

## SUBMISSION FROM PROFESSOR MICHAEL KEATING, UNIVERSITY OF ABERDEEN

As part of the Brexit process, the UK Government has been undertaking a review of the UK 'single market' or 'internal market'. The premise is that, when the UK leaves the European Union, it will need something to replace the EU internal (or single) market, which serves to secure economic union not only across the EU but within the UK itself. There is broad consensus about the idea in principle but much less on exactly what it is and what it entails.

For some time, there have been discussions at official level between the UK and devolved governments around post-Brexit policy 'frameworks' in key sectors such as agriculture and the environment. The aim is to replace existing EU frameworks where there is a need for harmonization of regulations or financial support across the UK (or Great Britain). The intention is that those discussions should lead to agreements, which might be legislative or non-legislative. In addition, there are sectoral bills (for example in Agriculture) which the Welsh but not the Scottish Government has used to accept some common provisions. It has been agreed that, while framework discussions are under way, the devolved governments would not change regulations so as to prejudice future frameworks, and the UK Government would not use its powers under the EU Withdrawal Act to take back competences to Westminster.

The idea of the internal market, however, is broader than this and covers matters that might not be covered by these specific sectoral arrangements. What it does cover is by no means given. Even the terminology is confusing. The EU has sequentially used 'common market', 'single market' and 'internal market' but now has aligned references in the treaties to 'internal market'. In its initial responses to Brexit, the UK Government talked about the 'UK single market' but has now settled on 'internal market'. We can treat them as synonymous.

Some people have been arguing that the UK single market was already secured by the Acts of Union of 1707<sup>1</sup> (and 1800). This is misleading and anachronistic. The concept of a single or internal market only makes sense in the context of a modern, interventionist, regulatory state. It represents one of the advanced stages in economic union, which starts with free trade and progresses through a customs union towards monetary union. While free trade eliminates tariff barriers, the common market addresses non-tariff barriers including regulations and subsidies. The European Single Market introduced in the 1980s goes beyond trade in goods and services to harmonize (or provide for mutual recognition of) rules on product standards, public procurement, professional qualifications and other matters that might violate its principles.

In any advanced regulatory welfare state with two orders of government, indeed, the internal market is a complex and contested concept, raising socially and politically sensitive questions. Both 'market' and 'internal' are open to interpretation.

The first question is about the very definition of the 'market' itself. Modern states based on the mixed economy and welfare state recognize that certain matters (like the production and distribution of consumer goods) should be left to the competitive market, private production and consumer choice. Others (like the police and military) should be a government monopoly. Drawing the precise line in other fields is more contentious as there is less consensus on where the market ends, and social, cultural or environmental considerations should take over. Should health and

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<sup>1</sup> Sam Taylor, *what is the UK Single Market?* These Islands, 2019. [https://www.these-islands.co.uk/publications/i336/what\\_is\\_the\\_uk\\_single\\_market.aspx](https://www.these-islands.co.uk/publications/i336/what_is_the_uk_single_market.aspx)

education be left to the market or be a governmental responsibility? If they are offered as public services, should private operators be allowed to tender to provide them? Should islands ferries be seen as an economic sector or a vital public service?

The second question concerns the 'single' or 'internal' bit and whether the market, either in the narrow or the broader sense, could or should be regulated differently across the component parts of a union. Should the Scottish Government be able to impose more severe restrictions on the sale of alcohol or tobacco than in England on public health grounds? Should crofters in the Highlands be entitled to special support on social and cultural grounds? Can devolved governments impose stronger environmental regulations on developments? None of these issues bothered the framers of the union treaties.

In any case, the two acts of union did not provide for devolved legislatures which might cause endanger common provisions. The various Home Rule proposals for Ireland and Scotland in the late nineteenth and early twentieth centuries included free trade provisions but were equally silent on modern regulatory and welfare issues.

The European Single Market programme, launched in the 1980s, aimed to push the EU from a free trade area to a complete internal market. At the same time, it recognizes that public services should be largely exempt from market competition and that social and environmental regulations should sometimes trump the market. It is not a fixed set of regulations, but a living principle and decisions can be politically contentious. Measures are brought forward by the European Commission and adopted by the Council of the European Union (representing member states) and the European Parliament. They are implemented either by laws directly applicable across the Union or transposed into national law by member states (or sub-state governments where appropriate). The whole process is governed by the principles of subsidiarity and proportionality. Subsidiarity means that action should be taken at the lowest level possible. Proportionality means that measure rules should only be as detailed as necessary, allowing for flexibility in their application. Infringement of the rules is dealt with by national courts and, ultimately, the Court of Justice of the European Union.

There is no equivalent single/ internal market provision in the UK devolution legislation, apart from a rather vague reference in the Northern Ireland Act. Instead, reserved competences are set out clearly, with everything else devolved. It is EU law that secures the UK internal market in matters such as public procurement, agricultural support and state aid – hence the debate about frameworks. As a living, transversal principle, however, it can go beyond these matters and arise in unexpected ways. The Scottish legislation on minimum pricing of alcohol was passed as a public health matter, which might be presumed to be exempt from market competition rules. Yet it was challenged by producers as an interference in the market and restraint on competition. It took a series of appeals all the way up to the Court of Justice of the EU and back to the

Court of Session to resolve that this was a justifiable restraint on market activity.

Nor is there anything in the UK devolution settlement corresponding to the elaborate, multilevel process for making single/ internal market rules in the EU. There is no neutral body like the Commission to make proposals and monitor compliance. The UK courts do not have the same role and expertise as the Court of Justice of the EU is enforcing market rules. There are no principles of subsidiarity and proportionality.

The UK Government seems to accept that there is a gap in provision for the internal market because it is engaged in study and intergovernmental discussions on the matter. It is not surprising that there is a great deal of argument about what it might encompass and how it should be managed in a way that is consistent with devolution.

A narrowly-drawn internal market provision would probably add little to whatever emerges from the discussions about policy frameworks. A broadly drawn one could impinge severely on devolved competences, leading to centralization, especially if it were entrusted to Westminster and not accompanied by strong rules about subsidiarity and proportionality. If it were put in statutory form, the courts could be drawn into deciding what are properly matters of public policy. The emphasis on the internal *market* could also lead to the criteria of economic competition prevailing over those of social inclusion, equality and environmentalism. Much of the criticism of the EU single/ internal market and the rulings of the Court of Justice of the EU stems from such concerns. Given that Scotland and Wales have consistently supported centre-left governments while the UK has often tilted to the right, the balance between social and market criteria could become a matter of intergovernmental conflict.

The discussions around policy frameworks have been addressed by the UK Government as technical rather than political matters. Blanket provisions in the EU Withdrawal Bill allowing them to take back all powers from Scotland, Wales and Northern Ireland in areas of 'retained EU law' were dropped after strong opposition and the UK Government has since acted with more prudence. Although powers to take back competences are still there, they have not been used and may well never be. This suggests that the UK may be wary of the political problems that could lie in store from a sweeping internal market provision and prefer instead to try and muddle through. In that case, we may never know just what the UK internal market actually means.