

## UK Internal Market Bill

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### Report Stage, House of Lords

October 2020

#### About the BMA

The BMA is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in the UK. It is a leading voice advocating for outstanding health care and a healthy population. It is an association providing members with excellent individual services and support throughout their lives.

#### Key points:

- The BMA welcomes the House of Lords' amendment to remove clauses from the UK Internal Market Bill that would undermine the Withdrawal Agreement by giving the UK power to disapply or modify elements of the agreement and the Northern Ireland Protocol. However, we note with concern that the Government has said it will seek to reinsert the Clauses when the Bill returns to the Commons.
- We welcomed the Government amendment to the Bill that would give parliament a vote before any such powers are used. However, Brussels has argued its objections have not been addressed and that the Bill is "still illegal", and the EU launched legal proceedings against the UK over the Bill on 1 October.
- There is a real risk that this could increase the chances of a no-deal Brexit, the results of which would have been catastrophic for our members and patients pre-pandemic. Its impact on our health services, which are struggling to deal with the massive backlog of non-COVID-19 clinical work and being threatened by a second peak in infections during the challenging winter period, simply cannot be countenanced.
- The impact this could have on the UK's reputation and ability to independently negotiate trade agreements with other countries that set a high bar to protect the health sector and public health in the UK, and enhance health globally, is of concern.
- The Bill should be used to promote the Westminster Government's ambition to present Britain as a world leader on standards and public health. It is therefore vital that the Bill does not result in a race to the bottom with any UK nation being required to accept lower standards than it would wish to.
- The BMA is calling for a commitment to non-regression on all current UK-wide and devolved nation health, wellbeing, animal welfare and environmental standards to be written into the Bill.
- It is vital that health and social care sectors are protected from increased privatisation across all UK nations by safeguarding options for rolling back privatisation.
- Any increased risk of a no-deal Brexit puts in jeopardy cross-border healthcare between the Republic of Ireland and Northern Ireland. This could also have significant implications for EEA nationals graduating with UK medical qualifications, who could be treated as 3<sup>rd</sup> country nationals in most EEA countries and obliged to undergo onerous separate registration processes in both their "home" country and in most EEA jurisdictions in which they wish to practice. Such obstacles would detract significantly from the attractiveness of studying medicine in Northern Ireland (NI) and ultimately further reduce the provision of healthcare in the, already understaffed, cross-border area.
- The human cost of the disruption of All-Island care would be significant. For example, the All-Island Congenital Heart Disease Network's ongoing efforts develop "*a world-class patient and family-centric*

*CHD service for the island of Ireland*” is dependent upon the ability to run cross-border training programmes with successful graduates’ qualifications being automatically recognised across the EEA.

- **The BMA urges peers to vote in favour of amendments to the Bill that would address our key concerns regarding ensuring the Bill does not lead to a race to the bottom on standards and that options for rolling back privatisation are safeguarded.**

### Risk to the Withdrawal Agreement

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Prior to Lords Committee Stage of the Bill, the Bill contained clauses that would give the Government powers to disregard existing domestic laws or international obligations relating to the Withdrawal Agreement and Northern Ireland Protocol. Clause 42 in Part 5 of the Bill gives the UK Government the power to disapply or modify export declarations or exit procedures for goods moving from Northern Ireland to Great Britain; Clause 43 gives ministers the powers to make regulations to determine how the state aid law is applied, including in a way that modifies the protocol itself or is incompatible with international law; Clause 44 gives UK ministers the power to disapply or modify exit summary declarations for goods moving from Northern Ireland to Great Britain; and Clause 45 states that regulations made under clauses 42 and 43 cannot be deemed unlawful on the basis of incompatibility with international or domestic law.

We welcome the Government amendment to the Bill that would give parliament a vote before any such powers are used. However, Brussels has argued its objections have not been addressed and that the Bill is “still illegal”, and the EU launched legal proceedings against the UK over the Bill on 1 October.

By undermining the Withdrawal Agreement, there is a real danger that this could increase the chances of the UK leaving the EU without a deal. **We therefore support the House of Lords’ vote to remove these clauses from the Bill, but note with concern that the Government has said it will seek to reinsert these when the Bill returns to the Commons.**

The BMA has been consistently clear that a ‘[no deal’ Brexit](#)<sup>1</sup> will harm the NHS, medical research and education, patient care and public health. It risks disruption to essential medicine supplies, patient healthcare and the movement of highly skilled doctors, as well as the potential return of a hard border in Northern Ireland.

This is within the context of a worsening workforce crisis. Nearly 22,000 thousand EEA doctors work in health services across the UK and at various points since the referendum EU doctors have told us that they are considering leaving because of Brexit. A ‘no deal’ could obviously lead more medics to leave the UK. With around 10,000 medical vacancies in the health system, the loss of more experienced and talented doctors risks exacerbating the workforce crisis and undermining patient care at this critical time.

The NHS also faces being plunged into a no deal Brexit during winter and during the COVID-19 pandemic. The latest NHS performance figures reveal the extent of the devastating impact of COVID-19 on patient care with waiting times for treatments at record highs. In September 2020, the number of patients waiting a year or more for treatment rose to 139,545 – a 107-fold increase from 1,305 in September 2019.

Whilst NHS England has instructed providers to have contingency plans in place to ensure safe services for patients can continue in the event of a no-deal Brexit, their ability to do deliver on these in the midst of winter pressures and a global pandemic is unlikely.

Over the longer-term, a ‘no deal’ Brexit could also significantly impact the speed of availability of new drugs for patients in the UK. The Government’s ‘no deal’ guidance confirms that the MHRA (Medicines and

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<sup>1</sup> BMA – *S health service on the brink: Dangers of a ‘no deal’ Brexit* - <https://www.bma.org.uk/media/1345/bma-no-deal-brexite-briefing-aug-19.pdf>

Healthcare products Regulatory Agency) will take on the work of the EMA.<sup>2</sup> Regulating medicines on its own, outside of the EMA, the UK will be a much smaller market for medicines, coupled with already tight margins for medicines, this means the UK will be less of a priority market, leading to delays in new products being brought to market in the UK. For example, it has been suggested that a separate regulatory system to the EMA could lead to delays of 12 to 24 months for UK patients being able to access lifesaving cancer drugs.<sup>3</sup>

## Market access for goods

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Part 1 of the Bill sets out plans for the mutual recognition of goods within the UK. This means any goods which are legally sold in one part of the UK can also be sold in the other parts of the UK, regardless of whether or not it complies with national regulations. This principle will not apply to requirements in place before the Bill comes into force, or to goods for which there is an exemption, including food safety.

Part 1 of the Bill also sets out a non-discrimination principle, which would prevent any part of the UK from introducing regulations that would block the flow of goods from any other part of the UK. Exceptions would be made to address emergency situations, such as a public, plant or animal health emergency.

However, the BMA is concerned that the Bill could result in a race to the bottom with less incentive on national governments to improve domestic standards and for other governments to follow suit. For example, after 50p minimum alcohol pricing was introduced in Scotland in 2018, Wales implemented the policy earlier this year after witnessing the public health benefits the policy brought.<sup>4</sup>

Restricting exemptions to the non-discrimination principle to emergency settings is inconsistent with typical public health exemptions in trade agreements, which explicitly allow differential treatment for the purposes of protection of public health. For example, the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) states that:

*“Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.”<sup>5</sup>*

The BMA has previously raised concern over trade agreements that limit the use of TRIPS flexibilities to emergency situations. The narrower provision within the internal market risks setting a dangerous precedent for other trade agreements, which could have a negative impact on public health in the UK and globally.

The UK Government has stated, ‘the UK’s existing high standards across areas including environmental standards, workers’ rights, animal welfare and food standards will underpin the functioning of the Internal Market to protect consumers and workers across the economy. The UK Government is committed to maintaining high standards in these areas, including in all free trade agreement negotiations.’<sup>6</sup>

Although there is a standstill clause in the Bill, we are concerned that existing rules like Scotland’s minimum alcohol pricing rules, could still be at risk.<sup>7</sup> EU law invokes a proportionality principle that ensures competing objectives of market access and market regulation are balanced. This means public health concerns must be considered when rules restricting market access are at issue. For example, when the Minimum Unit Pricing for

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<sup>2</sup> Department of Health and Social Care (2019) Further guidance note on the regulation of medicines, medical devices and clinical trials if there’s no Brexit deal. London: Department of Health and Social Care.

<sup>3</sup> BBC (2017) Cancer drugs may be delayed after Brexit, say experts <https://www.bbc.co.uk/news/health-38922366>

<sup>4</sup> BBC (2020) Alcohol: Wales minimum pricing law comes into force

<sup>5</sup> World Trade Organisation (WTO), [Trans-Related Aspects of Intellectual Property Rights](#)

<sup>6</sup> BEIS (2020) [UK Internal Market Bill](#)

<sup>7</sup> European Futures, Professor Kenneth Armstrong (October 2020) [What does a UK Internal Market mean for Regulatory Divergence in the UK?](#)

alcohol regime was challenged by the Scottish Whisky Association, the regime was protected as it was accepted there was no less restrictive means of seeking to attain the public health goal set by the Scottish Government. Under the UK Internal Market Bill, there is no such proportionality test and it is unclear how the rules contained in the Bill will be enforced, or contested.

To ensure high standards are both maintained and enhanced, the BMA is calling for a commitment to non-regression on all current UK-wide and devolved nation health, wellbeing, animal welfare and environmental standards/climate change measures to be written into the Bill.

## Market access for services

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Schedule 2 sets out proposals for the mutual recognition and non-discrimination of services across the UK, as well as the list of services that would be exempt, including healthcare.

The BMA has repeatedly called for the healthcare sector to be exempt from trade deals that might lock-in privatisation, or lead to privatisation in the devolved nations, and make it more difficult to move towards a more collaborative model of health and social care in the future. Competitive procurement is market-driven rather than health-driven and contributes to fragmentation of services. It creates significant barriers to innovative and cooperative models of care that can help improve the health of the country.

The current COVID-19 pandemic has demonstrated the vital importance of preserving our public health service, and the ability of health and support services to collaborate flexibly and adaptably to limit the spread of disease and save lives. For example, research has shown that bringing hospital cleaning staff in-house, rather than outsourcing this activity to private companies, can improve infection control rates.<sup>8</sup> This is highly relevant in the context of the COVID-19 pandemic.

It is vital that all aspects of health and social care provision, and the support services they rely on, are protected from any measures that may result in further privatisation across the UK, or in the future.

## Recognition of Professional Qualifications

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The increased risk of the UK leaving the EU without a deal presents a significant threat to the facilitation of cross-border healthcare.

Without an automatic mechanism for the mutual recognition of professional qualifications, EEA nationals graduating with UK medical qualifications will be treated as 3<sup>rd</sup> country nationals in most EEA countries and obliged to undergo onerous separate registration processes in both their “home” country and in most EEA jurisdictions in which they wish to practice. This also places in jeopardy the long-term viability of the planned new medical school at the University of Ulster’s Magee campus.

Having spoken to many of our members who would fall within this category, it is clear that such obstacles would detract significantly from the attractiveness of studying medicine in Northern Ireland (NI) and ultimately further reduce the provision of healthcare in the, already understaffed, cross-border area

The human cost of the disruption of All-Island care would be significant. For example, the All-Island Congenital Heart Disease Network’s ongoing efforts to develop “*a world-class patient and family-centric CHD service for the island of Ireland*” is dependent upon the ability to run cross-border training programmes with successful graduates’ qualifications being automatically recognised across the EEA.

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<sup>8</sup> University of Oxford (Dec 2016) [NHS hospitals that outsource cleaning ‘linked with higher MRSA’](#)

Should the future arrangements governing the recognition of professional qualifications impinge on these highly specialised professionals' mobility, there is a genuine risk that they would choose to pursue their careers elsewhere and endanger the future of the CHD network.

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