

## Briefing for NGOs on the IMA

### Background to the IMA

In December 2020, the Internal Market Act (IMA) was approved by the UK Parliament and received Royal Assent, coming into power on 1st January 2021. This Act aims to establish a single market regime for the UK following its departure from the EU single market.

The Act was passed by a majority in the UK Government, though Scotland, Wales, and Northern Ireland did not consent to its introduction. Following its introduction, the Welsh Government sought a judicial review of the Act, though this was subsequently dismissed as there had been no evidence at that time of the Act being used to undermine devolution.

The IMA made headlines in early 2023 through its interactions with the Scottish deposit return scheme. This example of the Act being used to undermine legislation in devolved nations shows the potential for interference in environmental regulations under this more stringent form of single-market governance.

### What the IMA does

The Act establishes two key market access principles for the UK with regard to goods:

- The principle of mutual recognition, where if a good is produced or imported into one part of the UK and can be lawfully sold in that part, it can be sold across the UK regardless of any differences between UK nations in regulations relating to that good.
- The principle of non-discrimination, where the sale of goods in one part of the UK should not be affected by relevant requirements that directly or indirectly discriminate against goods that have a relevant connection with that part of the UK.
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Under these principles, if one nation of the UK passes legislation to ban or regulate a product, that law can only be enforced on a product produced in or directly imported into that nation from outside the UK. Anything brought into that nation from another part of the UK does not have to comply with the legislation unless specifically excluded from the IMA. This could have a negative impact on environmental legislation, as a reduction in standards in one UK nation would have the effect of pushing down legislation in the rest of the UK and making positive environmental legislation impossible to implement.

The Act impacts services similarly but relates to the authorisation requirements for services, and both mutual recognition and non-discrimination can apply simultaneously. Where a service provider is authorised to provide a service in any of the four nations of the UK, they may provide the same service in all four nations of the UK.

One important distinction to make is that the IMA does not impact the ability of a devolved nation to pass legislation that infringes on the market access principles, though it does impact its ability to enforce that legislation.

Legislation which was enacted prior to the introduction of the IMA, or which is specifically listed in the schedules of the Act, is exempt. Sections 10 and 18 of the Act allow the UK Government to make regulations to create exclusions from the market access principles. Exemptions can specifically be given to allow certain legislation to be introduced and enforced, such as with the Single Use Plastics Ban in Scotland. The process for seeking an exclusion to the IMA involves:

- The relevant government setting out the scope and rationale for the exclusion
- A review of the proposed exclusion and supporting evidence for it by the relevant framework forum; and if the exclusion is agreed
- The laying of a statutory instrument by UK Government Ministers in the UK Parliament to implement the exclusion.

However, there is no 'official' application process for an exemption, but it is based on discussions between the UK Government and representatives of devolved administrations. This exemption is discretionary, and UK Government Ministers do not have to grant an exemption even where there is support from devolved governments.

The Office of the Internal Market (OIM) was established to support the operation of the internal market and provide independent guidance to the UK Government and devolved nations. This is done on a purely economic basis, and they do not comment on the virtues of bills or policy. However, this advice is non-binding.

### **Differences between the IMA and EU single market rules:**

Lots of single market blocks have mutual recognition principles, however the test for exclusions is far higher in the IMA than in the EU Single Market, making it disproportionate to the EU single market in homogenising policymaking across the UK. The principle of subsidiarity under the EU, in which member states retained decision-making power if the intervention of the EU was not necessary, had a higher value, and was better respected than under the IMA. In addition, the EU single market rules contain a derogation for environmental legislation and public health, meaning that much environmental legislation impacted by the IMA would not have been under EU legislation.

The IMA contains Henry VIII powers, which allows a UK Secretary of State to change the scope and schedule of the Act. Due to its relative size, power within IMA discourses rests almost entirely with the UK Government, and there is no external governance body for the IMA. While the UK Government must *seek* the consent of devolved nations in matters relating to the IMA, they do not *require* their consent to proceed with such matters.

### **How the IMA was used in Scotland<sup>1</sup>**

In Scotland, an exemption was granted for the Single Use Plastics ban. Though the ban came into force in June 2022, relevant single-use plastic items were only officially banned in August 2022 when an exclusion to the IMA was granted. Between this time, single-use plastic items that were imported into or produced in other parts of the UK could be legally sold in Scotland, meaning that the ban could not be enforced until this later date.

In January, Defra announced the scope and timings of the deposit return scheme for England, Wales, and Northern Ireland, reiterating that the Scottish scheme was to begin in August 2023 and would include glass, PET plastic, and aluminium. However, on 27th February, just 24 hours before the deadline for producers to register with the scheme, the [Times](#) quoted a UK source implying that the scheme was in danger due to a lack of compliance with the IMA. These early rumours about UK government officials refusing to grant an exemption to the Act cast uncertainty on the entire scheme. Eventually, the UK Government gave a partial and temporary exemption for PET plastic and aluminium in the Scottish deposit return scheme, though refusing to grant an exemption for glass, ensuring that while they did not explicitly cause a delay or cancellation of the scheme, going forward would have been a huge challenge. However, by this time the UK Government's delay in granting a decision on an IMA exemption caused enough uncertainty around the scheme to undermine confidence amongst businesses and the public. Through the IMA, Scotland's deposit return scheme was largely politicised and a subject of tension between the Scottish and UK Governments, until it was almost entirely removed from any environmental context.

From an APRS perspective, the IMA was on our radar prior to 2023, though we assumed that an exemption would be given as with the single-use plastics ban. Regulations for deposit return were passed before the IMA was introduced, and reassurances<sup>2</sup> were given by the UK Government at the time the IMA was being debated that "the deposit return scheme can be brought into effect in full compliance with the market access principles that we have set out in this legislation". With our experiences of the deposit return campaign we are concerned of the dangers the IMA poses for future environmental policymaking.

### **What the IMA means for future environmental policymaking**

As was shown with the Scottish deposit return scheme, the IMA can pose an existential threat to environmental policy, with the potential for any regulations which regulate what can be sold to be impacted. Some upcoming areas of legislation which would fall under the IMA are charges for single-use cups and the sale of horticultural peat. The process for negotiating and granting an exemption is quite time and labour-intensive, which

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<sup>1</sup> There is a fuller account of the timeline and how the IMA was used against the deposit return scheme in a log on our website [What Happened to Deposit Return?](#)

<sup>2</sup> Lord [Callahan](#) addresses the Lords in October 2020

should also be considered in campaigning for policies impacted by the IMA. In addition, the IMA does not prevent legislation but prevents the enforcement of such legislation, so there is a risk of legislation being introduced which cannot be enforced.

In cases where the IMA may be applicable to a piece of legislation, campaigners would have to focus both on the Scottish Government introducing the policy, plus on the UK Government to grant an exemption through persuading a relevant UK Secretary of State.

In addition, certain policies can be designed to avoid the constraints of the IMA through regulations that do not directly alter conditions of sale. Similarly, while the IMA impacts restrictions on the *sale* of particular items, it does not impact bans or restrictions on its *use*.

Unlike EU single market rules, the UK IMA tends towards a homogenisation of policy across the UK. Emphasising common frameworks, which set out how the governments of the UK nations will work together to manage regulatory divergence in policy areas formerly governed at an EU level, can be a means to work together more constructively, through the existence of the IMA largely constrains this. However, the IMA remains an existential threat to environmental policymaking across the UK.

You can sign a letter from environmental and public health organisations to the Prime Minister which makes the case for the Act to be amended to add a qualified automatic exemption for legislation in the areas of public health and the environment, to reduce bureaucratic overheads and support policy innovation across the UK.

The letter is [here](#). Please sign by close of play Friday 8th September

### **Action to Protect Rural Scotland (APRS) - 22 August 2023**

There is more information and background on the 'Have you got the Bottle?' Campaign for a deposit Return Scheme for Scotland on our website

[aprs.scot/campaigns/have-you-got-the-bottle/](https://aprs.scot/campaigns/have-you-got-the-bottle/)