

## **Institute for Government submission to Competition and Markets Authority (CMA) consultation on draft guidance on the operation of the CMA's UK Internal Market Functions**

### **About the Institute for Government**

The Institute for Government is an independent, non-partisan think tank whose mission is to improve the effectiveness of government across the UK. We have researched the role of public bodies, the UK's exit from the European Union, and devolution within the UK.

In February 2021 we published a briefing paper, [The UK Internal Market Act 2020](#), summarising the legislation, including the statutory role of the Office for the Internal Market, and its implications for devolution. We also published a report [The UK internal market: balancing frictionless trade and regulatory autonomy](#) in June 2021, which makes recommendations on how the internal market should be monitored, how the OIM panel should be established, and how the OIM should approach its role. Our submission is based on our research, including interviews with academics, officials in all four administrations and public bodies, and parliamentary staff.

### **Background**

The Office for the Internal Market (OIM) will exercise its functions in a politically fraught environment. The Scottish and Welsh Governments raised strong objections to the United Kingdom Internal Market (UKIM) Act 2020, which they argue places new constraints on how they exercise their devolved powers. The Act passed without the consent of any of the devolved legislatures, which was sought under the Sewel Convention.<sup>1</sup> The Ireland/Northern Ireland protocol, which is strongly opposed by Northern Ireland's unionist parties, including the current First Minister, will also have implications for how the OIM exercises its functions.

It is within this context that we make our recommendations on the operation of the CMA's UK Internal Market Functions.

### **1. The Office for the Internal Market must establish its credibility with the devolved governments**

The OIM is expected to provide advice to the four administrations of the UK: to be able to perform its functions effectively it will need to be able to command the confidence of all of them. As well as complying with its statutory duty to be 'even-handed' it will need to demonstrate a good understanding of devolution and the particular circumstances and sensitivities of each part of the UK.

For this reason, the IfG has recommended that the Secretary of State appoint OIM panel members with sufficient expertise in the constitutional arrangements of the UK and the powers of the devolved administrations, following agreement with the devolved administrations. In addition, the CMA should ensure that officials working in the OIM have the necessary skills, expertise and understanding to support the panel in serving all four governments of the UK. This could include ensuring its offices in Edinburgh, Cardiff and Belfast are adequately staffed and resourced,<sup>2</sup> hiring

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<sup>1</sup> The Sewel Convention is that the UK Parliament will 'not normally' legislate on devolved matters without the consent of the devolved legislatures.

<sup>2</sup>As recommended in the Institute for Government's report on subsidy control, Pope T, E Shearer, *Taking back control of subsidies: Replacing EU state aid rules in the UK*, Institute for Government, May 2021, <https://www.instituteforgovernment.org.uk/sites/default/files/publications/taking-back-control-subsidies.pdf>, p 32.

staff with expertise or experience of devolution and devolved government, and training current staff in the devolution arrangements in the UK.

## **2. The OIM should be clear on when and how it will assess the policy implications of proposed regulations and the UKIM Act more broadly**

Given the political sensitivities surrounding the UKIM Act, there is a risk that the work and findings of the OIM could be politicised. The OIM will need to manage the different expectations of different governments and make it clear from the outset what it considers its role to be, the nature of its work programme, and what it will – and more importantly will not – comment on in its reports and findings. This draft guidance is very helpful for this purpose, however, some areas require further clarifications.

The OIM is primarily intended to be a source of economic advice and information. However, its role in considering the impact of common frameworks and the interaction with the UKIM Act suggests that it will also need to take into account the four governments' approach to managing regulatory divergence, as well as the economic implications of divergence that might arise.

A key criticism of the UKIM Act by the devolved administrations is that it prioritises economic considerations – the need to prevent barriers to trade – over the policy autonomy given by the devolution settlements. The Act has allowed fewer exceptions than were allowed within the previous EU regime, curtailing the devolved governments' scope to act. The draft guidance rightly recognises the need for “the balance to be struck between frictionless trade and devolved policy autonomy”, however it is not clear how, or even whether, non-economic evidence will be considered in the OIM's reports or advice. For example, it is unclear if the OIM take into account the policy aims of a proposed regulation when exercising its advisory functions, how effective that regulation is likely to be in achieving that aim, and whether an alternative way to achieving that aim – that may be less disruptive to the internal market – is available.

If the CMA believes that the governments themselves, or other public bodies, should gather and consider this evidence when making regulatory decisions, and the role of the OIM should be limited to providing economic evidence only, it should say so explicitly from the outset. If it intends to play a role in assessing the policy implications of regulations, and UKIM Act architecture more widely, it must provide more detail on how it intends to do so.

## **3. The CMA should outline how it will take the Northern Ireland Protocol into account when exercising its functions**

The Ireland/Northern Ireland Protocol will have significant implications for the functioning of the UK internal market. It requires 300 EU regulations and directives to continue to apply in Northern Ireland increasing the risk of regulatory divergence between Great Britain and Northern Ireland that could create new barriers to trade. Although regulatory provisions implementing the protocol are excluded from the remit of the OIM, the protocol will have implications for the work of the OIM in other ways.

To accurately report on the operation of the internal market, the OIM will need to assess the extent and impact of GB-NI divergence created by the operation of the protocol in Northern Ireland and policy choices made by the UK, Scottish and Welsh governments in its statutory annual reports. In areas where Northern Ireland is required to continue to apply EU law, the protocol will also provide important context when the OIM exercises its role in advising and reporting on regulatory proposals in England, Scotland and Wales.

The OIM will need to be aware of upcoming changes to EU law applicable in Northern Ireland to effectively carry out its monitoring and advisory functions. It should set out how it intends to integrate this into the “toolkits and processes” it will develop as part of its regulatory monitoring, working with the relevant parts of the Cabinet Office, the UK Mission to the EU and the Northern Ireland Executive.

#### **4. The OIM should also consider where it can add value by providing useful evidence to inform intergovernmental discussions and decisions**

Under the terms of the UKIM Act, the Secretary of State may exclude certain cases, matters, requirements or provisions from the application of the market access principles, including to give effect to an agreement that forms parts of a common framework. The OIM could aid these discussions by offering evidence on the economic implications of adding a new exclusion – for example, the impact a Welsh government ban on plastic forks would have on the internal market if it were to be enforceable against goods from other parts of the UK.

The draft guidance states that its advisory reports will look at the economic impact of regulations “in light of the market access principles”. But where the UK government may be considering adding an exclusion, evidence about the economic impact of regulations if the MAPs did not apply would be most useful. The OIM should be open to providing this advice formally, as part of its statutory function, or, if this is not possible, on an informal basis.

#### **5. The OIM should prioritise building a better evidence base for the UK internal market and assess the impact of existing divergence**

There is surprisingly little data on economic flows between the nations in the UK. This means that the decisions the UK government has already made about how to manage the UK internal market – including passing the UKIM Act – have lacked a robust evidence base.

A key role for the OIM should be building a better evidence base to inform future decisions about the operation of the internal market and how it performs its advisory role. The OIM is already working with the devolved administrations and the Office for National Statistics to address this. But for the first few years at least, it will have to rely on qualitative survey data by working with business groups to understand what barriers to trade businesses face, and the degree to which the UKIM Act addresses them. This could include the ONS survey of “business insights and impact on the UK economy”, which, since 2020, has asked broader questions from businesses such as the impact of Brexit, as well as the OIM’s proposed new online interface to gather intelligence from consumers, suppliers and producers.

It should also consider initiating sector-specific reviews into the behaviour of businesses across the UK. The UK government explicitly excluded certain regulations already in force from the market access principles to support its argument that the UKIM Act would not undermine the devolved administrations’ existing powers. As such, the OIM should make the most of this opportunity to understand the impact of existing divergence on trade within the UK to inform any analysis of what the implications of future divergence are likely to be.