

Additional Submission from Professor Michael Keating

The UK Government's White Paper on the Internal Market addresses what is widely agreed to be a real issue after the UK leaves the EU Internal Market at the end of the year. A range of matters, including the environment, agriculture, food standards and aid to industry, are both devolved to Scotland, Wales and Northern Ireland and governed by European laws and regulations. There are no UK frameworks so that, as from January, there will be no common frameworks at all. It is for this reason that the UK and devolved governments have been working through a series of matters that may need to be subject to agreed common frameworks.

The White Paper, however, addresses a much wider issue, of the 'internal market'. It has been produced by the UK Government, not negotiated with the devolved administrations. The internal market is a broad principle in EU law that provides for the removal of obstacles to free movement of goods, services and people wherever they may arise. Most of these arise from government regulations or subsidies. Potentially they could come up in any policy field. So minimum pricing of alcohol in Scotland, introduced as a public health measure, was challenged on internal market grounds, although it was ultimately upheld.

The application of this principle to the devolution settlement is problematic in a number of ways. The White Paper asserts that it was part of the Acts of Union of England with Scotland in 1707 but this is doubtful. The term is not used and the concept of an internal market only really arises in a modern, regulatory state. In any case, the Acts of Union abolished the Scottish Parliament, the opposite of the devolution which occurred in 1999. The Court of Session has already ruled (in the minimum pricing case) that the Union legislation cannot be used to over-rule the devolution settlement on internal market grounds.

Another claim in the White Paper is that, from January, the devolved territories will gain new powers. In fact, Scotland, Wales and Northern Ireland have all powers except those expressly reserved to Westminster. The powers in question are not reserved and, in the absence of a change in the devolution statutes, would automatically come back to the devolved level. Within the EU, Scotland, Wales and Northern Ireland had the same degree of discretion in interpreting EU regulations as do Member States, which is quite considerable and has increased in recent years. So Scottish agriculture policy has diverged significantly from that in England. The test for the new arrangement will be how much discretion is still available. The Frameworks that are still being negotiated would govern that. The new internal market principle could go much further in curtailing devolved powers. There is a suggestion in the White Paper that the discretion available to the German Länder is problematic although that is smaller than the devolved UK nations had.

There is a big difference between how the EU Internal Market works and what is being suggested here, although there is a lack of detail. EU laws and regulations are initiated by the European Commission, which is independent of Member States. They are agreed in the Council of the European Union,

representing Member States and approved by the European Parliament. They are subject to a test of subsidiarity and proportionality, meaning that they must be applied at the lowest level possible and be no more detailed than necessary. Breaches of these principles can be appealed to the Court of Justice of the EU. Even sub-state governments can appeal via the Committee of the Regions.

The key principles in the White Paper are mutual recognition and non-discrimination. The principle of mutual recognition is taken directly from EU practice. This means that an item that meets the regulatory standards in one part of the UK can be sold anywhere else in the UK. Yet, again, the context is different. The EU is a union of 27 countries, in which no country predominates. In the UK, England has 85 per cent of the population so that it will be English standards, set by the UK Government, that prevail. Some of these standards will be set so as to conclude trade deals with other countries, meaning that these imports will be freely available across the UK, whatever standards are set in Scotland and Wales. Northern Ireland raises further issues, given that it will remain part of the EU regulatory regime in many respects.

The White Paper gives an assurance that 'key decisions will be put to the UK Parliament for approval, rather than resting exclusively with the UK Government.' It does not say that the devolved parliaments and assembly will have to approve. There will, doubtless, be consultation but this is not the same as co-decision as happens in the EU.

The internal market principle in the EU has often proved contentious as the minimum pricing case showed. The question is about which matters should be left to market competition and which matters might be subject to regulation on social or environmental grounds. This is, essentially, a political rather than a purely technical matter. The White Paper does suggest that the internal market will not cover some important matters but, again, the detail is missing. There may be a monitoring body but its status is unclear. In the EU, some of these matters end up in the courts.

Internal market mechanisms in other devolved or federal states have been based on intergovernmental agreements and mechanisms and constrained by constitutional rules. So a mutual recognition clause in the Spanish law was struck down by the Spanish Constitutional Court on the grounds that it represented extraterritorial jurisdiction, that is one region legislating for what happens in another one.

The White Paper includes a detailed analysis of the costs of not having an internal market across the UK and there are repeated claims about its benefits. There is no accompanying analysis of why leaving the EU internal market, which is even larger, should be a positive move.