Response to Office for the Internal Market Consultation Document of 27 May 2021

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The UK Internal Market Act contains no formal mechanism for obligatory notification of measures that fall or may fall within its scope. Nor does it contain any formal system designed to permit testing of whether or not measures comply with the market access principles in advance of their entry into force. The control is ex post facto and ad hoc, when damage may already have been done to the UK internal market.

As a general observation the Act, lacking such mechanisms, offers a weak framework within which to manage the balance between unimpeded intra-UK trade and local regulatory diversity, which is the tension which the Act aims to mediate.

The CMA does not possess a direct enforcement capacity. It is not a regulator, a decision-maker or an enforcer. Instead under the Act it plays a much softer role of review, monitoring and guidance. There is a real risk that under this model problems will arise within the UK internal market which will be capable of resolution only through costly ex post facto negotiation and litigation.

EU practice shows a better route.

The EU has a relatively well-developed set of techniques designed to manage its internal market. These include measures which aim to screen national measures that may contravene the Treaty rules on free movement before they are brought into force in a Member State, so avoiding the need for costly litigation aimed at curing harm to the internal market. Prevention is after all better than cure. They also operate more broadly, beyond this particular but central matter. Relevant instruments include obligatory advance notification to the Commission of draft technical standards [1], procedures to be followed by national authorities where restrictions are to be placed on products lawfully marketed in another Member State [2], identification of designated contact points within the Member States [3], legislative obligations to evaluate existing and potentially obstructive standards in a pro-active manner [4] and services such as 'SOLVIT' which seek solutions to problems encountered in the internal market through administrative co-ordination without the need for litigation. [5]

The UK internal market would be improved by adoption of this type of supportive

[1] Originally mandated by Directive 83/189 [1983] OJ L109/8, now Directive 2015/1535 [2015] OJ L241/1.
[2] Originally mandated by Dec 3052/95 [1995] OJ L321/1, then Regulation 764/2008 [2008] OJ L218/21, now Regulation 2019/515 [2019] L91/1. There is also guidance on the application of the Regulation in a Commission Notice, [2021] OJ C100/16.
[3] Regulation 2015/1535 Arts 9-11; also visible in sector-specific measures, eg the 'Services Directive', Directive 2006/123 [2006] OJ L376/36 Art 6.
[4] Eg Directive 2006/123 Art 39.
[5] http://ec.europa.eu/solvit/index_en.htm.

infrastructure. Such additions would not alter the basic balance between unimpeded trade and local regulatory autonomy to which the statutory market access principles are directed. They would simply make the Act operate more smoothly and in a more transparent manner.

In the meantime, in the absence of the adoption of such concrete rules, what is needed in order to achieve some degree of certainty in the UK internal market is an institutional culture of living with the Act, and the CMA should seek to replicate these EU measures *in practice* in the UK. It should aspire to play an active role in gathering empirical evidence on the operation of the UK internal market and in the development of good practice on the management of the Act, bringing together relevant regulators, trading interests and affected groups such consumers and those concerned about environmental implications of trade. Following the well-tested EU model should be in everyone's interests. I do hope that the CMA will *not* follow the model of petty anti-intellectual obstinacy which caused the UK government to ignore almost entirely the lessons of the EU internal market in its July 2020 White Paper on the UK Internal Market, and that the CMA will instead embrace openly the value of comparisons (and doubtless contrasts too) between practice in different internal markets, whether national or transnational.

As things stand, prevailing political bitterness seems likely to make the CMA's job difficult. The way the UK government has behaved so far is not conducive to the aim of securing co-operation among all affected interests. In particular the Scottish and Welsh administrations are aggrieved that under the Act the scope permitted to justify local rules which offend against the market access principles is extremely narrow (and much narrower than the equivalent under EU internal market law). Moreover the 'common frameworks' which were initially presented as a means to grant a voice to the devolved administrations in the shaping of the UK internal market have been radically downgraded during 2020, to the point where under the Act they operate purely at the discretion of the relevant Minister in London, and they are accordingly subordinate to the deregulatory vigour of the market access principles. The main point is that where a measure introduced by Scotland or Wales offends against the market access principles in circumstances where no statutory justification is forthcoming and where no common framework applies, that measure is applicable in Scotland and Wales only to local producers or suppliers and must be disapplied in relation to imports, most obviously imports from England, the economically dominant part of the UK. The Scottish and Welsh administrations have a legitimate complaint that de facto if not de jure the Act removes powers allocated to Scotland and Wales under the pre-existing devolved settlements.

The CMA will therefore have to work hard to gain the confidence of the Scottish and Welsh administrations. (Northern Ireland, because of the Protocol, is a different case again). But it is in everyone's interests to achieve a co-operative and transparent means to manage the UK internal market - through advance notification of potentially relevant measures, for example, in line with the helpful EU model noted above.

Chapters 3.2 and 3.10 of the CMA's May 2021 Consultation Document show awareness that the issue here is not simply the effect of a measure on intra-UK trade but also the benefits of such a measure within the part of the UK which is the source of the measure. This is important in building trust and promoting co-operation. The CMA should not be slow to advertise its concern to act not only in defence of liberalized intra-UK trade but also in defence of the unilateral regulatory aspirations of the UK's devolved administrations. This is entirely in line with the statutory mandate. Section 31(2) of the Act provides that the objective to which (according to section 31(1)) the CMA must have regard in carrying out its functions 'is to support, through the application of economic and

other technical expertise, the effective operation of the internal market in the United Kingdom (with particular reference to the purposes of Parts 1, 2 and 3)'. Section 31(3) provides that that objective includes, in particular, supporting the operation of the internal market in the interests of all parts of the United Kingdom, and in the interests of consumers of goods and services as well as other classes of person with an interest in its operation. Section 31(4) adds that the CMA must also, have regard to the need to act even-handedly as respects the relevant national authorities.

In short, the key point is that the Act puts in place a scheme designed to locate the pursuit of unhindered intra-UK trade within the context of legitimate regulatory diversity among the constituent elements of the UK. The several references in the Act to the 'operation of the UK internal market' are not to be taken to mean that it aims only at unimpeded trade. Attention must be paid not only to the deregulatory dimension of the market access principles but also to the virtue of local regulatory choice.

I take the view that the room permitted to justify measures under the Act is narrower than is appropriate in order to reflect adequately the regulatory aspirations of the devolved administrations. (It is a great deal narrower than justification permitted under EU law). I hope the CMA will take a broad view of the existing scope to justify measures foreseen by the Act (see sections 8(6), 10, 19(4), 20(3), 21(7) and Schedule I). I hope too that the CMA will push for use of the power in sections 8 and 21 to amend by Statutory Instrument the list of legitimate aims in connection with indirect discrimination, thereby to grant a wider scope of regulatory autonomy to the devolved administrations. That, at one level, is simply a consequence of my own assessment of the location of proper balance between the deregulatory market access principles and the room allowed for local regulatory choice, which I believe would be better placed closer to the latter than the Act currently mandates. But of more practical relevance to the CMA it is an approach likely to win friends and encourage co-operation in Scotland and in Wales. This in turn would strengthen the effectiveness of the CMA's management of the UK internal market even without the type of binding obligations of co-operative action (notification, 'standstill' etc) imposed to useful effect on Member States in the EU's internal market (as mentioned above).