern Ireland, but cannot do so because the distance travelled would always be more than 110 miles?

- The Northern Ireland legislation applies to live animals transported from England in a way that disadvantages farmers in England, compared to farmers in Northern Ireland by making it more difficult (in this case, impossible) to transport live animals from England to Northern Ireland for sale.
- To be indirectly discriminatory, the Northern Ireland legislation would also have to cause a significant adverse effect on competition in the market for live animals in the United Kingdom.
- However, if the Northern Ireland legislation is a necessary means of achieving the legitimate aim of protecting the health of animals, then it is not indirect discrimination.
- This may result in litigation to determine whether the 110 mile limit is a necessary means of protecting the health of animals. If 110 miles was chosen arbitrarily without a correlation to the protection of animal health, the limit is unlikely to be justifiable.

Note also that this form of indirect discrimination has such an impact on England ,Wales and Scotland that it may even amount to direct discrimination. This is because the Northern Ireland legislation would never capture animals from Northern Ireland (where legislation refers to a distance, the distance is measured in a straight line).

Section 9 says that any legislation **in force on the day before** section 9 came into force is **excluded** from the principle of non-discrimination. However, if that legislation then **changes substantively**, it will come within the scope of the Act and be subject to the principle of non-discrimination.

2.4. Exclusions from Market Access Principles for Goods

Schedule 1 to the Act lists policy areas that are **excluded** from the principle of mutual recognition and non-discrimination for goods. The list includes threats to **human, animal or plant health**, **chemicals** ,**taxation, pesticides and some measures relating to fertilisers.**.

Also, Acts of Parliament that contain relevant requirements that apply in both the originating part and the destination part of the United Kingdom are excluded from the principle of non-discrimination.

Sales made for the purpose of a **public function** are not captured by the principle of non-discrimination.

Hypothetical example 6: **Sale of goods during an epidemic**

Legislation in England prohibits in England the sale of any goods from Wales, because there is an epidemic in Wales that has not reached England. Is this direct discrimination?

- If the legislation in England can be reasonably justified as a response to a public health emergency, then it is not direct discrimination under the 'threat to human health' exclusion in Schedule 1.

Section 10 gives the Secretary of State the power to amend the exclusions to the market access principles set out in Schedule 1. This can include excluded areas covered by a common framework. Further information is provided in section 3.5.

2.5. Guidance relating to Part 1

Section 12 provides powers to the Secretary of State to issue guidance on any matter relating to the practical operation of the United Kingdom market access principles or the effect of any provision in Part 1.

Guidance can be issued to the public generally or to specific categories of people such as traders or bodies who have an enforcement function in relation to any regulatory requirements captured under Part 1 of the Act. The power includes powers to withdraw or revise that guidance.

2.6. Northern Ireland

Section 11 modifies the market access principles for goods in relation to Northern Ireland.

The mutual recognition principle for goods applies to "qualifying Northern Ireland goods" as if they were produced, or imported into, Northern Ireland. But the mutual recognition principle does not apply to any other goods produced in, or imported into, Northern Ireland unless they move from Northern Ireland to England, Wales or Scotland in the same way as goods imported into those places from outside the United Kingdom.

For the purposes of the non-discrimination principle, goods that are not qualifying Northern Ireland goods do not have a relevant connection with Northern Ireland, and so the non-discrimination principle would not apply.

Section 47 in Part 5 of the Act defines "qualifying Northern Ireland goods" by reference to regulations made under section 8C(6) of the EU (Withdrawal) Act 2018. No such regulations have yet been made.

3. Part 2: UK Market Access - Services

3.1. Summary of main provisions

Part 2 of the Act governs the regulation of service providers in the United Kingdom. Part 2:

- establishes a principle of mutual recognition of authorisation requirements to provide services, and
- prohibits discrimination by a service regulator against a service provider.

3.2. Mutual Recognition of Authorisations to Provide Services

The principle of **mutual recognition of authorisations to provide services** is set out in section 19. Where a service provider is required to have the **permission** of a regulator before providing services in **one** part of the United Kingdom, that requirement does not apply to a person who is already **authorised** to provide those services in **another** part of the United Kingdom.

Hypothetical example 7: **Private Landlord Services**

Wales legislation says that a person who wishes to provide private landlord services (i.e. private rented accommodation) in Wales must have the permission of the Wales regulator before the person can provide such services.

England legislation says that a person who wishes to provide the same services in England must have the permission of the England regulator before the person can provide the services.

- A person who has the permission of a regulator to provide private landlord services in England can provide those services in Wales under the mutual recognition principle. And vice versa.
- However, if the Wales legislation was in force on the day before section 19 came into force, the Wales legislation will not constitute an authorisation requirement under the Act and the mutual recognition principle will not apply because of the exclusion in section 17(5)(c)(i).
- Also, if the Wales legislation requires landlords to be registered in respect of **specific properties**, the Wales legislation will not be an authorisation requirement and it will not be captured by the mutual recognition principle because of the exclusion in section 17(3).
- If, on the other hand, the England legislation was not in force on the day before section 19 came into force, or the England legislation authorises landlords on a blanket basis for any property (as opposed to requiring authorisation for each individual property), then the England legislation is an authorisation requirement and will be captured by the mutual recognition principle.
- This would mean that a landlord who has permission from an England regulator to be a landlord in England could take advantage of the mutual recognition principle and be a landlord in Wales without getting permission from the Wales regulator.

Note the mutual recognition principle does not apply to social housing services.

3.3. Discrimination by a Service Regulator Against a Service Provider

Under section 20, a regulatory requirement which **directly discriminates** against a service provider has no effect. If legislation says that a service provider cannot provide a service unless the service provider **satisfies a requirement**, and the requirement:

a. has the effect of treating the service provider **less favourably** than other service providers, and

b. the reason for the less favourable treatment is the service provider's "**relevant connection**" (or lack of relevant connection) to a part of the United Kingdom,

then the requirement is directly discriminatory and has no effect.

But such a requirement will not amount to direct discrimination if it can be reasonably justified as a response to a **public health emergency**.

A service provider has a relevant connection to a part of the United Kingdom if the service provider:

a. has a registered office, place of business or residence in that part;

b. provides services from that part; or

c. has members, partners, offices or staff with a registered office, place of business, or residence in that part.

Under section 21, a regulatory requirement which **indirectly discriminates** against a service provider has no effect. If legislation says that a service provider cannot provide a service unless the service provider **satisfies a requirement**, and the requirement:

a. is not directly discriminatory (as described above),

b. would put the service provider at a **disadvantage** in the part of the United Kingdom where the requirement applies;

c. has an **adverse market effect**; and

d. cannot be considered **a necessary means of achieving a legitimate aim**,

then the requirement is indirectly discriminatory and has no effect.

Section 21(7) says that the legitimate aims are:

a. the protection of life or the health or humans, animals or plants;

b. the protection of public safety or security;

c. the efficient administration of justice.

Hypothetical example 8: **Agricultural Workers**

Legislation in Wales requires agricultural workers to have Welsh language skills, in order to maintain Welsh language communities in rural areas. Is this indirect discrimination?

- The Wales legislation is not directly discriminatory, but it may put an agricultural worker from England at a disadvantage compared to an agricultural worker from Wales (because an agricultural worker from Wales is more likely to be able to speak Welsh).
- To amount to indirect discrimination, the Wales legislation would also have to cause a significant adverse effect on competition in the market for agricultural workers in the United Kingdom.
- There is no legitimate aim under section 21(7) that could justify the Wales legislation so, if it causes a significant adverse effect on the market, it would be indirect discrimination.

3.4. Services that are excluded

Section 18 sets out a list of things that are **not covered** by Part 2 of the Act. Section 17(5)(c)(i) also excludes any legislation that is in force the day before section 17 comes into force. Therefore, **existing requirements** will not form part of mutual recognition unless sections 17(6) and 17(7) apply.

Section 17(6) states that a pre-existing requirement that corresponds to a requirement elsewhere in the UK is brought within scope if the corresponding requirement is 'substantively changed'. Section 17(7) states that a requirement is corresponding if it is the same, or substantively the same.

Hypothetical example 9: **Change in service requirement**

- 2018: Wales requirement about regulation of estate agents in force
- 2019: Equivalent England requirement about estate agent services in force
- 2020: UK Internal Market Act comes into force
- 2022: Wales requirement about estate agents services remains unchanged, therefore not captured by the market access principles
- 2023: Equivalent England requirement about estate agent services changes substantively, therefore both the England and the Wales requirements about estate agent services captured by the market access principles, despite no change in the Wales requirement.

Schedule 2 contains a list of services that are **excluded** from Part 2. The list include healthcare services, social housing services, social care services and transport services. Section 18 gives the Secretary of State the power to amend the exclusions to the market access principles set out in Schedule 2. This can include excluding areas covered by a common framework. Further information is provided in section 3.5.

3.5. Practical effect of the legislation

Effect on devolved competence

As set out in chapters 1 and 2 of this briefing, the Act introduces two key principles to govern how goods and services are regulated in the UK. The first principle is that of mutual recognition and the second is non-discrimination. These principles apply to both goods and services.

The definition of goods in the Act is broad. It does not just contain the sale of goods but also things such as their labelling, composition, packaging, production methods and place of production. It also includes goods imported into the UK. Therefore goods imported into the UK will only have to meet the conditions for the country which they are imported into to enable them to be sold anywhere else in the UK.

Services cover a wide variety of sectors including construction, tourism, accountancy, plumbers and electricians, estate agents and letting agents, wholesalers, private education and business-related services such as office management or advertising.

The definition of indirect discrimination is broad and covers any legislation that might put goods or service providers incoming into one part of the UK from another at a 'disadvantage' and has an 'adverse market effect'. Indirect discrimination can be justified on limited grounds, i.e. the legitimate aims set out in section 21(7).

The Fifth Senedd's External Affairs Committee and Legislation, Justice and Constitution Committee expressed concerns about the practical impact of the Act on the Senedd's competence. In its report on the Legislative Consent Memorandum on the Bill, the External Affairs Committee stated:

> The Bill will reduce the practical effect of many future laws passed by the Senedd, limiting the ability of the Senedd to deliver on the priorities of the people of Wales

Parts 1 and 2 of the Act do not create any new reservations in the Government of Wales Act 2006 and do not legally restrict the Welsh Government or Senedd from legislating in areas that are currently devolved. The key effect of this part of the Act is its impact on the practical effect of Senedd legislation that comes within its scope.

For example the Welsh Government could choose to introduce a new law to limit or prohibit the sale of diesel cars in Wales. But any such legislation could only be applied to Welsh producers. They won't be able to limit or prohibit the sale of diesel cars in Wales if they have been produced or imported legally into another part of the UK because of the mutual recognition principle. The policy initiative behind such legislation may be reduced and could put domestic Welsh producers at a competitive disadvantage compared to others in the UK. The same would be true of services. Producers or service providers could opt, however, to follow higher standards if, for example, there was consumer demand for it.

The Explanatory Notes to the original Internal Market Bill laid in the House of Commons outlined that whilst the provisions of Part 1 and 2 do not change the devolution settlements directly, the provisions:

> [...] create a new limit on the effect of legislation made in exercise of devolved legislative or executive competence. For example, clause 2(1) disapplies any legislative requirements that do not comply with the mutual recognition principle.

The Regulatory Impact Assessment (RIA) that accompanied the original Bill stated that one of the non-monetised costs of the Bill is that it could limit the intended societal impact of devolved legislation:

> In certain instances, where parts of the UK pursue separate policies, the scale of the intended public benefit of local (devolved) measures might not be fully realised due to the more limited number of goods and services to which the policy applies, compared to the counterfactual of separate regulations without mutual recognition. This results from the fact that goods/services originating from elsewhere in the UK may, when placed on the local market, could be complying with different regulations adopted elsewhere in the UK. This could mean that societal benefits that could otherwise have occurred, were it not for mutual recognition, would be foregone.

The RIA also stated in relation to services that there may be less accountability of service providers as they will be able to choose which parts of the UK's regulatory requirements they meet whilst operating elsewhere in the UK.

The RIA outlined the UK Government's view that these non-monetised costs would be offset by a reduction in costs to business.

There are some exemptions in the Act to these two key principles as set out above.

Exemptions

The Act provides for some specific exemptions to the general principles of mutual recognition of goods and services. These are set out in detail above.

There is also a general exemption that the Act won't apply retrospectively to legislation already in force on the day the provisions in the Act came into force unless they are subject to 'substantive change'. The Act does not provide a definition of 'substantive change'. Its isn't possible to know how much change would need to be made to a piece of legislation before it would no longer be covered by this exemption. In its report on the Legislative Consent Memorandum, the Fifth Senedd's **Legislation, Justice and Constitution Committee** concluded:

> Under the Bill, much existing Welsh law would not fall under the internal market regime. However, this is of little comfort as any "substantive change" to statutory requirements concerning goods and services under such laws negates this exclusion and protection. As drafted, it strikes us that the Bill introduces a perverse incentive for the Welsh Government and Senedd to avoid innovation in policy and law making. Any attempt to update, refine or otherwise amend standards or regulations existing when the Bill is passed would risk bringing such standards within the internal market regime.

Exemptions are also allowed under the rules governing the EU's Single Market. These exemptions, which were previously available to governments in the UK, are broader in scope than the exemptions provided for in the Act. For example

in the EU's Single Market, Member States can diverge from the principles on public interest grounds such as environmental standards, protection of heritage or morality. A **summary of the different exemptions** that Member States can use under the rules governing the EU's Single Market are summarised in the briefing provided for the Fifth Senedd Committees' by Dr Kathryn Wright of York University.

Whilst the Act does provide exemptions on its face, these can be changed by the Secretary of State using subordinate legislation powers. For example, the Secretary of State can amend the Schedule 1 exemptions for goods and also Schedule 2 which sets out which service sectors are covered by the Act. The Secretary of State is required to seek the consent of the devolved governments before making any such regulations but can proceed if consent is not given within a month of it being requested. If the Secretary of State decides to proceed without consent, they must publish a statement explaining why they have decided to do so. As set out above, the Secretary of State can exempt areas covered by a common framework from the scope of the Act.

The UK Government Department for Business, Energy and Industrial Strategy (BEIS) has concluded **an initial consultation** on possible amendments to Schedule 2 of the Act which sets out exemptions to the principles of mutual recognition and non-discrimination for services set out in Part 2 of the Act. In addition to consulting on specific issues related to the interaction between the UK Provision of Services Regulations 2009 and the Act, the consultation also asked for views on how the exclusion list in Schedule 2 should be amended to reflect the fact the UK has left the EU and other ways the UK's internal market could be enhanced.

The Act's exemptions in relation to services were also amended during the Bill's passage through the House of Commons. In the original version of the Bill requirements in relation to the authorisation or regulation of services were exempt, provided they were passed before the Bill was enacted. The Bill was amended so that if the same or similar regulations exist elsewhere in the UK before the Act was passed, and if those regulations are 'substantively changed' in one part of the UK, then all regulations that are corresponding would fall within the scope of the Act.

Common frameworks: managing divergence jointly

The **UK and devolved governments agreed in 2017** to set up common frameworks to manage policy divergence outside the EU single market. Common frameworks generally set out processes for the governments to discuss and agree where to follow the same rules or diverge. They may be underpinned by legislation. Common frameworks were expected to be agreed by December 2020. They are currently provisionally in operation. while negotiations continue.

During the passage of the Bill through Parliament, the then **Welsh** and **Scottish governments** suggested that the common frameworks programme should be used to manage divergence instead. The **Fifth Senedd's External Affairs Committee argued** that the common frameworks programme represented a 'clear alternative approach' to the Bill.

The UK Government outlined its view that the common frameworks programme was insufficient to manage divergence on its own, but did amend the Bill to enable the UK Government to make exclusions from the market access principles on the basis of a common framework agreement. This would mean that if the governments agreed to set divergent rules through a common framework, the UK Government could stop the market access principles from applying to those divergent rules. However, the UK Government would not have to do this.

Standard levels

In the **White Paper** which preceded the Bill, the UK Government stated that it was committed to maintaining high standards within the UK internal market when the UK leaves the EU and in some cases setting higher standards. It said it would do this through the common frameworks programme.

This work on maintaining standards is important because of the effect of enshrining in law the mutual recognition and non-discrimination principles. As explained above, the practical effect of the legislation could mean that where different standards exist across the UK, producers could move their production operations to the nation with the lowest possible standards in place.

Governments that set higher standards for their own producers would have to do so knowing that they would put their producers at a competitive disadvantage. The Act provides that where no standards apply (i.e. a sector is unregulated in one part of the UK), it would not be required to meet standards anywhere else. Under the terms of the Act, if there is divergence in the way the governments of the UK

regulate for services, businesses could be incentivised to choose to be regulated in a part of the UK which has the lowest regulatory requirements whilst still providing the majority of its services elsewhere.

Agreeing jointly to minimum standards across the UK in some policy areas would be one way of preventing any lowering of standards. In the EU's Single Market, common (or harmonised) standards apply to **70-75% of goods on the market** meaning that the principles of mutual recognition and non-discrimination only apply in 25% of the market.

4. Part 3: UK Market Access - Professional qualifications and regulation

4.1. Summary of main provisions

Part 3 of the Act introduces a system for the recognition of professional qualifications across the UK internal market.

Where access to a profession is regulated in law, the Act provides that a professional qualified in one part of the UK can access the same profession in a different part without needing to requalify, subject to exceptions.

Automatic Recognition Principle

Section 24 of the Act establishes the automatic recognition principle in relation to professional qualifications in the UK. Where an individual wants to practise a profession in one part of the UK (the "Relevant Part") but qualified in another part of the UK (the "Other Part") they are automatically treated as qualified in respect of their profession in the Relevant Part ("**Automatic Recognition Principle**").

Hypothetical example 10: **Professional qualifications**

For example, hypothetical legislation in Wales (the Relevant Part in this example) provides that a certain profession requires three A levels. Legislation in England (the Other Part) only requires five GCSEs to practise the same profession.

Despite the higher regulatory standard in Wales, the Automatic Recognition Principle means that a person qualified to practise the profession in England is to be treated as if they have the qualifications or experience required to practise the profession in Wales.

The stricter requirements will still be applicable to professionals seeking to qualify in Wales, but cannot be enforced against people who properly qualified to lower standards outside Wales.

Exceptions to Automatic Recognition Principle

Section 26 provides that the Automatic Recognition Principle under section 24 **doesn't apply** if there is an alternative process for recognising an individual's professional qualifications or experience.

The process must comply with specific principles set out in section 26 of the Act which focus on the individual demonstrating the knowledge and skills needed to practice the profession. The alternative process will be administered by the relevant regulatory body or, if there isn't one, the Secretary of State or devolved administration responsible for the profession. This is discussed further below.

Under section 27, the Automatic Recognition Principle doesn't apply to 'existing provisions' which were in force when the Act became law on 31 December 2020. This means that stricter Welsh standards in force before this date can still be enforced against professionals who qualified outside Wales.

However, **if any part of the UK** makes provision after 31 December 2020 that **changes the circumstances** in which individuals are qualified in relation to a particular profession, then it will be brought within the scope of the Act and the Automatic Recognition Principle will apply.

Other exceptions under section 27 include any provisions limiting the ability to practise a legal profession or the profession of school teaching. This means that a school teacher trained in one UK nation is not automatically qualified to teach in another nation. This is discussed further below.

Equal treatment

Some professions have ongoing professional practice requirements such as those relating to registration, monitoring, insurance or continuing professional development. Section 28 establishes the principle of equal treatment in respect of such requirements.

It states that professionals qualified in another part of the UK cannot be treated less favourably in respect of ongoing practice requirements than those qualified in the Relevant Part, based on where in the UK their qualifications or experience were obtained, or the type of qualifications they have (unless the latter is justified). This means that professionals cannot be required to meet higher ongoing requirements than locally qualified professionals as part of their ongoing practice.

4.2. Practical effect

Part 3 of the Act is concerned with access to professions that are regulated in law. For example, access to certain professions often require a person to have specific professional qualifications, such as a degree in medicine. Some professions may also set requirements to hold more general qualifications, such as A-levels, or to have undertaken certain types of experience.

In the UK **there are over 160 professions** that are regulated by legislation by a network of more than 50 regulators, in addition to a range of other professions regulated voluntarily.

The Act's **Explanatory Notes** state there is currently no overarching system or consistent approach for the recognition of professional qualifications between the nations in the UK. It argues that if professional divergence increases across the UK, professionals could experience greater limitations on their ability to practise across the UK than exists currently.

The previous Welsh Government **expressed concerns** about the proposals stating that this was "an area of divergence which already exists". It also voiced specific concerns regarding teachers' qualification and the potential for the Act to undermine teaching standards in Wales.

Following amendments in the House of Lords, the profession of school teaching was subsequently **excluded** from the Automatic Recognition Principle by section 27(7) of the Act.

Individual Assessment

Where two professional qualifications from different parts of the UK cannot be automatically recognised, the Act provides an alternative pathway for assessing differing regulatory requirements.

Section 26 of the Act allows the relevant regulatory body to provide an individual assessment on a case by case basis to determine whether a person should be allowed access to the profession in the Relevant Part.

The process must comply with a set of principles. For example, it must ensure that qualifications or experience gained in any other part of the UK which substantially demonstrate the same standard, are treated as equivalent. If that isn't possible, the applicant may be given an opportunity to demonstrate the required knowledge through a test or assessment.

However, the demands of such test must be limited and proportional to the level of deficiency. That is, the test must not go any further than satisfying any shortfall in knowledge or experience which is preventing an applicant's qualifications from being recognised as equivalent. This may conceivably include completing select modules or training courses.

During the Bill's passage through the House of Lords, a number of Lords questioned whether an application to practise may be refused if the applicant could not satisfy language requirements. In response, Baroness Scott of Bybrook **stated**:

> Relevant authorities will continue to have the ability to refuse access to those who are unable to demonstrate that they meet the standard requirements, such as the Welsh language.

Connection with proposed Professional Qualifications Bill

The mutual recognition of professional qualifications between the UK and EU formally ended at the end of the transition period. As an interim measure, **EU-derived and retained regulations** continue to provide a framework allowing the UK to recognise professional qualifications obtained across the EEA and Switzerland. Outside the EU, provision about qualification recognition is often included in international trade agreements.

The UK Government has now introduced a **Professional Qualifications Bill** (the "Qualifications Bill") to **revoke and replace** the current system and create a new framework for the recognition of professional qualifications and experience gained overseas. The UK and devolved governments also intend to agree a common framework to manage divergence in policy on mutual recognition of professional qualifications for after the end of the transition period. This remains unpublished at the time of writing.

The Bill provides a power for the 'appropriate national authority' to make regulations allowing an individual with overseas qualifications to practise a regulated profession in the UK, or a part of the UK, if certain conditions are met. For Wales, the appropriate national authority will be the Welsh Ministers if a regulated profession falls within devolved competence, or the Secretary of State if not.

If an assessment is made under the Qualifications Bill that a person is entitled to practise a regulated profession across the UK as a whole, Part 3 of the Internal Market Act is unlikely to be engaged as there will be no barriers to entry or divergence (which the Act is designed to overcome).

However, the Internal Market Act may be relevant if a determination is made under the Qualifications Bill that a person with overseas qualifications is entitled to practise a regulated profession in one UK nation.

These circumstances may arise if a devolved nation recognises an overseas professional qualification as being equivalent to domestic requirements for access to a regulated profession within a devolved competence.

This scenario is likely to fall within the scope of the Internal Market Act as the person would constitute a 'qualified UK resident' under section 25 of the Act. Under the Automatic Recognition Principle, such person would be treated as qualified to practise the profession in any part of the UK, subject to exceptions.

Therefore, if a person with overseas qualifications was recognised as entitled to practice a regulated profession in England under the Qualifications Bill, such person would also be treated as qualified to practise the same regulated profession in Wales (and the rest of the UK) under the Internal Market Act.

5. Part 4: Monitoring of the internal market

5.1. Summary of main provisions

Part 4 of the Act grants the Competition and Markets Authority (CMA) reporting, advisory and monitoring functions on the operation of the internal market and information-gathering powers to support these functions.

Monitoring and reporting

The CMA is given new reporting, advising and monitoring functions on the operation of the internal market. These are set out in sections 30-45 of the Act.

The CMA **must** prepare and publish a report on the operation of the internal market and its effectiveness, before 31 March 2023 and at least once every 12 months after that.

Before 31 March 2023, and every 5 years after that, the CMA must also prepare a report on:

- the effectiveness of the internal market provisions in Parts 1-3 of the Act;
- the impact of the operation of those provisions on the development of the internal market in the UK;
- any interaction between the operation of these Parts and common frameworks; and
- the impact of common frameworks on the internal market.

The annual and quinquennial reports will be laid before all four UK legislatures.

The CMA **may** also undertake reviews and publish reports at any time on 'any matter it considers relevant' to the effective operation of the internal market or provisions of Parts 1-3.

Under sections 34 to 36, a national authority (any of the UK or devolved governments) can request that the CMA give advice or report on the impact on the internal market of:

- proposed new regulatory provisions within its own competence (section 34);
- existing provisions within its own competence (section 35); or

- provisions made by any authority which may be considered to have detrimental effects on the internal market (section 36): for example, this would allow the Scottish Ministers to request a report on legislation passed by the Senedd.

The CMA may decline a request for a report, as long as it provides the requesting authority with a notice of its reasons for doing so and publishes that notice in a manner that it considers appropriate. If it chooses to report under section 36, such a report must be laid before all four legislatures within six months of being completed. The government that requested the report and the government that the report covers must each make a statement on the report to their legislature (section 37).

The CMA must provide copies of advice on proposed regulatory provisions to all national authorities and must publish any reports that it produces.

The CMA must prepare and publish general advice and information about how it will perform these reporting functions, including what factors it may take into account in deciding whether or not to exercise any of its functions (section 39).

Information-gathering powers

The CMA is granted powers to gather information in support of its monitoring, advising and reporting functions (section 41). The CMA may request any documentation for these purposes by issuing an information notice. It may request that a person who carries out a business provides estimates, forecasts and returns or other information as specified.

The CMA is granted enforcement powers in cases of non-compliance (section 42). It must publish a statement of policy on the enforcement of information-gathering notices, in consultation with each relevant national authority. It may impose penalties not exceeding £30,000 for a fixed amount penalty, or £15,000 if the amount is calculated by reference to a daily rate (section 43). Within those limits, the Secretary of State can specify caps for penalties in regulations, in consultation with the CMA and the devolved governments.

Governance

The CMA is a non-ministerial department of the UK Government. Section 40 of the Act requires the CMA's annual plan, proposals for the plan and annual report to be laid before the devolved legislatures as well as the UK Parliament.

The CMA is required to support the effective operation of the internal market in

the interests of all parts of the UK (section 31). The CMA must also have regard to the need to act even-handedly towards all the national authorities.

The CMA may delegate its powers under the Act to an **Office for the Internal Market Task Group** (section 32). Schedule 3 amends the Enterprise and Regulatory Reform Act 2013 to allow the Secretary of State to appoint a Chair and Members for an Office for the Internal Market (**OIM**) Panel. The Chair would also become a member of the CMA's Board. In making the appointments, the Secretary of State must ensure there is a balance of members with knowledge of the internal market in different parts of the UK. The Secretary of State must also seek the consent of the devolved Ministers, but may proceed without consent if it is not forthcoming within a month.

The OIM panel chair may constitute task groups of three or more of the members of the panel to carry out the monitoring and reporting functions in Part 4. OIM task groups must act independently of the CMA Board, but they can share information with each other.

Between three and five years after the Act comes into force, the Secretary of State must carry out a review of the role of the CMA and the OIM task groups in carrying out functions under Part 4 (section 44). The review must assess the advantages and disadvantages of other options for carrying out these functions, including arrangements not involving the CMA. The Secretary of State must consult the devolved governments on the content of the report and the report must be laid before the devolved legislatures.

5.2. Practical effect

Role and governance of the CMA

In its **Internal Market White Paper,** the UK Government committed to a new independent body having a role in overseeing the functioning of the UK internal market. The Act confers these functions on the CMA. The CMA is expected to bring the OIM into operation in the **autumn of 2021.**

The CMA was established in 2013 by the **Enterprise and Regulatory Reform Act** and is an independent non-ministerial department of the UK Government. The UK Government issues it with a non-binding **'strategic steer'** for each parliament and the Secretary of State appoints a CEO and members to its Board. The CMA works to promote competition for the benefit of consumers, both within and outside the UK. Its responsibilities include protecting consumers from unfair trading

practices, investigating mergers between organisations to prevent a reduction in competition and taking enforcement action in relation to anti-competitive practices by businesses and individuals.

The **Internal Market White Paper** suggested a range of options for governance of the Internal Market, including an independent body with close links to the UK Parliament and devolved legislatures; an expert committee; or a body accountable directly to the UK Parliament.

After the Bill was introduced, the Counsel General **indicated** that the Welsh Government could agree to the proposals in Part 4 of the Act subject to changes to the governance of the CMA:

> The functions proposed for this Office are ones that we broadly could endorse, but it is wholly inappropriate that a non-Ministerial Department of the UK Government, whose main function relates to matters that are wholly reserved, should be given this role without extensive reform of its governance arrangements.

Amendments were made in the UK Parliament to put the Office for the Internal Market on the face of the Bill and strengthen the role of the devolved governments and legislatures in governance and oversight of the CMA's functions (see above). The **Welsh Government proposed amendments** to the Bill to require the consent of the devolved governments before appointing a Chair or Members to the Office for the Internal Market Panel and to allow devolved governments to appoint one person to the CMA Board. However, these were not agreed.

Concerns were also raised during the Bill's passage through Parliament about the suitability of the CMA for providing advice and monitoring of the internal market. For example, **Baroness Finlay argued** that the Office for the Internal Market should be set up as 'a truly independent and unattached new body'. The Bill was amended to require the Secretary of State assess the role of the CMA in carrying out functions under Part 4 between three and five years after the Act becomes law. The Secretary of State must consult the devolved governments but does not have to reflect their views in the assessment.

Powers of the CMA

The Act allows the CMA to issue fines to enforce information-gathering notices against businesses. During consideration of the Bill in the UK Parliament, some parliamentarians argued that this could impose an unfair burden on businesses. For example, **Baroness Bowles argued** that '[t]he powers in this Bill are about investigating regulations, which is entirely beyond the control of business, and there

is no wrongdoing by business.'

The **UK Government has said** that it will not bring penalties into effect by regulations until there is 'clear and credible' evidence of the need to do so and that it expects penalties would be used as 'a last resort'.

The CMA cannot issue fines to the UK or devolved governments, but there is nothing explicitly to prevent it from imposing penalties on the devolved legislatures. In a letter to the Senedd's EAAL Committee on 9 December, the **UK Cabinet Office Minister Lord True confirmed this**, but said that 'it is improbable that they would hold relevant economic information with regard to detrimental effects on the internal market'.

Intergovernmental relations and dispute resolution

Part 4 of the Act enables the UK or devolved governments to ask the CMA to give advice or report on regulatory provisions in another part of the UK if they are believed to have a detrimental effect on the operation of the internal market. However, it does not establish any mechanisms for cooperation or resolution of disputes between the governments on how the internal market should operate, including how the UK Government should use its powers under the Act.

The **RIA** accompanying the Bill confirmed that any dispute resolution mechanisms would be based on existing arrangements. However, it also stated that distinct intergovernmental arrangements would be developed for the resolution of disputes.

In a statement on 17 December, the **UK BEIS Minister Paul Scully MP said:**

> We have also agreed to have an annual meeting to review the operation of Parts 1-4 of the UK Internal Market legislation with the Devolved Administrations, including the Office for the Internal Market's reports and new developments that might require the use of delegated powers, using our intergovernmental structures.

The UK and devolved governments began a **review of intergovernmental relations** in March 2018. This is ongoing. In a **progress update on the review** in March 2021, the governments proposed creating an Interministerial Standing Committee to provide oversight of the common frameworks programme and 'consider issues bearing an impact on regulatory standards across the UK for internal trade'. The progress update also set out proposals for a reformed dispute resolution mechanism.

If the governments are unable to resolve disputes on regulatory requirements, businesses or individuals may bring legal challenges to those requirements under the Act. The **UK Minister Paul Scully MP said** in the House of Commons on 15 September 2020:

> Ultimately, yes, the courts are there as a last resort, but if we have the inter- governmental relationships and build on those, as trusted partners, we will not have to resort to that.

Role of the Senedd

The CMA is required to lay reports before the Senedd. However, the Act does not set out how the Senedd should interact with the CMA.

In its legacy report, the Fifth Senedd's **Legislation, Justice and Constitution Committee recommended** that a new Committee might wish to consider the Senedd's role in oversight of the CMA, including:

- whether the Welsh Government should be required to notify it when the Welsh Government requests advice or a report from the OIM under sections 35 or 36 of the United Kingdom Internal Market Act 2020 and to lay any such reports before the Senedd;
- whether the Welsh Government should be required to inform the Senedd when it is notified that any other government has asked the OIM for advice on the detrimental effect of any Senedd legislation under section 36 of the United Kingdom Internal Market Act 2020;
- whether the Senedd Commission should be required to notify Senedd Members if the OIM requests that it provides or produces information to inform any advisory or monitoring functions it completes; and
- whether the Senedd or a Senedd Committee should seek to maintain oversight of the OIM and the Secretary of State's review of the appropriateness of the CMA as the body responsible for the monitoring and advisory functions.

Legal challenges and enforcement

Part 4 does not allow the CMA to take enforcement action against governments or legislatures. This is different from the role of the European Commission in the EU. While the European Commission can bring infringement proceedings against a Member State for failing to comply with the rules of the internal market and refer cases to the European Court of Justice, the CMA's role in dispute resolution will be limited to providing reports to assist in dispute resolution. There is no statutory duty on a legislature or government to take action in response to such reports.

Parts 1-3 of the Act may lead to legal challenges involving businesses and bodies that enforce standards for goods and services. For example, a supermarket may believe it is able to sell certain goods because it believes that the mutual recognition principle applies to the goods. However, an enforcement body may consider that the mutual recognition principle does not apply and that the goods must not be sold. This could lead to a legal dispute between the supermarket and the enforcement body.

The **RIA** acknowledges that 'stakeholders could raise complaints on UK Internal Market matters with the Office for the Internal Market (OIM) within the CMA, who will be responsible for delivering the independent monitoring, reporting and advice functions' and explains that the OIM will 'gather market intelligence' from stakeholders. It goes on to say that businesses and individuals could choose to enforce their rights in court 'if a UKIM matter remains unresolved'.

6. Part 5: Protocol on Ireland-Northern Ireland

6.1. Summary of main provisions

Part 5 of the Act makes provisions in respect of the **Protocol on Ireland-Northern Ireland** ("the Protocol") , which was agreed in October 2019 as part of the UK-EU Withdrawal Agreement. The Protocol sets out post-Brexit arrangements for the Ireland-Northern Ireland border, which is the only UK-EU land border. It fully entered into force from 1 January 2021, following the end of the transition period.

The UK and the EU agreed in its preamble that nothing in the Protocol prevents the UK from ensuring unfettered market access for goods moving from Northern Ireland to the rest of the UK's internal market. It also sets out how the Protocol "respects the essential State functions and territorial integrity of the UK."

Article 6 of the Protocol, entitled 'Protection of the UK internal market,' commits the UK-EU Joint Committee to keeping trade between Northern Ireland and the other parts of the UK under 'constant review' and to adopt recommendations with a view to the avoidance of controls at Northern Ireland's ports and airports.

6.2. Special regard to the Protocol and the movement of goods

Section 46 covers Northern Ireland's place in the UK internal market and customs territory.

When exercising powers relating to the Protocol, authorities must have special regard to three matters. This encompasses exercising powers to implement the Protocol, deal with matters arising from it or for a purpose relating to the movement of goods within and outside the UK.

This duty applies to an 'appropriate authority', including Welsh Ministers and devolved Welsh authorities (as defined by section 157A and Schedule 9A of the Government of Wales Act 2006), who must have special regard to:

1. maintaining Northern Ireland's integral place in the UK's internal market.
2. respecting Northern Ireland's place as part of the UK's customs territory.

3. the need to facilitate the free flow of goods between Great Britain and Northern Ireland, with the aim of (i) streamlining trade and (ii) maintaining and strengthening the integrity and operation of the UK's internal market.

6.3. Unfettered access

Section 47 concerns unfettered access to the UK market for Northern Ireland goods ("NI goods"). An appropriate authority, including Welsh Ministers, is prevented from exercising any function in a way that would result in new NI-GB checks, controls or administrative processes being used on qualifying goods.

The Act also prevents the use of existing checks, controls or processes from being used for the first time or for a new purpose, or from being introduced or being used.

Section 47(8) sets out definitions relating to a check, control or administrative process. Section 47(9) provides a Minister of the Crown with regulating powers to amend section 47 so that it applies to a different or new type of movement of goods. Such regulations are subject to the affirmative resolution procedure (section 47(10)).

Section 47(2) lists exceptions to these requirements for the following scenarios:

- to facilitate access for qualifying NI goods to the UK internal market;
- to secure compliance with, or give effect to, any UK international obligation or arrangement, particularly with Article 6(1) of the Protocol (section 47(3));
- if it is necessary where goods have been declared for a voluntary customs procedure;
- if it is necessary for the purposes of VAT or excise duty in consequence of the Protocol (further criteria is provided in section 47(4));
- to deal with a threat to biosecurity in GB (further criteria is provided in section 47(5) and 47(6)); or
- to deal with a threat to food or feed safety in GB (further criteria is provided in section 47(7)).

6.4. State aid

Section 48 provides guidance on Article 10 of the Protocol on state aid. Article 10 provides that EU state aid legislation continues to apply to the UK (listed in Annex 5 of the Withdrawal Agreement). This covers measures which support the production of, and trade in, agricultural products in Northern Ireland that affect NI-EU trade under the Protocol.

Section 48 of the Act requires the Secretary of State to publish guidance on the practical application of Article 10 within one month of the Act's entry into force on 1 January 2021. A person with relevant public functions relating to the implementation of Article 10 must have regard to the guidance when exercising their functions. The Secretary of State may revise, replace or withdraw the guidance. The Cabinet Office **published a paper** on the Protocol on 31 December 2020, although it does not confirm if this is the guidance required by the Act.

Section 48(2) requires Article 10 to be read in light of any relevant decision or recommendation of the UK-EU Joint Committee, or a declaration made by either Party which has been recognised by the other. The UK-EU Joint Committee oversees the implementation of the Withdrawal Agreement.

Section 49 states that only the Secretary of State may provide a notification or information relating to state aid to the European Commission (as required under Article 10 of the Protocol). Devolved Welsh authorities are explicitly prohibited from doing so.

6.5. Practical effect

The implementation of the Protocol is an ongoing process, overseen by the UK-EU Joint Committee established by the Withdrawal Agreement.

The Act essentially places new duties on Welsh Ministers and devolved Welsh authorities to have special regard to certain matters related to implementing the Protocol, whilst preventing them from introducing new or using existing checks and processes except in limited circumstances (such as to deal with a biosecurity threat).

Welsh Ministers and 'special regard'

Under section 22 of the European Union (Withdrawal Agreement) Act 2020, the Welsh Government was granted broad regulation making powers to implement the Protocol within areas of devolved competence.

The effect of section 46 of the Act is that Welsh Ministers must have special regard to the three matters set out above when exercising powers relating to the Protocol..

The **House of Lords European Union Committee** highlighted how section 46 does not take into account other aspects of the Protocol. The new 'special regard' duty makes: :

> No reference to the balancing objectives (...) of the Protocol, which are to address the unique circumstances on the island of Ireland (including maintaining the necessary conditions for continued North-South cooperation and avoiding a hard border), and to protect the 1998 Belfast/ Good Friday Agreement in all its dimensions.
>
> Nor is there any reference to the recitals to the Protocol. In other words, [section 46] is selective, requiring Ministers, in implementing the Protocol, to have regard only to its inward-looking, domestic objectives, not those that relate to the unique circumstances on the island of Ireland.

This is a new duty for the Welsh Government and devolved Welsh authorities and it is not yet known how it will operate in practice. 'Special regard' is not defined by the Act and the duties contained therein will likely require a balance of overlapping obligations, such as those contained in the Protocol or the UK-EU Trade and Cooperation Agreement.

An example can be found in recent Welsh Government regulations. The **Plant Health (Fees) (Forestry) (Wales) (Amendment) Regulations 2021** amends relevant plant health certification fees so that they do not apply to goods moving from Wales to a business or private individual in Northern Ireland.

Without the regulations, fees or charges could have been introduced to cover the costs of official controls and other official activities, such as pre-export or export certification. Whilst the Welsh Government does not explicitly confirm that the duty contained in section 46 applies, it states in the regulations' Explanatory Memorandum that:

> If pre-exit fees related to production of phytosanitary certificates were not amended, they would apply in full to trade in regulated plants, plant products and other objects between Wales and Northern Ireland. This would add additional costs to businesses when carrying out trade within the UK internal market.

Unfettered access

In aiming to ensure unfettered access for NI goods to the UK market, the Act prevents Welsh Ministers or devolved Welsh authorities from exercising any function in a way that would result in new NI-GB checks, controls or administrative processes being used on qualifying goods, except in limited circumstances,, such as to deal with a threat to food or feed safety or a threat to biosecurity in GB.

State aid

The provisions of the Act mean that Welsh Ministers and devolved Welsh authorities must have regard to **UK Government guidance** on the application of Article 10 of the Protocol when exercising their functions, which the Secretary of State may revise, replace or withdraw.

They must do so in light of any relevant decision or recommendation of the UK-EU Joint Committee, or a declaration made by either Party which has been recognised by the other.

Furthermore, the Act prohibits Welsh Ministers and devolved Welsh authorities from providing notification or information relating to state aid to the European Commission. This must only be provided by the Secretary of State.

7. Part 6: Financial assistance

7.1. Summary of main provisions

Section 50 of the Act gives the UK Government wide powers to provide financial assistance to any person for, or in connection with, a wide range of specified purposes. These purposes include promoting economic development, providing infrastructure, supporting cultural activities and events, and supporting educational and training activities and exchanges.

The financial assistance powers extend to funding activities in policy areas devolved to Wales.

Section 51 provides that the financial assistance may be provided by way of grants, loans, guarantees, indemnities or any other form. It may also be provided under contract, subject to repayment conditions or provided to an investment fund for onward investment.

7.2. Practical effect

The UK Government plans to use the new financial assistance powers to establish two specific funds:

- the UK Shared Prosperity Fund (starting with the **UK Community Renewal Fund**), which will replace EU structural funds; and
- the '**Levelling Up Fund'**. Initially a fund for England, but subsequently **extended** to cover the whole of the UK.

The previous Welsh and Scottish Governments were critical of these plans, arguing that they should be fully involved in any schemes replacing the EU structural funds. The devolved governments **were also concerned** that the level of funding promised by the UK Government will not be equivalent to the Structural Funds, reflecting the fact that the devolved nations have benefitted more in per capita terms than England from EU funding.

The **previous Welsh Government** suggested the UK Government planned to "bypass the devolution settlement" and argued that the legislation gave UK Ministers "for the first time in the 21 years since devolution powers to fund activity in policy areas which are devolved to Wales".

In March, the three devolved Finance Ministers issued a **joint statement** outlining their shared concerns about the proposals to allocate replacement EU funds, stating:

> '[T]he UK Government ignored the Devolved Governments' efforts and requests to input to the development process for these funds for almost three years and is now using powers under the UK Internal Market Act to bypass us completely.'

The Secretary of State for Wales, Simon Hart, **suggested** the funds would have "a greater degree of local input" than was the case with EU structural funds and that they represented an "extension of the devolution process". He also **said** that the Levelling Up Fund represents a 'significant investment in Wales'.

However, responding to this announcement, the then Counsel General and then Minister for Finance and Trefnydd issued a **joint statement** in February 2021, stating:

> It is important to highlight that none of this is new money being allocated to Wales [...]. In practice, this will mean that the UK Government is taking decisions on devolved matters in Wales without being answerable to the Senedd on behalf of the people of Wales.

It is unclear how or whether the Welsh Government will be involved in the allocation of the new funds, or how the spending decisions will be scrutinised.

8. Part 7: Subsidy control

8.1. Summary of main provisions

Section 52 of the Act reserves to the UK Parliament the exclusive ability to legislate for a subsidy control regime.

In respect of Wales, Section 52(3) of the Act does this by adding the regulation of distortive and harmful subsidies to the list of reserved matters in Schedule 7A to the Government of Wales Act 2006.

8.2. Practical effect

A subsidy is generally a financial contribution using public resources which confers a benefit on the recipient. Subsidies take many forms, including grants, cash payments, loans below market rate and loan guarantees.

Left unregulated, subsidies can cause distortive effects and give certain companies, industries or countries an advantage over their competitors.

As a member of the EU, the UK was subject to EU rules on subsidies (also called 'state aid') which were regulated by the European Commission.

Now that the UK has left the EU, it can choose to design a new subsidy control regime.

The previous Welsh Government had **argued** that state aid was devolved as it was not a reserved matter under any heading of the Reserved Matters Schedule in the Government of Wales Act 2006. In contrast, the UK Government has long stated its belief that the regulation of state aid is a reserved matter, meaning that the issue is the responsibility of the UK Parliament alone and that the devolved legislatures are not able to legislate in this area.

By expressly reserving subsidy control to the UK Parliament, the Internal Market Act removed any ambiguity and put it beyond doubt that subsidy control is not devolved.

A future subsidy control regime

The UK-EU Trade and Co-operation Agreement ("TCA") states that it is for the UK and EU to each determine how their obligations are implemented in the design of their own domestic subsidy regimes, provided that they adhere to the relevant TCA provisions.

On 30 June 2021, the UK Government introduced the **Subsidy Control Bill** to the House of Commons. The Bill provides the framework for a new, UK-wide subsidy control regime.

While subsidy control is now a reserved matter, the Bill **makes certain provision** within devolved competence that requires the consent of the Senedd. At the time of writing, the Welsh Government is **not recommending legislative consent** unless the Bill is amended to address its concerns.

9. Part 8: Final Provisions

9.1. Summary of main provisions

Part 8 of the Act sets out further provisions in relation to the Protocol on Ireland-Northern Ireland and details of the procedure that should be applied when regulations are made under the Act. It includes a general interpretation clause and sets out provisions in relation to its extent and its commencement.

Section 54 amends the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act (GOWA) 2006 to protect the act from modification by these legislatures.

9.2. Practical effect

Section 54 of the Act amends Schedule 7B to GOWA 2006 to include the Act in the list of protected enactments included in this schedule. Protected enactments of Acts of the UK Parliament are Acts which Senedd legislation cannot modify. This list of Acts is short and includes Acts such as the Human Rights Act 1998 and the Civil Contingencies Act 2004.

In its report on the Bill's Legislative Consent Memorandum the Fifth Senedd's External Affairs Committee **commented**:

> Making the Bill a protected enactment means that the devolved legislatures cannot amend any of the Bill's provisions as they relate to their nations, but the UK Government, acting as it does on behalf of England in devolved areas of policy, is not restricted from making changes to the Bill through the UK Parliament in future.