

UK INTERNAL MARKET WHITE PAPER

Initial assessment by the Scottish Government

Introduction

1. The UK Government published proposals for legislation on a UK Internal Market on 16 July. The proposals are for a Market Access Commitment, comprising legislation for a mutual recognition principle and non-discrimination, and potentially an independent body to consider the effect of legislation on the market and collate the views of stakeholders. The paper envisages the legislation being in place for the end of the Transition Period on 31 December 2020

2. The Scottish Government does not support these proposals and will oppose them if, after the brief consultation period, legislation is brought forward at Westminster. The proposals are neither necessary nor properly thought out. The UK's internal trading arrangements are already subject to an effective system of regulation which properly includes consideration of other policy matters which are necessary to achieve a balanced and proportional approach, and which are co-ordinated with powers held by the respective legislatures across the UK and by the UK Government and devolved governments. There are currently negotiations between the four governments on potential common frameworks where these are required to replace EU structures with approaches to agreeing alignment and managing differences, in line with agreed principles¹, and these will ensure coherence in policy development and regulation across the four nations. The UK Government proposals would confuse at best and negate at worst these current arrangements and would constrain devolved competence in a way never envisaged or proposed before. The proposals would undoubtedly be to the severe detriment of businesses and consumers in Scotland

Overview of UK Internal Market proposals

3. The UK Government published its White Paper on the 'UK Internal Market'² on 16 July with a four week consultation period. No detail or copy had been shared with the Scottish Government in advance of publication. No draft Bill has been published.

4. The proposals, intended to be enacted in law by the end of 2020, would introduce a new Market Access Commitment to apply to policy making in devolved areas, and include:

- A principle of **mutual recognition** to ensure that compliance with regulation in one part of the UK is accepted as compliance in the other parts, regardless of the views, and indeed laws, of devolved legislatures. It is important to note, as will be discussed, below, that the system of mutual recognition envisaged in the White Paper is significantly different to the way mutual recognition operates in the EU.
- A principle of **non-discrimination** so that local products and services cannot be favoured over others because of origin alone.
- **An independent monitoring function** to report on the "health of the internal market" and lead on business and consumer engagement, making non-binding

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

² <https://www.gov.uk/government/publications/uk-internal-market>

recommendations – which may either report to the UK Parliament *and* devolved governments – or only to the UK Parliament.

- The **reservation of state aid in which a new UK subsidy control regime**, which is being developed separately, is seen as an integral part of the UK internal market package of measures.

5. The Scottish Government considers these proposals to be fundamentally inconsistent with devolution. They will not only permit, but encourage a lowering of standards without any involvement of the devolved legislatures or Governments, are fundamentally unnecessary given existing structures and the ongoing development of new ones by means of agreed frameworks, and will be damaging to Scotland's interests, business and consumers.

- **They are fundamentally inconsistent with devolution** because the approach in the paper centralises control in the UK Government and UK Parliament, cutting across devolved powers by imposing new domestic constraints on the exercise of these functions; the approach sees devolved decision-making as an obstacle or problem that needs to be bypassed through UK-wide legislation, rather than taking an approach which prioritises agreement by means of negotiation and consensus between different decision-making centres across the UK.
- **They are unnecessary** because there is already a system in place to govern trading arrangements in Scotland and across the UK, consisting of reserved and devolved competences, and arrangements to manage the intersection of EU law and devolved competence which have been developed jointly by the UK Government and the devolved governments through the Common Frameworks process: these are already providing considered and agreed approaches in areas of policy and regulation relevant to UK internal trade.
- **They allow a lowering of standards** because Scotland will be compelled to accept standards, set by the UK Government and Parliament for England (most probably using the English Votes for English Laws mechanism which will exclude MPs from Scotland), regardless of the views and decisions of the Scottish Government and Parliament, and regardless of whether they are appropriate for circumstances in Scotland. The specific objectives set out in the US Government's mandate for trade talks with the UK³; the decision of the UK Government to block amendments to Brexit related legislation which would have protected food and animal welfare standards⁴ and the health service⁵ from any future trade deals; and the new UK Government's consistent statements of its desire to deviate from EU standards all raise concerns⁶. The White Paper is clear (paragraph 177) that doing trade deals with countries like the US which are likely to feature lower food standards is a key driver of these proposals: "Smooth trading arrangements across the UK constitute a key factor in the UK's ability to implement international trade deals."

³ https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf See, for example, p.2: "Establish a mechanism to remove expeditiously unwarranted barriers that block the export of U.S. food and agricultural products in order to obtain more open, equitable, and reciprocal market access".

⁴ https://publications.parliament.uk/pa/bills/cbill/58-01/0106/amend/agriculture_day_rep_0512.1-7.html ;

https://www.farminguk.com/news/mps-reject-ag-bill-vote-to-protect-uk-farmers-high-standards_55644.html

⁵ <https://www.bmj.com/content/370/bmj.m2877> ; <https://www.standard.co.uk/news/politics/mps-nhs-vote-trade-deals-brexit-a4504631.html>

⁶ See the Prime Minister's comments (3 Feb 2020) on future UK compliance with European Single Market rules: <https://www.bbc.co.uk/news/uk-51351914>

- **They do not, as is claimed, provide business certainty.** It is the UK Government's approach to EU exit and negotiations – invoking Article 50 without a plan, pursuing a “low deal” or “no deal” trade agreement with the EU which will result in customs checks, regulatory barriers and extra business costs, and persistently running down the clock – that creates uncertainty for the business environment from January 2021 . To deliver certainty on the domestic front, the UK Government should commit to completing UK Common Frameworks in good faith and restoring proper cooperation in inter-governmental relations. These proposals move in the opposite direction.
- **They are damaging to businesses and consumers in Scotland and more widely across the UK.** They are predicated on leaving the EU Single Market of 450 million people. They would mean losing the benefits of variations in approach to reflect consumer preferences, and health and environmental considerations in Scotland, and the advantages of high quality regulation of meat and fish products. In addition, the wider UK market would lose the policy innovation made possible by devolved governments taking initiatives that are later adopted elsewhere including in other parts of the UK.

Inconsistent with devolution

6. The UK Government proposals would establish new constraints on the devolved powers of the Scottish Parliament, Senedd Cymru/Welsh Parliament and Northern Ireland Assembly by the creation of the mutual recognition and non-discrimination requirements that will cut across existing devolved competence. In addition the UK Government proposes to reserve subsidy control, a devolved matter.

7. These proposals would mean that if the UK Government – not just the present one, but any future administration – decided to change the standards on food safety, animal welfare, the environment, building regulations or many other areas, other parts of the UK would simply have to accept such detrimental changes, even if they were unwilling to alter their own rules. Mutual recognition would mean that any changes would have to be accepted in Scotland regardless of whether they aligned with the desires of the people of Scotland or practical circumstances in Scotland.

8. The Scottish Government believes that EU standards represent international good practice, as well as facilitating trade with the EU following the end of the transition period, and intends to maintain them for Scotland where possible. Despite its claims to the contrary, there is every reason to believe that the UK Government will have to accept reduced standards to secure a Free Trade Agreement with the United States and accede to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)⁷, which takes a US-based approach to regulation. The US has been unequivocal that agriculture, food standards and drug prices will be on the table in any future trade deal with the UK.

9. In any case, whatever the claimed intentions of the current UK Government, consenting to the UK proposals would cede control and negotiating influence from devolved institutions permanently, and the Scottish Parliament could not resist any future UK Government effectively imposing lower standards on Scotland in devolved areas should it choose to do so.

10. The White Paper includes many examples of where decisions of the Scottish Parliament could be overruled as a result of these proposals:

⁷ <https://www.gov.uk/government/speeches/global-britain-and-the-cptpp> (accessed on 10/08/2020)

- In a section headed 'Costs of regulatory divergence' there is a case study on deposit return schemes (page 77)
- There is a trade costs example concerning food labelling (page 78)
- There is a case study on food manufacturing which covers food hygiene, recycling, animal welfare and environmental matters such as pesticides (pages 79 -82)
- Minimum unit pricing is specifically mentioned as a regulatory restriction and cost (page 82)
- Differences in building regulations and construction permits are highlighted as an additional burden (page 85)

11. Fundamentally, the approach, and the conceptual framework of governance, set out in the White Paper is inconsistent with devolution within the UK system, which depends on respect for devolved competence and restraint by Westminster in exercising its retained absolute Parliamentary sovereignty. The paper illustrates a worldview that differences in devolved areas are a problem, and that the approach to that problem is to impose a new framework designed and decided by Westminster. It does not recognise that such changes can only be legitimately made with the consent of the devolved institutions. The consultation itself does not recognise the particular role or status of devolved institutions in the UK's constitutional system – in the case of Scotland, the Scottish Parliament and Government were guaranteed their permanence by the Scotland Act 2016, after the Smith Commission following the 2014 referendum. Instead it suggests that they are merely stakeholders, and not fundamental components of the machinery of government in the UK.

12. The White Paper asserts that leaving the EU will lead to an increase in the powers of the devolved governments and institutions, whatever the eventual constraints imposed by UK internal market legislation. This is to misunderstand and indeed wilfully misrepresent the nature of the devolution settlement. Currently, devolved powers and responsibilities have to be exercised compatibly with EU law, as indeed do the powers and responsibilities of the UK Government and Westminster. Following the end of the transition period, that constraint on devolved competence no longer applies, as it does not apply to the UK Government or Westminster.

13. The imposition of a constraint on the exercise of devolved competence by Westminster legislation would be a reduction in devolved competence, as it would be a *domestic legislative constraint* imposed by Westminster not *an international obligation binding on both the Scottish Parliament and Westminster*. This would also be true if, for example, existing European Structural Funds, administered by the devolved governments, were replaced by a UK Government controlled fund (the Shared Prosperity Fund).

14. European Single Market rules allow national parliaments and governments considerable discretion to legislate to protect and promote the health and welfare of their populations. These rules flow through the devolution settlement to the Scottish Parliament. In practice, this means that the Scottish Government and Scottish Parliament are able to implement EU law in a way which works for Scotland and legislate in devolved areas using the well-established flexibilities of the European Single Market. These safeguards are not evident in the UK internal market proposals and it is clear that any flexibility permitted to the devolved governments and legislatures can be reduced or removed by decision of the UK

Government and Westminster (see paragraph 46 for a comparison between the EU Single Market and the UK internal market proposals).

UK Common Frameworks

15. The Scottish Government believes the UK internal market proposals are also completely unnecessary. We have participated in good faith in the common frameworks process since 2017, and believe that this process, which is designed to manage policy differences on the basis of agreement and is founded on respect for devolution, is not only all that is needed to manage the practical regulatory and market implications of the UK leaving the EU, but is in fact the specific tool that was jointly designed by the devolved governments and the UK Government for that task. The new UK Government proposals wish to abandon that work despite the fact that it is near to completion.

16. Significant progress has been made in relation to developing frameworks. Although the current public health crisis has impacted on the ability of the UK Government and the devolved governments to progress work completely as planned, the four governments have agreed on a revised delivery plan (as outlined in Annex A). It is now anticipated that seven frameworks, six of which relate to Scotland, will be fully developed, agreed and implemented by the end of December 2020, with provisional frameworks being established in the 25 remaining policy areas before being finalised for agreement as full frameworks after 2020.

17. Provisional frameworks will consist of a framework outline agreement and accompanying concordat, including essential arrangements required for the framework to operate at the end of the transition period. The development and agreement of provisional frameworks will be on the same basis as full frameworks, requiring adherence to the principles for common frameworks set out by JMC (EN) and including technical scrutiny with stakeholders and engagement with legislatures.

18. The successful delivery and implementation of frameworks, require greater clarity on a number of strategic dependencies, including the UK's future trade and regulatory relationship with the EU, and the implementation and operation of the Northern Ireland Protocol. This is another example of the harm being caused by the UK Government's decision not to seek an extension to the transition period to allow time for these issues to be resolved and their impact properly understood. In addition, the UK Government has shifted away from its previous vision for an economic partnership with the EU that includes a common rulebook for goods, including agri-food goods, as outlined in its 2018 White Paper on the future relationship between the UK and the EU.⁸ The move away from the UK-wide agreement on the need to follow EU level playing field rules also has implications for the framework development process.

19. The UK Government proposals for legislation on a UK internal market potentially undermine the frameworks process, both in principle – as they divert from an approach based on agreement not imposition – and in practice – by removing the incentive for the governments to agree ways of aligning and managing difference when mutual recognition rules require acceptance of standards from other parts of the UK.

⁸ HM Government (2018), *The Future relationship between the United Kingdom and the European Union* . Available from:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf (accessed on 04.08.2020).

20. The White Paper proposals also create the perfect conditions for greater, unmanaged and competitive regulatory divergence in a “race to the bottom” and therefore work against the purpose of frameworks. Although the Scottish Government remains committed to the delivery of full and provisional frameworks by the end of 2020, it is clear that any attempt by the UK Government to conflate Common Frameworks with its internal market proposals would negate the successful delivery of frameworks. In contrast, an agreement to use the frameworks as intended could lead to an acceleration of their implementation if the governments of these islands so decided.

The White Paper proposals – political or economic motivation?

21. These UK proposals are clearly inconsistent with devolution and the current system of governance of the UK. They are unnecessary because common frameworks are already in preparation which can, and indeed are designed to, manage the practical regulatory and market implications of the UK leaving the EU while allowing legitimate policy choices to continue to be made in line with the devolution settlement.

22. It is also difficult to reconcile the proposals with other statements and policies of the UK Government, and there are a number of contradictions on the document itself, which raises the question of whether the motivation is political rather than, as claimed, economic.

23. In updating the Scottish Parliament on 30 July the Cabinet Secretary for Constitution, Europe and External Affairs, Michael Russell described the proposals as undermining the basic foundations of devolution and existing mechanisms of co-operation and the entire list of devolved competencies – and as a ‘nakedly political ploy – a predetermined draconian solution in search of a non-existent problem.’

24. The analysis in the White Paper makes no provision for the social, environmental and wider benefits delivered by local policies and regulation, and runs counter to the UK Government’s own narrative of place-based approaches to economic development.

25. The White Paper relies on modelling and studies of the type the UK Government has recently dismissed in the context of Brexit. Indeed, the UK’s chief Brexit negotiator in a well-publicised speech⁹ said the impacts of such studies were exaggerated, but they are actually the basis of much of the White Paper.

26. In the White Paper, at least one reference - on “conformity costs” - relates to car manufacturing and appears to have been taken from a paper warning about the costs of Brexit¹⁰. This seems a curious source of evidence for the UK government to use. The White Paper also seems to champion the benefits of freedom of movement for workers, which in reality the UK Government is determined to abandon: “Human capital and the transfer of employee knowledge and skills is also beneficial Evidence further shows that such knowledge spill overs between regions translate into increased productivity” (p.66).

27. An additional layer of confusion exists around the Northern Ireland Protocol, which forms part of the Withdrawal Agreement signed by the UK Government and the EU. Producers in Northern Ireland will be manufacturing goods in line with EU Single Market regulations. The UK Government insists it will allow Northern Ireland businesses to have

⁹ <https://www.theguardian.com/politics/2020/feb/17/britain-wont-follow-eu-trade-rules-after-brexitsays-uks-chief-negotiator>

¹⁰ Society of Motor Manufacturers and Traders. (2016). *SMMT Issue Paper - November 2016*. Society of Motor Manufacturers and Traders.

unfettered access to the market in the rest of the UK, which means in effect that companies in Northern Ireland can, whilst operating to a single standard, sell into both the EU Single Market and the entire UK. By contrast, companies in Scotland will only be able to export to the EU Single Market subject to the additional conditions and procedures that the EU applies to third country products – even if Scotland chooses to continue applying regulations and standards in line with the EU's. And the conditions Scottish companies will have to meet when exporting to Northern Ireland will depend on whether or not the product in question is deemed to be at risk of travelling beyond Northern Ireland and entering the EU Single Market. Neither the list of 'at risk' products nor the conditions that will apply have been agreed between the EU and the UK.

28. Another striking example of contradictions in the White Paper is the dismissal of any risk from the proposals to the policy of alcohol minimum unit pricing (page 8):

"These principles will not undermine devolution, they will simply prevent any part of the UK from blocking products or services from another part while protecting devolved powers to innovate, such as introducing a plastic bag levy, minimum pricing or introducing smoking bans."

However, in a case study on page 82 there are overt references to minimum pricing as a cost.

'Regulatory measures can also directly reduce price competition or restrict advertising (e.g. rules that prohibit sales below cost or set minimum prices); or deprive market players of their minimum efficient scale by imposing market fragmentation'.

Internal Markets

29. The term "internal market" does not have a fixed or widely accepted single meaning. The regulation of trading activities is unique to each country as it reflects the specific circumstances of a state's historical development, internal legal and governmental arrangements, and its external relationships and international commitments. At its most fundamental, an internal market is simply the rules and institutions relating to trade within a state, including trade between sub-state territories if they have the autonomy to set their own rules and standards.

30. Trading activities intersect with a large range of other policy considerations that make up the governance arrangements of a state: the civil law to underpin contracts and resolve disputes; product standards for safety and consumer protection; safety in the workplace; employment laws; competition policy; formation of companies, to limit risk and liability; intellectual property; rules for transport and safety of vehicles; environmental standards; promotion of human health; protection of animal and plant health; provision of public services such as health and education; government procurement rules; taxation of trading activities. An internal market can therefore be seen to encompass many, if not almost all, areas of government and Parliamentary activity and public policy considerations.

31. The White Paper asserts the existence of a "UK internal market" that has been the bedrock of shared prosperity since 1707, a "centuries old" institution, overlaid between 1973 and 2020 by membership of the supranational European institutions (paragraphs 58 - 64). This picture of continuity is however seriously mistaken. The rules, institutions and standards that underpin trade and regulatory coherence in 2020 bear little resemblance to the broad provisions for trade and shared standards set out in the Treaty of Union.

32. The framework for executive and legislative decision making in the UK was changed fundamentally by devolution in 1998 which created sources of legislative and executive authority beyond Westminster and Whitehall. These democratically accountable bodies now exercise functions and responsibilities intrinsic to the functioning of the UK's trading arrangements, and any proposals for reform on exit from the EU must not only take account of these functions, but also, and critically, do so in full accordance with the rules of the UK's constitution. The Union is subject to the Scotland Act 1998¹¹ which reserves some matters which affect trade¹², with other matters devolved. These arrangements were put in place by a decisive referendum vote in Scotland in 1979 and no proposals to change it have ever been put to the Scottish people. Not only do the UK's constitutional rules require that under the Sewel Convention, any changes to the powers of the devolved administration and legislatures require the consent of those legislatures, as do proposals for Westminster to legislate for devolved purposes; the nature of the changes proposed is so great that it would require at the very least a manifesto commitment at both a Westminster and Holyrood election from any party proposing it and clear assent by the Scottish electorate for it to be acceptable. No such steps have been taken or are proposed.

33. One reason for the underlying difficulties with the White Paper is its very narrow view of the internal market in the UK, at least for the purposes of its proposals:

The UK's Internal Market is the set of rules which ensures there are no barriers to trading within the UK (paragraph 72)

34. In contrast, the EU Single Market recognises that there is a far greater range of legitimate policy goals – for example tackling inequality or environmental protection – that member states can pursue through market regulation (see paragraphs 46-53 below).

35. The Scottish Government has set out its overall purpose and performance outcomes and indicators in the National Performance Framework¹³. The purpose is:

To focus on creating a more successful country with opportunities for all of Scotland to flourish through increased wellbeing, and sustainable and inclusive economic growth

36. In considering how to exercise its powers and responsibilities across devolved functions, including those affecting trade, the Scottish Government looks at the effect on these national outcomes as a whole, rather than through a narrow market lens only. A narrow focus on "barriers" to trade or purely market considerations in considering the rules for internal trading is therefore unhelpful and does not describe the reality of the current trading or indeed any other policy arrangements within the UK. Those current arrangements allow for the Scottish Parliament and Government to make policy decisions in pursuit of public health, social or environmental benefits, such as minimum alcohol pricing to tackle health and social harms from alcohol, a ban on the sale of raw milk on health grounds, bans on plastic cotton buds or microbeads in cosmetics, and strict recycling targets which relate to broader health and social outcomes, rather than on solely market-based or trade considerations.

37. The White Paper describes (at Annex B) arrangements in other parts of the world to accommodate differences in policy approaches across other states with multiple centres of democratic decision-making similar to the UK but which are not reflected in these proposals.

¹¹ Section 37 of the Scotland Act 1998.

¹² Notably in Head C (trade and industry) and some rules in Head A (economic matters) of schedule 5 of the Scotland Act 1998.

¹³ <https://nationalperformance.gov.scot/>

Mutual Recognition and Non-Discrimination

38. The concept of mutual recognition in the White Paper means that meeting the regulatory requirements in one part of the UK would ensure that goods and services could then be legally supplied across the whole UK, whatever the local regulatory requirements.

Goods – mutual recognition of goods means that a good which can be lawfully sold in one territory, can be lawfully sold in other territories without having to comply with that other territory's requirements (that would otherwise apply). (Paragraph 133(a))

39. The UK Government's mutual recognition proposals would therefore legally require goods to be accepted for sale in Scotland that are produced to whatever standards are set elsewhere in the UK irrespective of whether they comply with the standards and rules set by the Scottish Parliament. As a result of these proposals, for example, the sale of raw drinking milk could be required in Scotland despite the long standing ban on public health grounds.

40. In contrast, mutual recognition in other markets, including in the EU, does not provide an equivalent guaranteed right of access for a good to all markets. As discussed above, barriers can be permitted if they serve a legitimate policy objective and can be justified as relating to the protection of public safety, health or the environment.

41. The paper does indicate that some areas will be excluded from mutual recognition and non-discrimination and that these 'will have to be defined from the outset in legislation' (Paragraph 144). Examples include all reserved matters and:

Existing regulatory differences would be out of scope of the UK internal market model. In addition if a devolved administration was to regulate within an area that falls within an exclusion, then the mutual recognition principle would not apply

42. There is little other detail on potential excluded matters in the White Paper however, nor is there information about how the legislation will handle defining these and how they will be applied and adjusted in practice. It is therefore difficult to anticipate how the principle will affect current policy initiatives and the scope for the Scottish Government and Parliament to develop innovative policies that might also affect the market and trade. However, in another apparent contradiction, the paper sets out (paragraph 9) an overriding principle that these proposals will 'guarantee the continued right of all UK companies to trade unhindered in every part of the UK' – which in itself raises significant concerns in relation to private companies pursuing a claim to be allowed, for example, to operate in Scotland's health system or in the provision of water, which is of course a privatised system in England but not in Scotland.

43. It unfortunately does, however, seem clear the definition of these excluded matters will be a matter for Westminster legislation. That would mean that changes would most probably not require the agreement of the devolved legislatures as would be the case for other changes to devolved competence. The paper strongly implies there will be no role for devolved legislatures in determining the scope of the mutual recognition requirement in the future:

The evolution and overall shape of the UK's Internal Market will be overseen by the UK Parliament, and that key decisions will be put to the UK Parliament for approval, rather than resting exclusively with the UK Government. (Paragraph 154)

44. The principle of mutual recognition need not entail an unrestricted right of access for an originating good or service to all markets. Partial (minimum essential requirements) or comprehensive harmonisation of standards is an important part of the EU single market, and

is achieved via the enactment of common legislation and discussed, debated, agreed and enacted via the common EU legislative process. Apart from common frameworks, which can be by-passed by the prospective legislation, there is no role indicated in the White Paper for the devolved legislatures to collectively discuss, let alone agree on, any legislation flowing from these proposals.

45. Again there is little detail on the principle of non-discrimination and how it will operate in practice, including the central issue of identifying and enforcing indirect discrimination. The Scottish Government is concerned that initiatives such as the smoking ban could have been challenged (and could still be) as discriminating against businesses in Scotland when compared to their counterparts elsewhere in the UK. The abolition of tuition fees for Scottish domiciled students could be challenged as discriminatory against students from elsewhere in the UK. The effect of the proposals is therefore to construct a test or challenge for decisions of the Scottish Parliament that are clearly within devolved competence but might be argued to affect in some way the internal market, preventing the Scottish Parliament and Scottish Government from exercising leadership in, for example, tackling the harm caused by alcohol abuse, which it has done in the past with no impact on the proper functioning of the European Single Market.

Comparison with the EU and European Single Market

46. The Scottish Government has previously set out the benefits of participation in the European Single Market¹⁴. Proposals for a 'UK Internal Market' are a consequence of the decision to leave the EU despite a clear rejection by the people of Scotland and the Scottish Government. The benefits of the European Single Market are clear:

- enables Scottish exporters to be inside the world's largest single market and allows our citizens to buy goods and services from any other part of the single market, free from import taxes or other barriers
- ensures that our component manufacturers can prosper in the complex supply chains that characterise contemporary production systems
- ensures a level playing field for our exporters, and protection for our consumers, by setting common product and trading rules (including production rules) across the EU that must be met before a product can be sold - rules governing weight, size, packaging, ingredients, labelling, shelf-life conditions, and testing and certification procedures
- means that companies engaged in selling services such as financial products have so-called "passporting" rights, allowing them to sell directly to consumers across the EU
- allows people and companies - architects, engineers, students, tourists, haulage companies to name only a few - to move around the EU and establish businesses, build careers and live their lives free from discrimination

47. The White Paper draws a number of comparisons between the UK Internal Market and Scotland's current situation within the European Single Market and previously as a member of the EU. These parallels are misconceived.

¹⁴ <https://www.gov.scot/publications/scotlands-place-europe/>

48. The development of the European Single Market has been based on principles of equality, cooperation, co-decision, subsidiarity and consent and setting a baseline of minimum agreed standards that all member states' own rules must be compatible with. The UK Government's proposals are based on unilateral decision-making and imposition, with no minimum standards or guarantees. The UK Government's proposals therefore do not simply replace EU rules with UK rules as they claim.

49. European Single Market rules recognise and allow for policy objectives alongside pure market economic considerations, for example, the health benefits of Minimum Unit Pricing.

50. European Single Market principles ensure that decisions are taken as close to affected citizens as possible, and that member states abide by the rules agreed by the EU, and that rights can be enforced by individuals and companies against their own governments if necessary. The institutions of the EU also ensure that regional variations are taken into account.

51. The UK Government is proposing the opposite of the European Single Market approach.

52. The White Paper does not include any mechanism for negotiation or agreement for minimum standards which all four governments of the UK would then be expected to follow. Instead, the mutual recognition mechanism would allow the UK Government to decide its standards for England which would have to be accepted across the other nations of the UK, while in practice reserving the right under the doctrine of Parliamentary sovereignty to reverse any decisions taken by the devolved governments which might constrain the decision-making powers of the UK Parliament or UK Ministers. In reality, this means that the UK Government could impose decisions on the devolved governments with no right of repeal or means of redress. As one commentator has noted, "the Parliamentary sovereignty of Westminster ... means that, inherently, the legislative aspect of the internal market will never be independent and impartial in a way that would be recognised in the EU, for example."¹⁵

53. The White Paper proposals also differ from the European Single Market, in that they do not cover reserved matters which currently need to meet minimum EU standards such as employment and competition law, and also go beyond the current arrangements for the devolved governments: devolved matters such as building standards are apparently included despite there being no evidence of an adverse market impact from the current long lasting arrangements in that area, which predate devolution and are the result of geography, geology and different aesthetic and overseas influences. Finally, there is no indication in the paper that important policy objectives such as the protection of health and the environment would be legitimate reasons to derogate from mutual recognition, unlike the EU which allows for wider policy objectives to be taken into account as well as economic considerations.

Economic performance since devolution

54. The UK White Paper illustrates a worldview that appears to regard difference as harmful whilst asserting that uniformity and Westminster control is required to maintain economic prosperity across the UK. However, that view is not supported by the facts. As devolution has progressed over the last twenty years there have been a number of regional policy differences resulting in non-uniformities in the market. None the less – in fact because of that fact - Scotland has performed well across a range of indicators since devolution and historic gaps between Scotland and other parts of the UK have been narrowed:

¹⁵ Professor Michael Dougan, evidence to the Scottish Parliament's Finance and Constitution Committee, 19 June 2019, <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12202>

- Prior to 2008, Scotland's level of productivity was around 10% lower than the UK average. Latest data for 2018 show that the productivity gap is now around 1%.¹⁶
- Since 2008 productivity has grown at an average annual rate of 0.9% per year, compared to the UK average of 0.4% over that period.
- Gross median weekly earnings for full-time employees in Scotland were £563 in 2018, broadly in line with the UK average. Among the countries of the UK, long-term pay growth has been highest in Scotland since 1997 – 87% higher.¹⁷

55. Devolution has not inhibited economic performance nor has it inhibited the functioning of the UK economy. As the White Paper itself makes clear, the UK market has not exhibited any evidence of increasing barriers to trade, or any decline in flows between the nations and regions of the UK. As devolution has developed, and devolved competences exercised, the impact – across a range of sectors and activities – has in fact been to formalise the non-uniformity of the UK market. There are differences in the market, representing local preferences in devolved policy areas, yet the reality is there are no real barriers to trade apparent in the data.

56. The basis of the UK proposals appears to be that conformity and control are required for an internal market to function effectively, yet that is at odds with arrangements within other well-functioning internal markets, which highlight the scope for policy devolution. The US has high levels of labour market mobility and a highly integrated internal market. Within this its states have the power to vary an additional rate of income and corporate tax over and above the federal rate. The US internal market is also characterised by variation in the minimum wage and in the provision of welfare payments. In Belgium, although corporation tax rates are set nationally, innovation policy is under the full authority of the regions who can offer grants, R&D tax credits, and payroll incentives.

57. In summary, these proposals do not, as it is claimed, simply replace current arrangements within the European Single Market. The EU operates by members negotiating and agreeing, on an equal basis, single market rules – the UK Government is proposing the opposite. The UK Government wants to be able to decide and impose, even in devolved areas and that is not only unacceptable, but also does not work in the interests of business or consumers, as the actual facts of devolution show.

Business and consumers

58. Much has been made about the need for to operate to a common set of rules. Business already operates with differences across UK which reflect preferences in local markets or policy initiatives on health and environmental considerations.

59. A key finding the RSA¹⁸ City Growth Commission (October 2014), was that an overly concentrated system of decision-making can reinforce already existing disparities in economic performance. The Commission argued for the devolution for greater responsibilities to be devolved to UK cities and regions, to reflect local priorities within the internal market structure. For example, concentration of large scale infrastructure projects in London (including Crossrail - Thameslink, London underground and Heathrow airport) add to the already strong concentration of economic activity in London.

¹⁶ <https://www.gov.scot/collections/economy-statistics/#productivitystatistics>. This time series begins in 2008.

¹⁷ [the Annual Survey of Hours and Earnings \(ASHE\)](#)

¹⁷ <https://www.gov.scot/publications/scotlands-economic-strategy/pages/5/>

¹⁸ Royal Society for the encouragement of Arts, Manufactures and Commerce

60. Devolution brings policy-making closer to local priorities, with the potential for a more joined-up and effective approach across policy levers to boost economic performance and address challenges. For example, the Scottish Government is a full partner in all the City Region Deals agreed in Scotland, matching and in some cases exceeding financial contributions made by the UK Government. We are also supporting the development of Regional Economic Partnerships, which seek to align priorities and resources across public, private and third sector partners in order to stimulate inclusive economic growth. There are already differences in policy approaches in UK nations, and this does not adversely affect the functioning of the market in the UK. There are several examples in Scotland covering tax and regulation, including:

- Business rates and property transaction taxes vary between Scotland and the UK
- Regulatory differences already exist within the UK single market - for example, SEPA environmental regulation has devolved aspects and we have different planning laws and a separate legal system.
- Food standards is an area where flexibility is essential to provide proportionate tailored policy to reflect local circumstances and differing risk assessments.
- Differences in the construction sector between Scottish and English building regulations and the methodology behind calculating Energy Performance Certificates.

61. The Scottish Government recognises that business want certainty. But leaving the EU creates massive uncertainty. With just five months to go until the end of the implementation period, there remain a number of important questions yet to be addressed from the UK's negotiations:

- Will there be tariffs on trade with the EU and what will they apply to?
- Which regulations to follow? Businesses still do not know, if they make something in the UK to UK standards, whether those will be recognised in the EU (and vice versa).
- Customs paperwork and processes: there will be checks, but businesses still don't know what they will have to provide at the border and whether UK certificates will be recognised (and vice versa for the EU). Businesses do not know how much of their products have to originate in the UK and EU to benefit from preferential trade terms. They also don't know how this interacts with other trade agreements the UK and EU have, which undermines businesses' ability to plan their supply chains.
- How will people and data cross borders to make businesses work?
- Will professional qualifications be mutually recognised?

62. The White Paper proposals for mutual recognition and non-discrimination will not provide business certainty but will create the conditions for a lowering of standards when Scottish businesses want to compete on quality and provenance as well as cost.

- food safety and animal welfare standards would be undermined by the requirement to accept lower standards set elsewhere
- Scotland's distinctive procurement system, which requires public bodies to consider social and environmental benefits and not just take the lowest bid on offer, could be challenged under non-discrimination rules

- The quality guarantee that underpins our world-class meat and seafood industries – and the many thousands of jobs they support – could be destroyed by UK ministers effectively imposing lower food and drink standards on Scotland. In July, UK Ministers again rejected proposals to write requirements to maintain high food and animal welfare standards into law as part of future trade deals

Food and Drink sector – case study

63. The food and drink industry is a major contributor to Scotland’s economy. It is worth around £15 billion each year and accounts for one in five manufacturing jobs. Scotland has 18,850 food and drink businesses, which employ around 115,400 people, many in remote and economically fragile rural and island communities. It is identified as a growth sector in the Scottish Government’s Economic Strategy. The case study at Annex B sets out in more detail the threat the White Paper proposals pose to the progress being made on the development of the food and drink sector as well as jobs and businesses.

International trade negotiations

64. The White Paper states that internal market arrangements are a means of ensuring that a state’s internal regulatory and market arrangements are aligned with its external trading relationships (paragraph 123). However, in other states, territorial administrations have a role in influencing and agreeing those new trading relationships. For example, the Canadian Provinces had a substantive role involved in developing Canada’s mandate in the recent CETA negotiations with the EU.

65. There are significant structural weaknesses in the system oversight and scrutiny of the UK Government’s approach to international negotiations. This is an issue for the devolved governments and parliaments but also for Westminster.

66. The Scottish Government has published detailed proposals to improve these arrangements which become even more relevant in the context of the UK internal market proposals¹⁹. The proposals are designed to ensure that Scotland’s voice is heard and respected, and to protect and promote its interests. In summary, the proposals are that the Scottish Government and Scottish Parliament must have a guaranteed role in all stages of the formulation, negotiation, agreement and implementation of future trade deals. The proposals set out in greater detail what such involvement might look like, as well as proposing the establishment, in statute, of a new inter-governmental committee to consider and agree a range of trade issues.

67. Such an enhanced role will be in everyone’s interest. Domestically, it would ensure that negotiations are conducted on a proper understanding of the issues for the devolved governments, that decisions would be taken closer to the people affected and have a greater transparency and legitimacy, and that any problematic issues would be surfaced and dealt with quickly. Implementing these proposals would also provide reassurance to the UK’s future negotiating partners that negotiations are proceeding on consensus within the UK and that agreements would endure.

Subsidy control

68. The White Paper proposes to expressly reserve the control of subsidy regimes, leaving the devolved governments with the role of deciding payments in their areas under rules set by the UK Government and Westminster. There is no reason for the UK Government to have

¹⁹ <https://www.gov.scot/publications/scotlands-role-development-future-uk-trade-arrangments/pages/1/>

exclusive competence over subsidy control, especially as decisions on subsidies are very particular to local circumstances and industrial concerns as has been seen in Scotland over recent years. However as reported in the Financial Times²⁰ this issue is clearly a source of tension within the UK Government quoting a person close to the discussions as saying:

“The current plan is an odd combination of reserving state aid [for control from London] but then agreeing to a free-for-all. They just want to be able to bung money at things and do not want UK internal market legislation cutting across that. It's very confused.”

Governance arrangements

69. The proposals on governance lack detail: on the nature of the body to be established, its composition, its accountability and especially its functions in terms of market surveillance and the enforcement tools it might have at its disposal. The Scottish Government does not believe the case has been made for the establishment of an oversight body. Even if one were to be established it could not have a meaningful role unless it also had power over reserved matters, which cover most issues within the European Single Market (for example, company law, competition law, employment law). It is difficult to see what justification there would be in establishing a market surveillance body whose functions were limited to devolved matters yet there is no proposal to affect reserved matters at all, and could not be given the claimed sovereignty of the UK Parliament.

The consultation

70. The UK Government's White Paper on the “UK Internal market” was published for consultation on 16 July. The consultation period closes on 13 August. The paper says (on page 13):

The consultation seeks the views of businesses, academics, consumer groups and trade unions on the policy options set out in this White Paper through proposals to enshrine in law two principles to protect the flow of goods and services in the UK's Internal Market: the principle of mutual recognition, and the principle of non-discrimination.

The paper also says (at paragraph 70 on page 31):

The purpose of this White Paper is to set out the Government's plan for the key objectives and application in UK of our Internal Market system for the whole of the UK, and to seek additional stakeholder views on some of the details of how this system should function.

71. It is therefore unclear whether the UK Government is seeking views on the overall policy set out in the paper, or only on the detail of implementation having already settled on its overall policy intention, whatever the views of the other governments of the UK and stakeholders. Neither approach, in our view, is acceptable and neither will be accepted by the Scottish Government.

Scottish Government
August 2020

²⁰ <https://www.ft.com/content/e29430c7-9dae-440e-8093-74f705ce62c3>

ANNEX A

UK COMMON FRAMEWORKS

1. It is clear that the COVID-19 outbreak has had a significant impact on the ability of the four administrations to make progress in developing frameworks, and that there is now insufficient time for many policy teams to develop a full framework by the end of December 2020. In response to this, a revised delivery plan for frameworks has been jointly developed and agreed by all four administrations through the UK Frameworks Project Board.
2. It is now anticipated that seven frameworks will be fully developed, agreed and implemented by the end of December 2020, six of which will cover Scotland. Provisional frameworks will be established in a number of other policy areas before being finalised for agreement as full frameworks during 2021. Appendix 1 details the policy areas where full and provisional frameworks are now expected to be developed.
3. The following seven frameworks to be available to legislatures for scrutiny this autumn:
 - Hazardous Substances (Planning)
 - Nutrition Health Claims, Composition and Labelling
 - Emissions Trading System (ETS)
 - Radioactive Substances
 - Recognition of Insolvency Proceedings
 - Food and Feed Safety and Hygiene (FFSH)
 - Company Law (which will not cover Scotland)

By the end of the transition period, the aim is that these seven frameworks will have completed their formal parliamentary scrutiny process. The relevant scrutiny Committees are set out below.

4. For frameworks in other policy areas, the expectation has been that policy teams will develop a provisional framework to ensure operability by the end of the year, with their scrutiny agreement and implementation as full frameworks thereafter. Provisional frameworks will consist of a framework outline agreement and accompanying concordat, including essential arrangements required for the framework to operate at the end of the transition period. The draft provisional framework would be agreed by the relevant Ministers across all four administrations and then confirmed by JMC (EN) Ministers by the end of December 2020. This process would also allow the provisional framework to be operational at the end of the transition period, while also allowing for further policy development and refinement after the end of the transition period. The development of these frameworks would then follow the process for full frameworks development, to be completed after the transition period, and would continue to comply with the principles for common frameworks set out by JMC (EN), including that frameworks will respect the devolution settlement. The Scottish Parliament and other legislatures will receive a summary of each provisional framework and an update on its progress before the end of 2020, with the expectation that these frameworks will be ready for scrutiny into 2021. Parliamentary scrutiny remains an important part of the frameworks delivery process and this revised timetable ensures that there is sufficient time allocated to undertake effective scrutiny. Nonetheless an accelerated timescale could be agreed if that was required by the parties involved.

5. A reclassification exercise is also currently being undertaken jointly by UK Government and the devolved governments to determine where frameworks should be reclassified as ‘no further action’. This classification means that the UK Government and devolved governments are in agreement that the impact of divergence across the UK is low and that there are alternative opportunities for future joint ways of working, meaning that a formal framework agreement is not required. The expectation is that this exercise will result in significantly fewer frameworks requiring development than was previously published in the UK Government’s revised frameworks analysis.²¹ Several frameworks are also to be consolidated as part of this reclassification exercise due to significant overlap of the policy areas, which will again reduce the overall number of frameworks. These changes should be confirmed in the publication of a revised UK Government frameworks analysis later this year.

APPENDIX 1

Frameworks Areas by Scrutiny Committee at 6 August 2020

The following list of Frameworks Areas by Scrutiny Committee might change due to the ongoing reclassification exercise. This exercise may lead to some of the Frameworks Areas on the list being assessed as no longer needing a framework, as existing arrangements may be deemed to be sufficient.

Finance and Constitution Committee

Public procurement	Provisional framework
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Rural Economy and Connectivity Committee

Agricultural support	Provisional framework
Animal health and welfare	Provisional framework
Chemicals and pesticides regulation	Provisional framework
Fisheries management and support	[see below]**
Plant health	Provisional framework
Plant varieties and seeds	Provisional framework
Fertiliser regulations	Provisional framework
Organic farming	Provisional framework
GMO marketing and cultivation	Provisional framework
Zootechnics	Provisional framework
Intelligent transport systems	Provisional framework

*** The Fisheries framework is in three parts, including a short administrative arrangement building on existing working arrangements (e.g. the UK Fisheries Monitoring Centre agreement) and a provisional approach that will be in place by the end of the year. The main part of the framework to ensure delivery of international obligations and joint management of a common resource is the Joint Fisheries Statement and further detailed in Fisheries Management Plans, as set out in the UK Fisheries Bill. This has a statutory consultation and legislative scrutiny process as set out in Schedule 1 of the bill. Relevant officials will continue to work with the Rural Economy and Connectivity Committee to ensure they are aware of the timetable and any possible changes.*

²¹ UK Government – Cabinet Office (2019), *Revised Frameworks Analysis*. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/2019_0404-FrameworksAnalysis.pdf (accessed on 13.07.2020).

Environment, Climate Change and Land Reform Committee

Emissions Trading System	Full framework
Radioactive substances	Full framework
Chemicals and pesticides regulation	Provisional framework
Waste and resources	Provisional framework
Ozone depleting substances and F-gases	Provisional framework
Air quality	Provisional framework

Health and Sport Committee

Nutrition health claims, composition and labelling	Full framework
Food and feed safety and hygiene	Full framework
Food compositional standards and labelling	Provisional framework
Reciprocal healthcare and cross-border healthcare rights	Provisional framework
Blood safety and quality	Provisional framework
Organs, tissues and cells	Provisional framework
Public health (serious cross-border threats to health)	Provisional framework

Economy, Energy and Fair Work Committee

Recognition of insolvency proceedings in EU Member States	Full framework
Statistics	Provisional framework
Mutual recognition of professional qualifications (MRPQ)	Provisional framework
Late payment (commercial transactions)	Provisional framework
Efficiency in energy use	Provisional framework
High efficiency cogeneration / Combined Heat and Power (CHP)	Provisional framework

Local Government and Communities Committee

Hazardous substances planning	Full framework
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Justice Committee

Following the initial policy development between the revised frameworks analysis published in 2019 and the 2020, UK Government and the devolved governments are currently undertaking a joint reclassification process of frameworks. A set of 'reclassification review' questions have been used to identify whether frameworks were necessary in all areas, taking into account the principles for common frameworks agreed at JMC(EN), and any previous statements or communications made by policy teams.

As part of the reclassification process, a number of areas relating to Justice and Home Affairs have been identified as not requiring a common UK framework, and are, therefore, not included in this annex. In these areas, existing arrangements are in place because justice is devolved to Scotland and the Scottish justice and legal systems are separate, and within a jurisdiction distinct from the rest of the UK. These arrangements work well and will continue.

For international relations, consultation on devolved matters applies as it does with non-EU countries.

ANNEX B

Case Study – Food and Drink

1. The Scottish Government takes a holistic approach to this key sector of the Scottish economy, underpinned by a commitment to the high environmental, social and regulatory standards provided by EU law. The Continuity Bill, currently before the Scottish Parliament, will allow for Scotland to keep pace with these EU standards in areas of devolved competence, from food safety and animal welfare to environmental standards and biodiversity to procurement.

2. National food and drink policy encompasses the impact of food and drink on health, the environment, social justice, education and the economy in Scotland and aims to build a 'Good Food Nation' where people benefit from and take pride and pleasure in the food they produce, buy, serve and eat.

3. The UK Internal Market proposals potentially undermine these policy choices in individual areas and across the whole “joined up” approach to the interactions between them, threatening the progress made on this approach as well as jobs and businesses:

- food safety and animal welfare standards would be undermined by the requirement to accept lower standards set elsewhere
- Scotland’s distinctive procurement system that requires public bodies to consider social and environmental benefits and not just take the lowest bid on offer could be challenged under non-discrimination rules.
- the quality guarantee that underpins our world-class meat and seafood industries – and the many thousands of jobs they support – would be at risk from lower food and drink standards on Scotland effectively imposed in Scotland, either by regulatory decisions elsewhere in the UK or by the requirements of Free Trade Agreements. In July, UK Ministers again rejected proposals to write requirements to maintain high food and animal welfare standards into law as part of future trade deals.

Background

4. The food and drink industry is a major contributor to Scotland’s economy. It is worth around £15 billion each year and accounts for one in five manufacturing jobs. Scotland has 18,850 food and drink businesses, which employ around 115,400 people, many in remote and economically fragile rural and island communities. It is identified as a growth sector in the Scottish Government’s Economic Strategy.

5. The Quality Meat Scotland Cattle & Sheep Assurance Scheme is the longest established scheme of its kind in the World and celebrated a milestone 25th anniversary in 2015. This internationally recognised assurance scheme covers more than 90% of livestock farmed for red meat in Scotland.

6. After whisky, Seafood is Scotland’s second largest export, sold to over 100 countries. From farmed seafood, shellfish to whitefish, over 60 species are landed in Scotland. The export value for Scottish Seafood in 2017 was a record £944 million, an increase of 23% from the previous year; and has doubled over the past decade.

7. Scottish salmon is both Scotland's and the UK's top food export. The USA remains the largest market for Scottish salmon with sales worth £193 million, followed by France (£188 million), China (£69 million) and the Republic of Ireland (£34 million).

8. The Scottish soft fruit sector is worth an estimated £115 million, contributing some 5% of total Scottish crop output by value.

Promoting sustainable production and procurement

9. Producing food and drink sustainably means farming and manufacturing it in a way that helps to preserve and protect the environment for future generations.

10. Procuring it sustainably means buying it from producers who minimise their impact on the environment, for example, by reducing their carbon emissions, and support the longevity of the industry. The Scottish Government is committed to sustainable production and procurement to ensure a long and prosperous future for Scotland's food and drink industry, and the environment it depends on.

Organic farming

11. Organic farming supports the rural economy, encourages biodiversity, improves soils, protects water sources and helps minimise climate change. In January 2016 the Scottish Government worked with industry-led body the Scottish Organic Forum to develop an Organic Action Plan outlining actions for growing the organic food and drink supply chain.

12. The Action Plan includes delivering the Organic Ambitions Fund 2016-2017 that will award funding to one or more applicants capable of developing existing relationships within the organic supply chain, identifying and addressing critical gaps, and demonstrating a proven track record of successfully developing co-ordinating and delivering projects.

Sustainable public sector food

13. The Procurement Reform (Scotland) Act 2014 includes a sustainable procurement duty requiring public bodies to consider and act on opportunities to improve economic, social and environmental wellbeing through their procurement activity. Public bodies are required to demonstrate through procurement strategies and annual procurement reports how they comply with the sustainable procurement duty. They are also specifically required to set out in their procurement strategy how they intend their approach to regulated procurements involving the provision of food to improve the health, wellbeing and education of communities in their area.

14. *Catering for Change: Buying Food Sustainably in the Public Sector* explains how working within procurement legislation can help public sector bodies support the sustainable procurement of food.

15. The Schools (Health Promotion and Nutrition) Act 2007 outlines mandatory food and nutrition standards and advocates the procurement of sustainable food.