



## Universities Scotland submission to Finance and Constitution Committee Call for Views on the UK Internal Market Bill

**25 September 2020**

We welcome the opportunity to comment as part of the Committee’s scrutiny of the UK Internal Markets Bill.

Given the remit of our organisation, we limit our response to aspects that directly affect Scotland’s higher education sector. This submission follows the structure of themes and questions as set out by the Committee’s inquiry

A particular difficulty in commenting is that the provisions of the Bill are so broad and unspecific that its effects on higher education cannot be known with confidence. So, we would welcome clarification on these points as the Bill proceeds through Parliamentary scrutiny. We should note that the Scotland Office has organised a technical briefing on the Bill for stakeholders on 25 September. This is a welcome initiative and we hope it will help to clarify some of the Bill’s intentions.

Particular issues on which we seek clarity are:

- Whether the Bill would enable non-Scottish higher education enterprises to operate in Scotland and attract public funding, even if they do not meet the standards of quality and governance required here; and
- Whether the Bill undermines the capacity of the Scottish Parliament to set its own policy on student fees

Each of these is dealt with further below.

### **Operation of the internal market**

**Q5. The impact of the Bill on devolved regulatory competences and regulatory divergence across the UK and devolved nations.**

**Q6. The definition and scope of application of the market access principles of mutual recognition and non-discrimination; the appropriateness of the exclusions to these principles provided for in the Bill (in particular Schedule 1); and the range of goods, services and professional qualifications affected by the provisions of the Bill;**

We have chosen to answer questions 5 and 6 together.

There are aspects of the Bill that require clarification as it potentially applies to higher education. Including:

**Is higher education a “public authority” for the purposes of this Bill?**

The extent to which higher education would be subject to the market access provisions needs to be clarified – in particular, the provisions to remove barriers relating to authorisation requirements (the ‘mutual recognition’ rule) and regulatory requirements (the ‘non-discrimination’ rule). A number of services are



excluded from mutual recognition and non-discrimination requirements including “services provided by a person exercising functions of a public nature” which means by a ‘public authority’ (the NHS is given as an example). The term is not further defined in the Bill and its interpretation has been problematic in other contexts (e.g. Human Rights Act and the Equalities Act).

If higher education is excluded on the grounds that it is a function of a public nature, it would not necessarily follow that all university ‘services’ are excluded, and clarification may be needed in relation to e.g. research, commercial services, employment or procurement.

### **Recognition as a fundable provider of higher education**

- In this context we have understood “fundable provider” as an organisation which would be eligible to receive some funds to deliver higher education services. The mutual recognition and non-discrimination provisions of Part 2 of the Bill could mean that a higher education provider, authorised by a regulator to provide services in one part of the UK, would be able to provide services anywhere in the UK, even if it did not meet quality standards for higher education required by the Scottish Parliament. While not wishing to inhibit cross-border higher education ventures (for instance some Scottish higher education institutions have a presence in England) we want to ensure that the quality of higher education provided in Scotland is maintained, in learners’ interests.
- We seek clarity on whether a non-Scottish provider that did not meet the standards of quality required in Scotland could assert that it should be funded by the Scottish Funding Council and/or have its courses designated for student support. At present, the Further and Higher Education (Scotland) Act 2005 provides that the Scottish Ministers can decide what higher education bodies can receive SFC funding, based on advice from the SFC. Section 7 of the 2005 Act requires that, to be a “fundable body” a higher education institution must meet certain standards of quality, transparency and inclusive governance. Could a higher education provider, such as a for-profit provider that did not meet these criteria, assert that it was a constraint on the operation of the internal market for it not to be eligible for public funding through the SFC? This is not clear from the Bill.

### **Tuition fee policy for undergraduate students**

- We need clarification on whether the Bill would end or limit the capacity of the devolved administrations to make different policy decisions about student fees in general, and to set different fees according to students’ UK domicile. This is not clear. Clearly this is an important point for Scotland’s higher education sector, as Scottish domiciled students do not pay tuition fees for their full-time undergraduate higher education, whilst students domiciled in the rest of the UK are required to pay fees of up to £9,250 per year on the same basis as they would if attending universities located in England.
- The Scottish Government’s distinction in fee policy, based on student domicile, is an essential requirement to ensure the manageability of the policy of no tuition fees for Scottish-domiciled students. Given the respective population size and capacity of HE sectors in Scotland and England, if Scotland were required to apply the same fee policy regardless of domicile within the UK and chose to retain the policy of no tuition fees, there is a very strong likelihood that Scottish-domiciled students would be displaced from Scottish HEIs purely based on the volume of qualified applicants from England motivated to avoid fees in England. This risk was rehearsed at length at the point of introduction of fees of up to £9,250 for rUK students in 2011/12 by the Scottish Government in response to a fee change policy in England.
- It is not clear what impact the Bill may have on this. On one reading, since Part 2 of the Bill is about the rights of service providers to trade throughout the UK rather than about individual citizens’ rights it may



not directly affect the devolved capacity to set policy on student fees. We do, however, need to have absolute clarity on this point.

## **Enforcement, Governance and decision taking**

**Q10. Providing the Competitions and Markets Authority with powers to monitor, provide advice and report on the operation of the internal market and the proposed accountability arrangements of the CMA for its use of these powers.**

- The Bill creates powers for the Office for the Internal Market/Competition (OIM) and Markets Authority which appear to be wider than necessary to ensure compliance with Parts 1 and 2 of the Bill. They include the power to review any aspect of the operation of the internal market of the UK. Potentially, this could give the OIM/Competition and Markets Authority (CMA) the power to investigate and reach a view on whether differential student fees represent a distortion of the new UK internal market. Regardless of the non-binding nature of the reports and advice of the OIM/CMA, it would have to be taken seriously by Parliament (Holyrood or Westminster). This could introduce new and greater basis for individual challenges to the variable fee regime within the UK, brought by individuals who feel they are discriminated against.
- If this understanding is correct, this would apply in both directions, with possible challenges brought by Scottish domiciled students/individuals who consider the fee policy as administered by universities in England to discriminate against their options.

## **Funding**

**Q12. The impact and the appropriateness of provisions in the Bill which seek to provide the UK Government with the ability to provide direct financial assistance to organisations in Scotland.**

Based on our reading of the Bill, this question relates to part 6 of the Bill, *Financial Assistance Powers*. Part 6 concerns the power to provide financial assistance for economic development, infrastructure (where education is specifically defined), cultural events and educational exchange (both internationally and within the UK), all of which are potentially relevant to Scottish higher education.

We have two points to make about this aspect of the Bill:

### **12a Financial assistance for international exchange**

- The power to provide financial assistance for international exchange is, in our view, a potentially useful provision to ensure that the UK has the means to develop and fund a UK-wide student mobility successor scheme to Erasmus in the event of a no-deal Brexit or in the event that association with Erasmus+ as a non-member state is not part of a negotiated deal between the UK and the EU.
- Our preferred outcome, as Scotland's higher education sector, is that the UK's association with Erasmus, after the transition period, can still be secured on an uninterrupted basis as part of a negotiated outcome with the EU in a deal that represents value for money for the UK and our partners in Europe. Erasmus+ is well-established, high quality and operates with high levels of awareness amongst students and stakeholders. We also believe it offers universities, Governments and other partners economies of scale in terms of management and operation.
- However, if that outcome is not achieved, our preferred plan B would be participation in a UK-wide alternative student mobility scheme. Our position is entirely and necessarily pragmatic for two reasons.



Firstly, we believe that one scheme, open to students studying at college and university across the UK, is likely to grow to achieve better international recognition and participation than a series of different schemes for different parts of the UK. Secondly, we desperately want to avoid a situation which leaves a sudden gap in educational exchange opportunities for students. There has been work to develop a UK domestic mobility scheme, with good input from Scottish and UK Government officials and HE representatives and a constructive consultation process led by the Department for Education. Although this is not concluded, and needs a further concerted push from both Scottish and UK Governments to reach final agreement, there simply is not enough time to create Scottish-specific solutions that would be comparable to Erasmus+.

- In this context, we consider this provision, in part 6 of the Bill, as a prerequisite to the funding of a UK-wide scheme given the remaining time available in which to establish such a scheme.
- To give a sense of the scale and importance of finding an urgent solution to continued student mobility beyond the transition period, over 2,500 people at Scotland's universities did a study or work exchange through Erasmus+ in 2016/17.<sup>1</sup> The number of outwardly mobile students at Scotland's universities has been growing over recent years, increasing by 15% in the three years to 2016/17 after a lot of energy invested by institutions, government and other agencies.

### **12b Financial assistance under current arrangements**

- Higher education straddles the devolved/reserved boundary when it comes to funding and policy matters. While much responsibility for higher education is devolved, aspects of HE policy remain reserved to Westminster, including very significant aspects of research and development policy and funding.
- As such, Scotland's universities already operate under a model which sees significant financial assistance from the UK Government funded UKRI come to Scotland's universities following a competitive bidding process as part of the dual-support funding model for research. Additionally, the UK Government's Industrial Strategy affords significant opportunities to Scotland's universities (and business sectors) which we have sought to maximise for Scotland's economic advantage.
- There are benefits to the sector and to the wider economic and social impact the sector, as a result of the current model. As a result, we are not opposed, in principle, to this aspect of the Bill. However, we do wish to make the point that the UK Government and Devolved Governments have a responsibility to work collaboratively to maximise the effectiveness of this approach in order to align strategies and recognise different priorities within nations and regions.
- Further, we believe there is considerable strength and benefit in a model which devolves aspects of decision-making to the nations. We have already stated our view, in a response to the Scottish Government's consultation on the replacement of European Structural Funds<sup>2</sup> that a successor scheme to the EU's Structural Funds, in the form of a UK Shared Prosperity Fund or alternative, should be designed to ensure priorities are set in a structured way that supports inclusive economic growth in all parts of the UK, with substantial devolved discretion on priorities.

**Q13. Whether the purposes specified for financial assistance (of economic development, culture, sporting activities, infrastructure, domestic educational and training activities and exchanges, and international educational and training activities and exchanges) are appropriate.**

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<sup>1</sup> [Erasmus+ Statistics](#)

<sup>2</sup> [Universities Scotland \(2020\) Submission to Scottish Government consultation on the replacement of EU Structural Funds post EU-exit](#)



Please see response to question 12.

**ENDS**

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