OIM Consultation

MACFARLANES

22 July 2021

1 Macfarlanes LLP ("**Macfarlanes"**) is pleased to make the following brief observations in response to the Consultation Document "Guidance on the operation of the CMA's UK Internal Market functions" (the "**Consultation**"). Macfarlanes is a London-based law firm that is focused on our clients and on delivering excellence in the international legal market. We advise a diverse range of clients from a variety of sectors on a wide range of legal issues, including in relation to competition law, subsidy control and wider regulatory issues and post-Brexit, EU external relations law.

2 We would say from the outset that we welcome the overall direction of much of what is proposed in the draft guidance. Macfarlanes has a strong interest in the future operation and development of the UK internal market and under the editorial leadership of David Gauke, its Head of Public Policy, Macfarlanes recently published a Report which examines the practical and business implications of various devolution and independence scenarios. Part of that Report was an analysis of the market access provisions of the Internal Market Act 2021 ("the **Act**") and the consequences of those provisions for different potential devolution outcomes. A copy of the Macfarlanes study and the paper on market access under the Act is accessible via the following link.

3 While it is recognised that the Office for the Internal Market ("OIM") can only operate within the legislative parameters provided for in the Act, we consider that the principle of mutual recognition provided for in the Act has the potential to ultimately undermine consensus between Westminster and the devolved administrations in the future, given its potential to limit the devolved administrations' exercise of their regulatory competence. In this regard we note the similarities between the general market access principles in the Act and the country of origin principle first established in the C-120/78 *Cassis de Dijon* judgment of the European Court of Justice and the concerns that case law raised as to a potential lowering of regulatory standards and/or discouragement to any increase in standards which may also lead to forum shopping. Although the EU ultimately moved towards adopting "hard law" legislative outcomes in the form of direct harmonisation of Member States' regulatory requirements, it would seem that in the context of the UK, there should be a recognition that the common frameworks should provide the primary means to manage the evolution and effective operation of the UK internal market. In our view there is nothing inconsistent between the OIM expressing such preference with its advisory role under the Act.

4 Against this general background we now turn to consider a number of specific matters raised in the consultation.

Paras 3.2 – 3.6: "effective management of the regulatory divergence (including through the common framework)"

5 We recognise that the OIM's remit is clearly delineated by the Act and that its role is ultimately advisory, however we consider that it would be helpful if a clearer explanation could be provided as to what is meant by the statement at para 3.2 of the Consultation that the assessment of effective operation of the internal market will take account of "effective management of the regulatory divergence (including through the common framework)". It would also be helpful if the relevant section of the Guidance could be expanded to explain how the OIM envisages that this common framework principle may in practice be balanced against its other objectives including, frictionless trade.

6 It is at least arguable that any introduction of, or alteration to, regulation has the potential to cause at least some impediment to frictionless trade. In particular, setting the regulatory threshold too low may in practice undermine the potential for meaningful divergence and deprive any administration of any practical scope to legislate, whilst setting the bar too high is likely to cause significant disruption to trade. Consequently, we would welcome confirmation that the materiality of any such impediment will play an important part in the OIM's overall analysis and in the OIM's corresponding balancing exercise. At present, although we agree in principle with the types of issues that may give rise to concerns as set out in paras 3.5 and 3.6 of the Consultation there is no indication as to how the OIM may approach this balancing exercise and it would be helpful to understand whether the OIM has any initial views on the potential magnitude of distortion that may or may not be acceptable in the context of devolved policy autonomy, perhaps by illustrative examples. For example, would the materiality of an "acceptable" distortion vary depending upon the circumstances, such as the importance of the sector to the UK as a whole and/or in a particular region, costs resulting from regulatory changes in relation to the value of the goods/services etc.

7 Although not directly linked to the point above, it would also be helpful if the guidance could provide some insight into how the OIM considers the Northern Ireland Protocol may affect the OIM's approach and analysis to such assessments.

Paras 3.13 and 3.24: Intra UK trade flows

8 It would be helpful to have further detail on the type and quality of evidence of trade patterns that the OIM may look to use for any baseline assessment against which any potential changes to trade patterns may be assessed. We are aware that the Institute for Government has previously noted that there are currently no statistics for intra-UK trade as traditionally there are no export controls[1]. Although it is possible that some statistics may now be collected as a result of the Northern Ireland Protocol they will clearly not provide a full picture and

[1] Trade in the UK internal market | The Institute for Government

therefore it would be useful to understand how the OIM may seek to resolve this potential information gap.

9 In that regard, whilst we welcome the opportunity for third parties to provide evidence and understand the need for information gathering powers to compel information from third parties, such as businesses active in the affected sectors, we are aware from experience in wider competition law inquiries that such orders can be burdensome and costly for the private sector. It would therefore be unfortunate if the absence of suitable statistics were to result in costs associated with evaluating the impact of regulation being regularly and/or disproportionately passed to the private sector.

Para 4.9: Prioritisation principles - Even-handedness

10 We welcome the explanation as to how the OIM may prioritise its resources to determine which cases/issues to review. We also recognise the importance accorded by the OIM to be even-handed in its approach across the four nations. We would however be concerned if this principle were to inadvertently be interpreted as creating a perverse incentive by signalling that where one nation has proposed/introduced a number of measures which potentially impede frictionless trade, only a small number of those measures would be reviewed as to do otherwise would be seen as lacking even-handedness. We therefore consider that the Impact and Significance principles should carry greater weight when assessing the prioritisation principle, and the assessment should be essentially a qualitative rather than quantitative one.

Right to be heard: engagement with stakeholders

11 Throughout the Consultation there are references to consulting with stakeholders and it would be useful if additional detail could be provided on how that engagement may be managed. In particular, it would be helpful to understand whether third parties may be given the opportunity to comment on submissions from the various nations regarding regulatory actions or legislative proposals that the CMA may be reviewing, for example by publishing the submissions or a summary thereof on the CMA's website. In this context, it would also be useful to understand whether the OIM intends to publish its provisional views to allow for comments before finalising its advice to the national authorities.

12 In conclusion, we trust that our observations are helpful and should of course be happy to discuss them further, if that were of assistance. We are conscious of the innovative and novel nature of the role of the OIM and the limitations of the legislative parameters in which it is required to operate. That said, we believe that the development of common frameworks are likely to represent the most effective and efficient means to achieve the UK internal market objectives underpinning the Act. Although the market access principles may appear at first sight to be a viable way to achieve those objectives, in our view they may in fact give rise to significant distortions and contention, such as to potentially have counter-productive effects

on the operation of the UK internal market and therefore clear guidance on the approach to any assessment by the OIM will be crucial.

MACFARLANES LLP

JULY 2021

The content on this page (and any information accessed through the above link) is provided for information purposes only and does not constitute legal advice. Professional legal advice should be obtained before taking or refraining from any action as a result of the contents on this page or in the document.

Macfarlanes LLP 20 Cursitor Street London EC4A 1LT T +44 (0)20 7831 9222 F +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com