



Llywodraeth Cymru
Welsh Government

The Welsh Government's Response to Consultations by the Competition and Markets Authority on:

THE OFFICE FOR THE INTERNAL MARKET - [GUIDANCE ON THE OPERATION OF THE CMA'S UK INTERNAL MARKET FUNCTIONS](#)

AND

THE OFFICE FOR THE INTERNAL MARKET - [DRAFT STATEMENT OF POLICY ON THE ENFORCEMENT OF THE OIM'S INFORMATION GATHERING POWERS](#)

Deadline for response: **23:59 on 22 July 2021**

This response is shared without prejudice to the Welsh Government's ongoing litigation in relation to the UK Internal Market Act 2020 ('the Act').

The Welsh Government has made clear its opposition to the Act. This legislation represents an unnecessary and heavy handed approach to control of the UK internal market and effectively undermines the competence of Senedd Cymru.

Notwithstanding this, the Welsh Government is not opposed to the need to control the internal market. The response attached should be considered without prejudice to the ongoing litigation the Welsh Government has initiated against part of the Act. Please find enclosed a considered response to the two consultations launched by the Competition and Markets Authority (CMA) in response to new functions transferred to establish the Office for the Internal Market (OIM) and a Statement of Policy on enforcing the information-gathering powers of the OIM.

The Welsh Government recognises the need for the devolved Governments to work together to ensure the smooth operation of the internal market, where our preferred mechanism to achieve this is through intergovernmental working and an expansion of the principles supported in the Common Frameworks approach.

Part 4 of the Act, which establishes the OIM, is not being contested by the Welsh Government's legal action. In this response we aim to provide comments on the establishing of the OIM and how it will undertake its functions and on the draft statement of policy on the enforcement of the information-gathering powers.

1. OFFICE FOR THE INTERNAL MARKET - GUIDANCE ON THE OPERATION OF THE CMA'S UK INTERNAL MARKET FUNCTIONS

- 1.1. The UK Internal Market Act transfers a new responsibility to the CMA to establish the Office for the Internal Market (OIM). The Welsh Government is of the strong view that this new body, established to advise, monitor and report independently on the effective operation of the internal market, should be set up with policies and guidance which reflects **this new and independent role** and hence these should not originate from principles applied to other CMA functions.
- 1.2. Once the OIM is fully operational, and to ensure continued review of the guidance, the Welsh Government encourages the OIM to undertake a transparent review and consider feedback from devolved Governments to ensure its new model of operation is effective in achieving its goals. This should address, in particular, the engagement with devolved Governments on regulatory matters and the reporting on UK internal market matters which are outside the core competence of the CMA, i.e. not solely based on economic matters.
- 1.3. Expressed in the table below are further points for clarity and questions to be considered by the CMA. The Welsh Government would welcome receiving a written response to these questions or the opportunity for a discussion to provide clarity on points raised in responses to your consultations.

Table 1 – Consultation questions and feedback on guidance on the operation of the CMA's internal market functions

Page and paragraph location	Welsh Government questions Welsh Government comments for consideration
Page 4 (p2) Page 14 (p2.29) Page 17 (p3.2)	<p>The consultation begins to address the OIM's purpose to report, monitor and advise on the "effective operation" of the internal market.</p> <p>The overarching principles described on page 17 p3.2 expand this to not only the economic impact but also the effective management of regulatory divergence.</p> <p>QUESTION – How will the OIM report and monitor effective operation of the internal market in the case of regulatory divergence?</p> <p>QUESTION – How will the OIM consider regulatory divergence in areas of devolved competence where the objective could negatively impact the market and consumers, but the outcomes for, as examples, the environment or health would be positive?</p> <p>Will the CMA make clear that its analyses are limited to economic issues only (if that is the case – see above), and does not take into account wider, legitimate policy goals?</p>

	<p>QUESTION – Does the CMA foresee any conflict of interest, perceived or real, in advising England as the relevant national authority when the Secretary of State also has oversight and acts to appoint senior figures in the CMA and OIM?</p>
Page 7	<p>At p1.5 The consultation describes “a number of panel members”</p> <p>QUESTION – How will the OIM Chair make the decision as to who sits on a particular task group and are there any scenarios where it may be appropriate to have more than three panel members?</p>
Page 7 (p1.6)	<p>QUESTION - How does the CMA intend to demonstrate “even-handedness”?</p>
Page 8 (p1.9)	<p>At p1.9 the consultation indicates a “commitment to ongoing review”.</p> <p>QUESTION – How does the OIM propose to engage with each relevant national authority when reviewing its experience and updating guidance?</p>
Page 10	<p>At p2.7 “<i>The OIM may from time to time undertake a review of any matter it considers relevant to assessing or promoting the effective operation of the internal market in the UK and/or provisions of Parts 1 to 3 of the Act.</i>”</p> <p>QUESTION – Please can you describe a scenario where the OIM may undertake a discretionary review?</p> <p>QUESTION – Considering the potential influence the UK Government might have in its capacity as “superintendent” is there a case for publishing requests for the OIM to undertake discretionary reviews? Or could there be a relevant national authority forum where such requests are transparently informed before commencement?</p> <p>QUESTION – At p2.8 there is a reference to the “CMA”. Should this be changed to reference the OIM?</p> <p>For consistency and to reflect the “even-handed” approach under which the OIM will operate, please refer to “relevant national authorities” instead of “<i>devolved administrations</i>”.</p>
Page 11 (p2.11)	<p>At p2.12 “<i>Both annual and five-yearly reports must be laid before the legislatures of in each of the UK nations.</i>”</p> <p>QUESTION – Does the OIM propose to provide reports both in English and Welsh to be laid before Senedd Cymru?</p> <p>QUESTIONS – What is the OIM’s proposal to deal with any responses from the legislatures once reports are laid?</p> <p>QUESTION – Can you explain what “<i>important metrics</i>” are in the context of the annual and five-yearly reports?</p> <p>Section 34 in the Act enables the OIM to give advice, or provide a report in relation to a qualifying proposal.</p>

	<p>QUESTION – How will the OIM distinguish between providing advice or producing a report? And could you describe a scenario where one is preferred over another?</p> <p>QUESTION – On page 11 – in the footnote – should footnote 16 read "see section 30(9)" ?</p>
Page 12 (p2.19)	<p>Please for consistency change this and other references to "<i>legislative competence</i>" to "relevant competence". This is the correct form of words as defined by s.45(5) of the Act and this captures both legislative and executive competence. Please change at footnote 21; in Page 13 p2.25; page 26 p5.4 and page 27 p5.5.</p> <p>In p2.2 it states "<i>the OIM may consider, among other things, the potential economic effects of the proposed regulatory provision on the effective operation of the internal market in the UK</i>"</p> <p>QUESTION – What "<i>other things</i>" does the OIM anticipate considering as part of its report?</p> <p>QUESTION – What consideration will be made when there is a clear effect on consumers and an economic impact but the objective of the regulation is for health issues, for example a regulation to change labelling to state clearly sugar content or, for example, banning cigarettes as part of a devolved Government's health strategy? How will the CMA reflect these wider legitimate goals and ensure the public debate is not skewed?</p>
Page 13	<p>The OIM will publish reports.</p> <p>QUESTION – How will the OIM consider confidential or sensitive information contained in any requests before publication?</p> <p>For the ex-post reporting function, there are strict rules in place around the publication of material about matters which are under consideration by a court. In the case of an ex-post report, it seems conceivable that a report could be requested (and therefore published) at the same time as the regulatory provision is being enforced in a court, or at the same time the regulatory provision is itself being considered by a court (for example a judicial review or a Supreme Court reference).</p> <p>QUESTION - How does the OIM intend to approach this ex-post reporting function in this scenario?</p>
Page 14	<p>QUESTION – How will the OIM ensure "<i>any other person is qualified to provide an independent report on the regulatory provision in question</i>" will do so appropriately and without bias or partiality?</p> <p>QUESTION – In p2.35 what does "<i>even handed</i>" mean? – would it be useful to add to or expand upon this so all are clear? For</p>

	<p>example, it could incorporate – “impartially” “neutrally” or “without prejudice”?</p> <p>QUESTION – By stating a national authority should seek advice or make their own assessment, doesn’t this confuse the option of asking the CMA for a view under s34-36?</p>
Page 15	<p>QUESTION – In relation to information requests – how does the OIM plan to deal with circumstances where it requires information from Crown Bodies? Will penalties also apply to information requests to relevant authorities?</p> <p>In p2.42 there are details about how the CMA will use information gathered. <u>The Welsh Government is opposed to the potential use of any information</u> gathered by the OIM by the CMA wider in any parts of its other functions.</p> <p>QUESTION – What assurances will the CMA give that information gathered by the OIM in any part of its functions is not subsequently used by the CMA? What processes will be put in place to protect any confidential or sensitive information shared by relevant authorities with the OIM?</p>
Page 17	<p>The OIM’s overarching principles (at p3.2) are clearly focused on the economic impact. s.33(6) and s.34(4) of the Act provide non-exhaustive lists of matters the CMA/OIM may take into consideration when undertaking its work.</p> <p>QUESTION – To what extent will other factors (such as environmental issues, social values) be taken into account as part of the OIM’s overarching principles?</p>
Page 18	<p>p3.12 presents the proposed “<i>Online interface</i>”.</p> <p>QUESTION – Has the CMA considered if an online interface is the best way to gather information? Has any consideration been made to other means of collecting information? Will the online interface be accessible and meet the Welsh language requirements for Welsh users?</p>
Page 19	<p>The OIM will assess “<i>the impact of CF agreements on the operation and development of the internal market</i>” –</p> <p>QUESTION – Will assessment of CF (Common Frameworks) agreements be undertaken at the overall level or at the level of individual frameworks?</p> <p>Page 32 p6.18, on reports, provides more detail on the content of reports.</p> <p>QUESTION – For reports on the effective operation of CF agreements, what form will the recommendation take?</p>
Page 21	<p>QUESTION – Where a regulation will impose a restriction or cost on a business (for legitimate policy reasons), what weight will be given to opinion or anecdote which is collected as evidence on the proposed or actual impact of that regulation?</p>

	<p>For example before the plastic bag charge was introduced in Wales there was negativity from business and consumers about the potential costs. These have not really come to fruition and since introduction the carrier bag charge has been universally accepted as a positive intervention.</p>
Page 23 & 24	<p>The prioritisation principles generally seem appropriate. However the OIM is a new function of the CMA and will have a new and different operating relationship with the Governments of the UK when exercising the OIM functions.</p> <p>QUESTION – How will the OIM continually assess the appropriateness of the prioritisation principles? How will the OIM consider key policy goals of Governments in its priority principles?</p>
Page 26	<p>At p5.4 the OIM will request “<i>appropriate evidence</i>”. Please change the reference to “legislative competence” to “relevant competence”. (this is highlighted above in the page 12 response as well)</p> <p>The requirement to provide “appropriate evidence” is at odds with the requirements of section 34(4), which states a request may be submitted where “it appears to the requesting authority that the proposal would be within relevant competence”. No further evidence should be needed, and it is not for the OIM to make a separate assessment of the “<i>legislative competence</i>” of a relevant national authority.</p> <p>Please also see page 27 p5.7 where the consultation states: “<i>there is insufficient evidence to suggest, or evidence which directly contradicts, that the regulation falls within the legislative or jurisdictional competence of the requesting authority</i>”. The Welsh Government strongly believes where a statement of competence has been provided by the issuing national authority confirming “relevant competence” it should not be within the scope or capability of the OIM to ascertain if this is correct or not.</p>
Page 30	<p>In p6.3 please remove the words “in some”. The Welsh Government is not aware of any frameworks where different choices could not be made.</p>

2. OFFICE FOR THE INTERNAL MARKET - DRAFT STATEMENT OF POLICY ON THE ENFORCEMENT OF THE OIM'S INFORMATION GATHERING POWERS

- 2.1. This response has been considered in conjunction with the [consultation on penalties](#) being conducted by the UK Government's Department for Business, Energy and Industrial Strategy. Having considered the consultations, please see below some observations and points about which the Welsh Government would like to seek further clarity and assurance.
- 2.2. The Welsh Government is not opposed to the need for penalties to act as a disincentive for non-compliance with information-gathering requests. We do, however, have questions about the level at which these penalties are proposed to be set and whether these are proportional to the use in information-gathering requests in relation to the functions of the OIM. These views will be shared in our response to the BEIS consultation outlined above.
- 2.3. The Welsh Government would welcome further detail on how the OIM will approach the use of its information-gathering powers to request information from crown authorities/devolved Governments.

Will penalties in relation to non-compliance with section 41 notices also be levied for example on the Welsh Government?

- 2.4. On the first page of the consultation, in the background section, the following statement raises some concern about the CMA transposing existing operations on to the new and distinctively different OIM: "*The draft Statement draws on the CMA's existing guidance and its experience of using its formal information-gathering powers*". The Welsh Government is of the view that this new body, with an independent remit and with an entirely different purpose from the CMA's, should be considered afresh and be constituted specifically and independent of the CMA's existing roles.

How will the CMA ensure the OIM's purpose is distinct and separate from the functions of the OIM?

- 2.5. In relation to sharing information, the Welsh Government has concerns about the appropriate use of information and we wish to seek assurances that potentially sensitive information for example about Welsh businesses shared by the Welsh Government with the OIM to support its functions is not then available to the CMA more widely to support other functions such as in the case of competition enquiries?

How will the OIM ensure information shared with the OIM by the Welsh Government is only used to support the OIM's functions to report, advise and monitor the effective operation of the internal market?

Would the CMA/OIM consider agreeing to a memorandum of understanding or suitable agreement about the appropriate use of information shared by the Welsh Government?