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## **Response to the open consultation on the Draft Guidance on the Operation of the CMA's UK Internal Market Functions**

### **1. Introduction**

- 1.1 Many thanks to the CMA for the opportunity to comment on the draft guidance for its internal market functions. This response has been written in an individual capacity by Charles Whitmore, a research associate with the Wales Governance Centre (WGC) and Wales Council for Voluntary Action (WCVA).
- 1.2 The WGC and WCVA have a partnership to work with the third sector in Wales on the administrative, legal and constitutional changes resulting from the UK's withdrawal from the EU. This response has been written following exchanges with interested third sector stakeholders.
- 1.3 The WGC is a research unit sponsored and supported in the School of Law and Politics, Cardiff University. It undertakes innovative research into all aspects of the law, politics, government and political economy of Wales, as well the wider UK and European contexts of territorial governance.
- 1.4 WCVA is the national membership organisation for the voluntary sector in Wales. Its vision is for a future where the third sector and volunteering thrive across Wales, improving wellbeing for all. Its purpose is to enable voluntary organisations to make a bigger difference together.

### **2. Comments on the role and place of the OIM**

- 2.1 The UK Internal Market Act (UKIMA) was passed in a highly abrasive political context. The Welsh Government as well as academic and third sector stakeholders in Wales voiced significant concern that the legislation would undermine the effective use of devolved competencies. The Senedd ultimately withheld consent and the Welsh Government has been

granted permission to appeal the Divisional Court's decision in the judicial review case.<sup>1</sup> These challenges were recently re-emphasised by the First Minister of Wales Mark Drakeford in a talk given at the Institute for Government on 15 July 2021. He noted that the Welsh Government is grappling every day with the undermining of devolution through the operation of the UKIMA.<sup>2</sup> Furthermore the Act was rushed through the parliamentary process and stakeholders across the four nations argued that the information used by the UK Government to justify the need for reform was insufficient at best and flawed at worst.

- 2.2 By way of illustration - the white paper consultation used potential divergence in building regulations as an economic concern to further justify the need for the Act. However, our discussions with the UK Government later confirmed that in their view, this policy area does not fall within the legislation's scope. Its inclusion as an example was hypothetical. A point that Professor Wincott accurately made when he noted that the counterfactual scenario presented by the UK Government in describing the consequences of an unmanaged internal market to underscore the need for the Bill - was largely hypothetical.<sup>3</sup>
- 2.3 This context is relevant and crucial to bear in mind in considering the functioning of the OIM because it will need to gain the trust of the devolved governments and stakeholders, build effective working relationships with them and demonstrate its independence from the UK Government and the highly politicised narrative used to pass the Act.
- 2.4 The OIM could usefully use its discretionary power, or the first yearly report to remedy the lack of empirical data that plagued the passing of the legislation. There is still little data on the effect of regulatory divergences on intra UK trade flows yet information on this is necessary to understand the potential and actual impact of the Act.
- 2.5 There is an opportunity for the OIM to mitigate this politically fraught landscape with rigorous independent information. To this effect, the guidance could usefully provide further indications on how it will interact and fit with the intergovernmental machinery of the common frameworks, how it could usefully help inform the exercise of the functions in section 10 of the Act and how it might provide information to inform the resolution of potential disputes.
- 2.6 There is evidence from foreign systems on the importance of having an independent body charged with providing expert information on the performance of an internal market - not only in economic terms but also on the environmental and wider social impacts (see comments below on the analytical framework):

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<sup>1</sup> Mick Antoniw MS, Counsel General and Minister for the Constitution, 'Written Statement: Legal challenge to the UK Internal Market Act 2020 – Update', 29 June 2021 (last accessed 22/07/2021):

<https://gov.wales/written-statement-legal-challenge-uk-internal-market-act-2020-update>

<sup>2</sup> Mark Drakeford, *Reforming the Union*, video available at (last accessed 22/07/21):

<https://www.instituteforgovernment.org.uk/events/reforming-union-mark-drakeford>

<sup>3</sup> Professor D. Wincott, 'UK Internal Market Bill: Risks and Challenges', Available at (last accessed 22/07/2021):

<https://ukandeu.ac.uk/uk-internal-market-bill-risks-and-challenges/>

- In Australia this role is discharged by the Productivity Commission which in the early years of the Mutual Recognition Act 1995 produced regular reports.<sup>4</sup>
- In the EU the European Commission fulfils this role and has conducted numerous reviews of the internal market, several specifically around the functioning of mutual recognition.<sup>5</sup>
- In Switzerland this role is undertaken by the Competition Commission.
- The role of all three bodies was highlighted in a review of Canada's internal market in 2016<sup>6</sup> which was struggling for not having a similar institution.

2.7 The Australian and European bodies can provide two cautionary lessons that intersect with aspects of the draft guidance:

- Both have previously reported on their initial underestimation of the importance of engaging and raising awareness with stakeholders. The inclusion in the draft guidance of this stakeholder engagement function is therefore very welcome. However, there are important considerations (see the analytical framework) around ensuring appropriate geographic representation of interests given the relative economic weight of actors in England. It also a little unclear how engagement opportunities will be triggered with respect to the exercise of specific functions. Will the OIM call for stakeholder input in connection with its regular reporting cycle? Will the use of its discretionary reporting powers be publicly advertised on its website and offer open consultation opportunities? Will this be the case when asked to review specific regulatory provisions? Or will engagement be limited to a more general openness to stakeholder consultation at any time via the online portal discussed in the guidance? If so, will the OIM website maintain a transparent public facing record of its current and upcoming activities?
- Both cases are also noteworthy for having over time highlighted the importance of intergovernmental cooperation in internal market governance. As such careful consideration should be given to how the OIM can support the intergovernmental nature of the UK's internal market governance both through the common frameworks and by using its discretionary powers to provide balanced views of regulatory activities that fall outside the scope of the frameworks. In its early years, the use of this power may be particularly necessary to demonstrate its value to the devolved governments and overcome any initial reluctance to call on its expertise. The guidance could engage more explicitly in framing how the OIM fits into and can support the changing intergovernmental landscape in the UK from the perspective of the internal market (common frameworks, review of intergovernmental relations...)

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<sup>4</sup> See for example: Industry Commission, *Annual Report 1989-1990*, (Australian Government Publishing Services, 1990), p.3; The Industry Commission was later renamed to the Productivity Commission; Productivity Commission, "Research Report – Mutual Recognition Schemes", January 2009; Productivity Commission, "Research Report – Mutual Recognition Schemes", September 2015;

<sup>5</sup> See for example the EU Commission's Biennial reports on mutual recognition which started with the: 'First Report on the Application of the Principle of Mutual Recognition in Goods and Services' SEC(1999) 1106; or the Second report, COM(2002) 419 final.

<sup>6</sup> The Standing Senate Committee on Banking, Trade and Commerce, "Tear Down These Walls: Dismantling Canada's Internal Trade Barriers", June 2016, p.3, Available at (last accessed 22/07/2021): <https://sencanada.ca/en/newsroom/government-must-tear-down-the-walls-created-by-internal-trade-barriers-to-free-canada-s-economy-senators-say/>

### 3. Comments on the analytical framework

3.1 Overall the analytical framework seems sensible though there does not appear to be an explicit definition of what the ‘effective operation of’ or the ‘effectiveness of’ the internal market means. Instead there is an arguably overly narrow focus on the purely economic impacts of regulation that runs throughout. This can be observed for instance in the definition of ‘detrimental effect’ and the repeated focus on ‘economic impact’ (such as in the illustrative approach in 3.22). By approaching the topic of divergent regulatory standards from a purely economic standpoint and neglecting wider public interest goals, the OIM may struggle to adopt the ‘even-handed’ approach discussed in the guidance and to appropriately reflect devolved interests. The geographical and economic weight of England may weigh stakeholder input and economic analysis in favour of frictionless trade and UK wide standards.

3.2 For example, will the OIM consider the overall impact of the market access principles on devolution and intergovernmental relations? These relate to the governance of the internal market and are arguably important in examining how the market is operating. Especially considering that the common frameworks process has been given a statutory basis in the UKIMA and that it is still not yet widely understood how the interaction between Market Access Principles and the Frameworks will play out in practice. Experience from Canada has shown that this wider holistic approach to considering internal market effectiveness may be preferable to a narrower approach.

3.3 This may be a missed opportunity for the OIM to bring an even-handed approach to what has been accurately described as a heavy handed<sup>7</sup> or even aggressive<sup>8</sup> piece of internal market legislation from the perspective of devolution. The OIM could temper the excesses of the legislation, including its very limited scope for exclusions based on public interest objectives by adopting a thoughtful balance between the more economic internal market objective of frictionless trade and wider societal benefits. This would also serve to build trust with the devolved governments and seems to be compatible with the definition of ‘effective operation’ provided in section 33 (8) (b) of the Act (which refers broadly to the practical implications of different approaches). Experience from other internal markets also shows that it is generally necessary to consider the wider impact of regulatory measures in areas like health, the environment and sustainable development alongside economic impact.

3.4 It is to be welcomed that the need for balance is acknowledged to some extent in:

- paragraph 3.2 of the guidance which recognises both the need for a ‘balance to be struck between frictionless trade and devolved policy autonomy’
- more broadly in the even-handedness principle, one of the aims of which is to ensure that the work of the OIM reflects the needs, interests and priorities of all nations in the UK equally

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<sup>7</sup> House of Lords Constitution Committee, available at (last accessed 22/07/2021): <https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/151/15103.htm>

<sup>8</sup> Professor S. Weatherill, ‘Will the UK Survive the UK Internal Market Act?’, available at (last accessed): <https://ukandeu.ac.uk/will-the-united-kingdom-survive-the-united-kingdom-internal-market-act/>

- And in the UKIMA itself which was amended to reflect the need for expertise on the OIM panel that is representative of all parts of the UK

However, the notions of balance and even-handedness in the guidance seem unduly focused on ensuring quantitative parity in its work with the devolved and central governments. Conversely, there is only limited acknowledgement of the need for substantive balance in the analytical framework:

- Would a proportionality, necessity or a functional equivalence test be used to assess the economic impact of measures on the UKIM relative to devolved policy objectives? The OIM might usefully consider this balance in making recommendations to inform discussions around future exclusions to be added to the Act and to feed this into the intergovernmental discussions for example.
- What steps will the OIM take to ensure that appropriate consideration in their reports and recommendations is given to the less quantifiable social value of local regulatory requirements – such as those adopted in Wales in the context of the Wellbeing of Future Generations legislation?
- What steps will be taken to ensure appropriate geographical representation when engaging stakeholders? The guidance suggests submissions will be open to stakeholders via an online portal but how will the OIM factor in any potential imbalance in representations from England where businesses interests are likely to disproportionately weigh against devolved regulatory divergence.

3.5 As assessment of the Welsh Government’s proposed ban on certain types of single use plastics could serve as a useful early analysis for the OIM to demonstrate its ability to balance the economic merit of frictionless trade and environmental objectives.<sup>9</sup> These proposals are likely to be within the scope of the market access principles which in effect would prevent them being enforced despite their significant merit on environmental grounds.

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<sup>9</sup> Welsh Government, ‘Reducing Single Use Plastic in Wales’, 22 October 2020, Available at (last accessed 22/07/2021): <https://gov.wales/reducing-single-use-plastic-wales>