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1. What is the UK internal market?

Until Brexit, the UK internal market could be understood in terms of the rules and principles of the EU internal market which underpinned it. With few exceptions, the EU internal market provides for frictionless trade between EU Member States. For goods, this means that there are no tariff duties - or checks - and no need for Member States to undertake regulatory compliance or certification procedures beyond what they do domestically. The EU achieved this by harmonising a great deal of its Members' standards for product safety and public protection. Goods regulated by standards that are not harmonised circulate freely due to the principle of mutual recognition. Within this framework, UK nations upheld a system of divergence and harmonisation that safeguarded free movement of goods, with narrow exceptions (such as checks on live animals between Great Britain and Northern Ireland).

Some post-Brexit legislation diverges from this model in ways which have the potential to undermine unfettered trade between UK nations. For food safety, including pesticides approval, pesticides Maximum Residue Levels (MRLs), GMO authorisation and labelling, food additives and microbiological food safety (better known as chlorinated chicken), post-Brexit secondary legislation departs from harmonisation that would have been required under EU single market rules by conferring powers to amend and make future laws to UK Government ministers for England, Welsh ministers for Wales and Scottish ministers for Scotland (Northern Ireland will remain aligned with the EU, following the Withdrawal Agreement 2019).¹

As Northern Ireland's continued alignment with the EU under the Withdrawal Agreement illustrates, regulatory alignment is an important component of frictionless trade. The new regulatory framework poses a risk of fragmentation and resultant intra-UK trade barriers. For example, EU rules would have prevented a devolved nation from approving chlorinated chicken, or pesticides or GMOs that were banned at the EU level – in the new legislation, these controls have been removed.

Routes to ensure the continuation of UK-wide harmonisation include voluntary agreement, an issue we address in Q. 4, or the central UK Government invoking powers under Section 12 of the EU Withdrawal Act (2018), which we address in Q. 6. Barring these, the UK could maintain a frictionless internal market by incorporating a principle of mutual recognition, which requires that, unless a country can prove that an imported product does *not* meet its standards on public safety, health or the environment, standards are presumed equivalent. As permitted divergence is greater, this would mean losing a greater degree of control over goods regulation from other nations of the UK.

To eliminate trade frictions, another option would be to rely upon labelling requirements in areas of divergence, which would not prevent these products from

¹ For a more detailed legislative analysis, see: Lydgate, E, Anthony, C and Millstone, E, 'Post-Brexit food safety legislation and trade: the devil in the details', UKTPO Briefing Paper 37, October 2019, available at: <https://blogs.sussex.ac.uk/uktpo/files/2019/10/UKTPO-Briefing-Paper-37.pdf>

circulating but rely upon consumer preferences. Finally, devolved nations could try to minimise trade disruption by undertaking regulatory checks (to e.g. ensure that goods imported from England met differing Scottish requirements) away from the border as much as possible. However this latter option would still require businesses in some cases to produce separate product lines complying with different regulatory requirements within the UK, which would be commercially damaging.

1. How will international treaties, including trade deals, impact on the UK internal market?

Trade negotiations drive changes to UK domestic legislation. They thus provide a catalyst for internal market disruption, particularly given Scotland's intent to maintain alignment with EU regulation. Again, the example of food safety is instructive. The US approach differs notably from that of the EU, and it has made clear that aligning UK rules and processes with those of the US is a key negotiating objective, which would encompass changes to regulation in virtually all of the areas we outlined above.²

In the context of continued uncertainty over the role of devolved nations in trade negotiations, it is possible that the UK Government would manage different positions between Scotland and England by allowing Scotland to avoid concessions made by the rest of the UK and maintain EU alignment. This would result in different regulatory systems and catalyse a set of challenges similar to that facing the UK in its trade relations with Northern Ireland. Alternatively, the central UK Government in Westminster could conclude a trade deal with the US and attempt to impose the outcome onto Scotland through e.g. EU Withdrawal Act (2018) Section 12 (further discussed in Q. 6). Such a move would be toxic in the context of already fragile relations between England and Scotland. The political question of whether a UK-US trade agreement merits the dissolution of the internal market is one that should be explicitly addressed.³

In order to avoid these outcomes, the UK Government would need to depart from the Constitutional Reform and Governance Act 2010 (CRAG Act) and the Concordat on International Relations and provide devolved nations with a much stronger oversight over trade negotiations, including the power to shape negotiating objectives. A role for the devolved nations is not provided for in the negotiation or scrutiny of international trade agreements. A report by the Constitution Committee in 2019 recommended the devolved governments should be 'effectively involved' in treaty negotiations in order to ensure their competences are respected, proper reflection of their interests and in acknowledgement of their role in implementing international obligations.⁴ Further, while the CRAG Act provides for limited scrutiny of treaties by Parliament, it does not require Parliament's approval.

² See the US Trade Representative's objectives for a UK trade negotiation:

https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf

³ Lydgate, E, Anthony, C, Millstone, E, 'Destruction of the Union: Too high a price to pay for a US trade agreement', UKTPO Briefing Paper 38, December 2019, available at

<https://blogs.sussex.ac.uk/uktpo/files/2019/12/BP-38-A.pdf>

⁴ Select Committee on the Constitution, *Parliamentary scrutiny of treaties* (House of Lords April 2019) HL Paper 345, para 141.

2. What are the priorities and challenges for Scottish businesses and organisations in operating within a UK internal market?

If the UK is unable to come up with common regulatory frameworks in areas necessary to achieve frictionless trade, there is a possibility that different regulatory requirements will apply in each UK nation. Scottish exporters to the UK in affected sectors, such as agriculture, would face new regulatory barriers.

3. What institutional structures will be required to administer and enforce the UK internal market?

As well as establishing legal principles for the EU single market, including subsidiarity, proportionality, harmonisation and mutual recognition, the EU also developed institutional structures which underpinned the UK internal market. The UK 'devolution settlement' sets out reserved and devolved competences⁵, however there is no neutral body similar to the European Commission to make legislative proposals or monitor compliance and the UK courts have not had a similar court to the Court of Justice of the European Union in interpreting and enforcing such rules.

Brexit makes clear that there is a need for new institutional structures to govern the UK internal market, and specifically to give more powers to devolved nations through a federalist structure. Federal models, such as that of Germany, are instructive with regard to the institutional structures designed to administer and enforce internal markets.

Current arrangements for decision-making between the four UK nations are well-recognised to be ineffective and underdeveloped. The Joint Ministerial Committee (JMC), established under the Memorandum of Understanding (MoU) between the UK Government and devolved administrations in 2013, provides for the 'central coordination' of reserved and devolved responsibilities.⁶ The UK Government and devolved administrations have agreed to develop UK-wide 'common frameworks' to combat some of the problems identified above, however this process has not proven successful to date.⁷ The UK Government's latest assessment set out an action plan consisting of five phases for the establishment of common frameworks and identifies 160 areas where common frameworks may be required, however the process has stalled in phase 2 (detailed policy development).⁸ This underscores the need for respect of the principle of legislative consent, and genuine and intense efforts to collaborate on developing new institutional structures, as the most essential first steps.

⁵ The Scotland Act 1998; the Government of Wales Act 1998; the Northern Ireland Act 1998.

⁶ Devolution Memorandum of Understanding and Supplementary Agreements (October 2013) <<https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement>>.

⁷ Joint Ministerial Committee (EU Negotiations) Communiqué (16 October 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf>.

⁸ Cabinet Office, *Revised frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland* (April 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf>.

4. What mechanisms should be available to challenge ‘unfair’ internal market practices?

It would be desirable for the UK to maintain a harmonised approach to trade remedies and subsidies, in order to avoid high tariffs in the form of remedies and countervailing duties being imposed on goods moving between UK nations.

5. What will be the impact of the UK internal market on devolved powers?

The prospect of an internal market that is developed and enforced through Westminster has rightly made devolved nations nervous. The EU Withdrawal Act 2018 confers a power for UK Ministers post-Brexit to make secondary legislation that may redefine the powers of the devolved administrations.⁹ This controversial provision creates a mechanism for the UK Government to legislate for the UK as a whole in areas previously devolved, subject to the consent of the devolved nations and certain time limits. The UK Parliament will ‘not normally’ legislate on devolved matters without the consent of the devolved administrations, however this political convention is not legally binding, and it is ultimately for the UK Parliament to legislate on any issue.¹⁰

However, as we noted in above Q 1, the picture appears mixed in terms of the devolution of powers. Post-Brexit secondary legislation gives powers previously exerted at the EU level to devolved nations. For example, regulatory processes undertaken at the EU level, such as approving new active substances for pesticides and new GMOs, will be carried out by devolved nations after the transition period.¹¹

As efforts to agree common frameworks have stalled, it is unclear how the internal market will be constituted and what its impacts on devolved nations will be.

6. What should be the role of the Scottish Parliament in relation to scrutinising the UK internal market?

The points previously made suggest the need for a review of the constitutional settlement of the UK. Perspectives on how such a review is best conducted may range from a principle of minimum effort and reliance on the UK’s existing balance of powers to recommendations for comprehensive, collaborative and democratic reform processes. The role of the UK parliaments in holding the executives to account is essential in any case. Further powers for the devolved administrations and UK parliaments would provide for democratic legitimacy in contrast to the current UK Government strategy of consolidating power to the executive.

⁹ European Union (Withdrawal) Act 2018, section 12.

¹⁰ Scotland Act 2016, section 2; Wales Act 2017, section 2. See also *R (Miller) v Secretary of State for Exiting the European Union*, paras 136-151.

¹¹ See note 1.