



Response from the Faculty of Advocates

to

UK Government Consultation on UK Internal Market Act 2020

Introduction

The Faculty of Advocates is the independent referral bar in Scotland. Advocates hold a public office within the College of Justice as well as being independent, self-employed service providers. Advocates do not directly provide services to the public, but are instructed by solicitors and certain other direct access professionals. Under the Legal Services (Scotland) Act 2010, the Court of Session is responsible for regulating the professional practice, conduct and discipline of Advocates. The Court has delegated this responsibility to the Faculty of Advocates. Rules which the Faculty makes are subject to approval by the Lord President of the Court of Session, the head of the Scottish judiciary.

The Faculty's response to this consultation is principally focussed on the application of the IMA to legal services. The Faculty does not seek to express views as to the operation of the IMA on other professions or the professional services market more generally.

Questions:

Question 1: What are your views on how the UK internal market for goods is best supported using the UK Internal Market Act?

1. Not applicable.

Question 2: What are your views on whether differing regulations that have effect later in the supply process are more straightforward for businesses to address?

2. Not applicable.

Question 3: What is the right balance between the potential for local regulatory innovations in sectors and UK-wide alignment?

3. Not applicable.

Question 4: What are your views on the operation of the market access principles for goods to date?

4. Not applicable.

Question 5: What are your views on the use that has been made of the Part 1 amendment powers – for example the exclusion for single-use plastics? In particular, we would welcome views on whether the changes have had or will have a positive or negative impact and whether they have been effective. (An explanation of what the Part 1 amendment powers are and what use has been made of them can be found in the Annex).

5. Not applicable.

Question 6: What are your views on how the UK internal market for services is best supported using the UK Internal Market Act?

6. So far as services other than legal services are concerned, the Faculty of Advocates is neutral on what appears to it to be a question primarily of commercial and pragmatic concern best addressed by those in the relevant service industries.

6.1. As for legal services, the United Kingdom is made up of three jurisdictions each with their own legal system: England and Wales; Scotland; and Northern Ireland. Divergence in the systems of law and procedure, the qualifications and knowledge required for practice, and the manner of regulation of the legal profession, is not a consequence of devolution or Brexit. In relation to Great Britain, the issues arise out of the fundamental pillars of the UK constitutional arrangements for the union of Scotland with England and Wales.

6.2. For these reasons, and given the matters identified in the Introduction to this response, the Faculty of Advocates considers that the exception in s. 27(5) of the Act remains appropriate—indeed, constitutionally essential.

Question 7: What is the right balance between the potential for local regulatory innovations in services and UK-wide alignment?

7. In a similar vein, the Faculty of Advocates is neutral as regards services other than legal services and considers that, as regards legal services, it remains constitutionally essential for regulation to remain a matter for each constituent jurisdiction of the United Kingdom.

Question 8: What are your views on the operation of the market access principles for services to date?

8. The Faculty of Advocates expresses no view on this matter beyond what is stated in answer to Question 10, and it expresses no view on the exercise of these powers in relation to other sectors or industries.

Question 9: What are your views on the use that has been made of the Part 2 amendment powers – for example, removing exclusions for certain services? In particular, we would welcome views on whether the changes have had or will have a positive or negative impact and whether they have been effective. (An explanation of what the Part 2 amendment powers are and what use has been made of them can be found in the Annex).

9. The Faculty of Advocates expresses no view on this matter beyond what is stated in answer to Question 10, and it expresses no view on the exercise of these powers in relation to other sectors or industries.

Question 10: What are your views on how the UK internal market for professions is best supported using the UK Internal Market Act?

10. There are no real barriers to legal professionals in the UK exercising their professional qualifications to provide their respective services across the UK:

10.1. The constitutional arrangements since the inception of the United Kingdom of Great Britain in 1707 have at their core the continued independence of the Scottish legal system. The College of Justice, including the Court of Session and the Faculty of Advocates, are central pillars of that system.

10.2. The present constitutional arrangements comprise three UK legal systems: England & Wales; Scotland; and Northern Ireland. Admission to practice in one jurisdiction does not generally confer rights to practise in the courts of another jurisdiction. There is, however, generally a freedom to exercise rights of audience before all UK tribunals. These internal UK constitutional arrangements have stood the test of time.

10.3. When the UK was a member state of the European Union, the EU internal market rules on lawyers did not apply with full vigour to intra-UK matters. The general EU law MRPQ regime was of limited practical application to lawyers because of the bespoke regime for EU lawyers under the Lawyers' Services Directive and the Establishment Directive. But those regimes were never applied *within* the United Kingdom. The IMA rightly does not seek to do so. However, the policy purpose of the IMA – at least in so far as it applies to legal services – may be overstated.

10.4. The exclusion of legal services (for mutual recognition purposes) in Part II (in terms of section 18 and schedule 2, part I); and, in Part III, in relation to Professional Qualifications and Regulation (under section 24(2), as read with section 27(5)), is thus firmly justified by measures contained in domestic law which existed long before the UK became a member of the EEC; long before devolution; and long before Brexit.

10.5. The Provision of Services Regulations 2009 (SI 2009 No. 2999, as amended) provide a common framework applicable to the provision of legal services in the UK's constituent nations. The Regulation of Legal Services (Scotland) Bill is currently at Stage 3 of its progress through the Scottish Parliament. If passed, the

consequent Act would reform the framework for regulation of the legal services sector in Scotland.

Question 11: What is the right balance between the potential for local regulatory innovations in professions and UK-wide alignment?

11. In the case of legal services, standing the three separate jurisdictions which are central to the UK's constitutional settlement, "UK-wide alignment" in relation to legal services and the legal profession is neither practically possible within the policy framework of the IMA nor desirable. Cross-qualification into the various legal systems of the United Kingdom is both available and common. Many members of Faculty are also qualified in the law of England and Wales. Many more members of the Law Society of Scotland are dual qualified in England and Wales. The fact that there are further requirements to be fulfilled simply reflects the different content of the laws of the different jurisdictions of the United Kingdom.

11.1. Separately, we note that there are proposed 'common frameworks' in place to allow all governments to work together co-operatively to ensure a common approach is taken where powers have returned from the EU which intersect with policy areas of devolved competence. These common frameworks must have regard to the constitutional and regulatory status of the Faculty of Advocates.

Question 12: What are your views on the operation of the system for recognising professional qualifications to date?

12. The exclusion of legal services from the mutual recognition scheme in the IMA, referred to in the responses to Question 10 above, is based sensibly in the recognition of the three separate jurisdictions and legal systems which make up the United Kingdom. The continued independence of the Court of Session and the Scottish legal system arises from the Treaty of Union 1707 (Articles XVIII and XIX), not from devolution or Brexit.

Question 13: How can the Office for the Internal Market best support the UK internal market through its role in providing independent monitoring and advice?

13. Not applicable.

Question 14: What are your views on whether the current arrangements in Part 4 relating to the use of the Office for the Internal Market task groups are appropriate for securing the most effective and efficient performance of the CMA's Part 4 functions? We would welcome views in particular on any advantages or disadvantages of continuing with the current arrangements as compared with other possible ways of carrying out the Part 4 functions. (A full list of functions is set out in the Annex).

14. Not applicable.

Question 15: What improvements could be introduced to facilitate more pragmatic management of the UK Internal Market Act's exclusions process?

15. An example of inefficient management of the exclusions process may be seen in the delayed deployment of the Scottish Government's Deposit Return Scheme, which now forms the subject of an action for damages against the Scottish Ministers by Biffa Waste Services Ltd, the intended logistics provider for the Scheme (see *Biffa Waste Services Limited v the Scottish Ministers* [2025] CSOH 9). Because the Scheme is intended to deal with goods produced elsewhere in the UK as well as those produced in Scotland, an exclusion from market access principles is required pursuant to s.10 of the 2020 Act. The Scottish Ministers accordingly asked the UK Government for an exclusion. It would appear that the exclusion process was not managed efficiently between the two administrations. For example, the UK Government and Scottish Ministers differ in their respective positions as to when an exclusion was requested: "*The UK Government consider that the request was made on 6 March 2023. The Scottish Ministers say they had commenced the "approval" process earlier*" (*Biffa Waste Services Limited v the Scottish Ministers* [2025] CSOH 9 at paragraph 10). This

may suggest a lack of shared understanding between the administrations as to how the exclusions process is meant to operate in practice, including on the timing of when an exclusion has been sought and received for consideration. On 26 May 2023, the UK Government approved a temporary exclusion covering plastic, aluminium and steel cans but not, as had been requested by the Scottish Government, glass. The Scottish Government's position is that the inclusion of glass is essential to the viability of the Scheme. It is understood that the Scheme has now been delayed until 1 October 2027, seemingly at significant expense to various parties and presumably resulting in uncertainty for businesses. It would seem tolerably clear from the foregoing that the exclusions process was not managed efficiently between the two administrations in this instance. Clear and effective intergovernmental communication between the UK Government and the devolved administrations at an early stage of any project requiring an exclusion under the 2020 Act, including as to: (i) the scope of any exclusion being sought; and (ii) the likely scope of any exclusion to be granted, may mitigate against the risk of similar situations arising in future.

Question 16: How should we ensure proportionate engagement with interested parties in relation to potential exclusions?

16. Not applicable.

Question 17: What evidence should be provided in support of an exclusion proposal by the proposing government, so the proposal can be fully considered (for example, information on potential impacts on businesses' ability to trade within the UK and the policy implications of not having an exclusion)?

17. Not applicable.

Question 18: Should there be a different process to consider exclusions proposals which could lead to potentially significant economic impact, compared to those likely to lead to smaller economic impact?

18. Not applicable.

Question 19: What do you think constitutes a potentially significant economic impact?

19. Not applicable.

Question 20: Is there anything else you want to tell us about the operation of the UK Internal Market Act?

20. Not applicable.