

SCOTLAND AND THE UK INTERNAL MARKET ROYAL SOCIETY OF EDINBURGH RESPONSE

Introduction

- 1 The Royal Society of Edinburgh (RSE), Scotland's National Academy, welcomes the opportunity to respond to the Finance and Constitution Committee's consultation into Scotland and the UK Internal Market. The Society looks forward to hosting a discussion event with the Committee and Scotland Futures Forum on this topic in April.
- 2 The RSE has provided independent and impartial evidence-based advice to the Scottish and UK governments and parliaments on the UK's withdrawal from the EU. Areas on which the Society has focussed include the constitution, intergovernmental relations and common frameworks.
- 3 The Committee will be aware of the RSE response to its previous consultation into Common UK Frameworks in August 2018.¹ Many of the same themes and issues raised, both in that written submission and in the oral evidence² the RSE provided for the Committee, remain relevant.
- 4 The following papers, published by the RSE over the past two years may also be of interest to the Committee as it undertakes its inquiry:
 - Environmental Principles and Governance Post Brexit (May 2019)³
 - The Future of Scottish Agriculture Post Brexit (January 2019)⁴
 - Intergovernmental Relations (November 2018)⁵

Key Points

Intergovernmental Relations

- 5 The RSE agrees with the findings of the 2018 report by the House of Commons Public Administration and Constitutional Affairs Committee (PACAC) lamenting "*the absence of formal and effective inter-governmental relations mechanisms...*"⁶ in the UK.
- 6 The current system, primarily based around the Joint Ministerial Committee (JMC), is inadequate in supporting consistent and successful intergovernmental relations. Too often a lack of incentives and purpose results in JMCs meeting infrequently; the absence of formality serving to compound this problem.
- 7 When the Brexit transition period ends and current EU-wide rules on trade no longer apply to the UK, strong intergovernmental cooperation will be vital in maintaining the UK Internal Market. The reality that the agreed transition period with the European Union extends only until the end of 2020 underlines the urgency, and significant challenge, of developing a new formal mechanism to address these issues.

New Arrangements

- 8 The RSE has consistently argued for the establishment of a new Independent Secretariat tasked with facilitating agreement on, developing and maintaining common frameworks across the UK. Due to the significant complexity of these frameworks the Secretariat should have a statutory duty and powers to oversee all common frameworks. While final decision-making power ultimately would remain with the UK Government, the use of this authority against the wishes of the Devolved Administrations constitutes a failure of intergovernmental relations, and such a Secretariat could play an important role in finding compromise in such situations.

1 <https://www.rse.org.uk/wp-content/uploads/2018/10/AP18-15.pdf>

2 <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11733>

3 https://www.rse.org.uk/wp-content/uploads/2019/05/AP19_06.pdf

4 https://www.rse.org.uk/wp-content/uploads/2019/02/RSE_Agriculture_SAC_Final.pdf

5 <https://www.rse.org.uk/wp-content/uploads/2018/11/AP18-21.pdf>

6 <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1485/1485.pdf#p41>

- 9** It would be important that the Secretariat is considered impartial, as serving the interests of the entire United Kingdom, and to be taking into account the respective needs and interests of all the nations of the UK. The body would be required to represent the UK interest and not merely those of either the devolved legislatures or UK Government departments. Equally vital will be the ability of the Secretariat to command the confidence of the UK Government and Devolved Administrations that it will provide evidence-based, independent and transparent advice.
- 10** Transparency and accountability within intergovernmental relations must be improved and the RSE has previously highlighted the continued relevance of the proposals presented by the Calman Commission in this area.⁷ These included recommendations to publish agendas, meeting times, and statements after the meetings with an annual report being published each year. We would expect that this could be achieved through the Secretariat.
- 11** The Secretariat should play a role in helping the UK Government coordinate its negotiating stance on international treaties with the Devolved Administrations when implementation of a treaty is likely to impinge on devolved competences. The aim must always be to reach an agreed negotiating position in such a scenario with an Independent Secretariat potentially playing an important role in facilitating this.
- 12** The RSE strongly supports the Secretariat possessing an analytical capacity. This would allow the body to take the initiative to set agendas and resolve disputes by undertaking research into potential resolutions. This may also serve to draw governments together to deal with difficult and complex issues at an earlier stage.
- 14** The principles of subsidiarity (that action should be taken at the most local level practicable) and proportionality (that this action should only be broad enough to achieve its aims and no more) are important mechanisms of the European Single Market in countering accusations of centralisation. While no such principles currently exist in the UK, or in relation to devolution, adopting these should play a similar role for the UK Internal Market.
- 15** Simply replicating all mechanisms from the European Single Market is one option open to the UK. These may not necessarily, however, translate to the new context. This is an area where the proposed Independent Secretariat could play an important role, commissioning and analysing research, before looking to form a view on what this market should look like. Conceptual work will be important and is likely to prove valuable irrespective of the constitutional future of the UK.

Question 2

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

- 16** The way in which, and indeed if, international treaties impact on the UK Internal Market remains to be seen. The impact of treaties will depend on how much regulatory harmonisation they contain and whether these cover devolved competences. Food standards and environmental regulations are possible areas of friction.
- 17** Agreements will eventually need to be applied and implemented by the Devolved Administrations and any stand-offs or disagreements resolved. To this end, only truly looking to build consensus across governments, and eschewing a top-down approach, will prove successful.
- 18** As discussed, the RSE considers that an Independent Secretariat could play a role in helping the UK Government coordinate its negotiating stance on international treaties with the Devolved Administrations when implementation of a treaty is likely to impinge on devolved competences. The aim must always be to reach an agreed negotiating position in such a scenario with an Independent Secretariat potentially playing an important role in facilitating this. While the UK Government may have the power to override the will of the Devolved Administrations, doing so would constitute a failure of intergovernmental relations.

Question 1

What is the UK Internal Market?

- 13** The UK Internal Market is a contested term with no one single agreed definition. In contrast, the European Single Market – from which the UK intends to withdraw by the end of 2020 – is far more well-defined as a longstanding effort to eliminate any barrier to the “four freedoms” of the European Union: the free movement of goods, capital, services and labour. Measures can cover various and wide-ranging fields.

⁷ https://www.qmul.ac.uk/law/maccormick/media/maccormick/timeline/15_06_09_calman.pdf

Question 3

What are the priorities and challenges for Scottish businesses and organisations in operating within a UK Internal Market?

- 19 The overriding desire of Scottish businesses will remain to have access, with as little friction as possible, to UK, EU and global markets.
- 20 Some level of diversity in different parts of the UK should not present any major challenges as homogenous regulation is not required. A flexible system with subsidiarity and proportionality at its core, one where central government only looks to intervene in the most serious of circumstances, would best serve businesses.
- 21 The system already operating across the UK regarding judicial decisions provides a robust example of how this could work in practice, with judgements circulated virtually automatically. A judgement reached in any legal jurisdiction of the UK is enforceable in all others, irrespective of differences in the law.
- 22 It should also be noted that as we leave the European Union, the role of the Competition and Markets Authority in the UK is likely to become more important. Consideration will be required over whether a more territorial view should be adopted and on how best to represent the Devolved Administrations on the body.

Question 4

What institutional structures will be required to administer and enforce the UK Internal Market practices?

- 23 A more constructive framing of this question might be: "What institutional structures can best guide, develop and research productive UK Internal Market Practices?" To answer this question, the RSE again stresses the value of an Independent Secretariat. Such a body could provide a forum for contentious issues to be raised and potential solutions researched and developed.

Question 5

What mechanisms should be available to challenge 'unfair' Internal Market practices?

- 24 Deciding which practices should ultimately be considered 'unfair' will depend on how the Internal Market is eventually defined.

Consideration should be given to whether the proposed Independent Secretariat could also serve as a mechanism for addressing concerns over unfair market practices. The analytical capability of the Secretariat would allow it to investigate complaints and propose potential solutions, although it would not be appropriate for it to have any administrative enforcement function.

Question 6

What will be the impact of the UK Internal Market on devolved powers?

- 25 Any outcome by which a stalemate between the UK and Scottish governments leads to the Sewel Convention being overridden should be considered a failure of intergovernmental relations. The Sewel Convention, as a constitutional convention, holds a status and significance beyond a mere political arrangement and consultation, cooperation and communication between different levels of government is vital to ensuring it is upheld.
- 26 Any decisions regarding the UK Internal Market which have implications for devolution or impinge on devolved competences should look to adhere to the principles of subsidiarity and proportionality. The presumption must remain that consent of the devolved administrations is sought and required.

Question 7

What should be the role of the Scottish Parliament in relation to scrutinising the UK Internal Market?

- 27 Scrutinising the UK Internal Market will require a sharp focus from all legislatures of the UK. It is of particular importance, given increased political polarisation, that parliaments are seen to be looking past constitutional differences to act in the best interests of those they represent.
- 28 Irrespective of how the UK Internal Market comes to be defined, or the constitutional future of the UK, this market will require continued attention and working relationships to prosper. All sides have an interest in an effective and well-functioning market.

29 Given the increased importance of scrutiny from the Scottish Parliament on constitutional issues relating to intergovernmental relations, the UK Internal Market and common frameworks, consideration should be given to whether a separate Scottish Parliament Committee is required to undertake this brief. Given the considerable expansion of the Scottish Parliament's taxation and borrowing powers in recent years, the establishment of a distinct Constitution and Intergovernmental Relations Committee would allow the Finance Committee to concentrate on the substantial task of scrutinising Scottish Government use of these powers, while allowing this new Committee to focus on the necessary oversight of constitutional issues and intergovernmental relations, including the UK Internal Market.

Additional Information

Any enquiries about this advice paper should be addressed to Craig Denham, Policy Advice Officer (cdenham@therse.org.uk).

Responses are published on the RSE website (<https://www.rse.org.uk/>)

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