

UK INTERNAL MARKET WHITE PAPER ROYAL SOCIETY OF EDINBURGH RESPONSE

Introduction

- 1 The Royal Society of Edinburgh (RSE), Scotland's National Academy, welcomes the opportunity to respond to the UK Government's White Paper on the UK Internal Market.¹
- 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 Over the past two years the RSE has published the following Advice Papers which are of particular relevance to this consultation, with many of the themes explored remaining highly relevant and deserving of reiteration in this response:
 - **Scotland and the UK Internal Market (February 2020)**²
 - **Environmental Principles and Governance Post Brexit (May 2019)**³
 - **The Future of Scottish Agriculture Post Brexit (January 2019)**⁴
 - **Intergovernmental Relations (November 2018)**⁵
 - **Common UK Frameworks (August 2018)**⁶
- 4 The RSE is pleased that the White Paper welcomes the submission of comments outside of direct responses to the questions posed in the consultation. To ensure the Society can best respond to the White Paper, the RSE has taken the approach of providing key points, before

presenting brief answers to the consultation questions.

Key Points

- 5 The RSE welcomes the key objectives set out in the White Paper as follows:

“[T]he UK Internal Market system will therefore be driven by the following three overarching policy objectives:

 - a) to continue to secure economic opportunities across the UK;
 - b) to continue competitiveness and enable citizens across the UK to be in an environment that is the best place in the world to do business; and
 - c) to continue to provide for the general welfare, prosperity, and economic security of all our citizens.

These objectives will be supplemented by the following three supporting aims:

- a) to continue frictionless trade between all parts of the UK;
- b) to continue fair competition and prevent discrimination; and
- c) to continue to protect business, consumers and civil society by engaging them in the development of the market.

Finally, the UK Internal Market will also follow two main design rules:

- a) foster collaboration and dialogue; and
- b) build trust with business and maintain openness.”⁷

¹ UK Government, UK Internal Market White Paper, accessible at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901299/uk-internal-market-white-paper-print-ready.pdf

² https://www.rse.org.uk/wp-content/uploads/2020/03/AP20_03.pdf

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

⁷ White Paper, paragraphs 25-27

- 6 However, the RSE is not convinced that the legislation proposed in the White Paper is required to achieve these objectives. As the White Paper acknowledges, the UK Internal Market is extremely strong, with almost completely frictionless trade, without any legislative requirement for mutual recognition or non-discrimination between the different political units in the UK. There is no urgency demonstrated by the evidence supplied in the White Paper for legislation.⁸
- 7 Before any such legislation is passed attention must be given to the limits that should be placed on the scope of new legislative obligations and on the exceptions to them which should be permitted to be made by each of the political units on the grounds of public policy, public health, environmental protection and other exceptions to such principles that exist elsewhere, including in the EU. The principle of “frictionless trade” has to be balanced with other important social goals (for example protection of public health through policies seeking to tackle alcoholism or obesity, environmental protection, food standards) which can legitimately vary in different parts of the UK according to the scale of the problem and the legislative priorities set by the political process in each political unit of the UK.
- 8 The RSE sees two significant areas where the aims and objectives in the White Paper should be enhanced. First, if a legislative route for securing the identified objectives is adopted some additional legislative principles should be added to the concept of the UK Internal Market, namely subsidiarity and proportionality. Furthermore, legislative exceptions to the principles of mutual recognition and non-discrimination should be introduced to protect the public policy, public health and other core values of each of the political units in the UK. Second, irrespective of whether legislation is adopted in the terms of the White Paper, the RSE supports a much stronger institutional framework for the development and enhancement of the UK Internal Market through the creation of an Independent Secretariat.
- 9 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 comparatively well-defined. The deregulatory impact of the “four freedoms” of the European Union, the protection of regulation by the lowest appropriate legislative unit within the EU through the Treaty principles of subsidiarity and proportionality, and the elaborate positive regulation (often minimum harmonisation) provided by the EU legislation were passed as part of the creation of the EU single market in the 1980s.
- 10 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. No such principles currently exist in the UK, or in relation to devolution, and the RSE notes with regret that the UK Government makes no commitment to adopting these into its vision for the UK Internal Market in the White Paper. If a legislative solution is needed for the UK Internal Market (beyond agreeing common frameworks) then the RSE advocates including subsidiarity and proportionality as mechanisms for guarding against inappropriate UK wide legislation which would be damaging to the devolved settlements that the UK Government wants to respect.

Intergovernmental Relations

- 11 The RSE welcomes the recognition in the White Paper of the Scottish Parliament’s competences and the UK Government’s commitment to ensuring that devolution works well.⁹

⁸ See in a similar vein the letter from the House of Lords Select Committee on the Constitution on 29 July 2020 in relation to the White Paper at <https://committees.parliament.uk/publications/2225/documents/20331/default/>

⁹ White Paper, paragraph 16

- 12** The RSE also welcomes the statements in the White Paper that:

“Intergovernmental arrangements will have to be expanded to account for Internal Market legislation and we will support these arrangements with two independently undertaken functions.

The first function will provide regular ongoing monitoring of, and reporting on, the health of the UK Internal Market as it develops. This will include monitoring the cumulative impacts across sectors or regions and horizon-scanning for emerging trends.

The second function will be to proactively gather business, professional, and consumer views to strengthen the evidence-base needed for independent advice and monitoring.”

and

“the Government does recognise that there remains an important role in relation to the Internal Market for independently-delivered functions removed from its own political influence and that of the devolved administrations.”¹⁰

- 13** It is the view of the RSE that the appropriate body to exercise these two independent functions, and indeed to help shape the development of the UK Internal Market more generally, is a new UK Independent Secretariat. A properly funded Secretariat (with costs shared appropriately between the UK Government and the Devolved Administrations) is more appropriate than one or more ad hoc bodies that might be created to carry out the two independent functions outlined in the White Paper. It would only be necessary to create one new system protecting the independence of the Secretariat while ensuring appropriate levels of accountability for its actions. By linking these tasks to a new Independent Secretariat with a clearly defined role, not only can an enhanced understanding of the UK Internal Market be developed, but effective intergovernmental relations could also be supported. The RSE, including in many of the papers listed above, has expressed concern over the functioning of intergovernmental relations (IGR) in the UK, particularly in regard to the Joint Ministerial Committee (JMC). The current system is

inadequate in supporting consistent and successful IGR. Too often a lack of incentives and purpose results in JMCs meeting infrequently; the absence of formality serving to compound this problem.

An Independent Secretariat for Common Frameworks and the Internal Market More Generally

- 14** 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. Common frameworks are part of the UK internal market as noted in the White Paper in paragraph 22.
- 15** The Independent Secretariat should have a role in relation to all aspects of the UK internal market. While final decision-making power ultimately would remain with the UK Government/Parliament on Common Frameworks and some other aspects of the UK Internal Market, the use of this authority against the wishes of the Devolved Administrations would constitute a failure of intergovernmental relations, and an Independent Secretariat could play an important role in finding compromises in such situations.
- 16** It would be important that the Secretariat is considered impartial, as serving the interests of the entire United Kingdom, and to be taking account of 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 to which it will provide evidence-based, independent and transparent advice. It would require a diverse personnel, bringing experience from the civil service – as it would operate in the UK and in each of the Devolved Administrations – and those from a non-civil service background with relevant expertise, including lawyers, economists, industrialists, entrepreneurs, trade unionists, and academic experts.

¹⁰ White Paper, paragraphs 52-54 and 155

- 17** 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.¹¹ 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.
- 18** 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.

The Devolution Settlement

- 19** The White Paper states that the overall shape of the UK Internal Market will be determined by the UK Parliament (an area in which the RSE has previously argued an Independent Secretariat could play an important role). While paragraph 154 of the White Paper states that significant decisions relating to this will be put before the UK Parliament, rather than being taken exclusively by the UK Government, it does not offer any assurance that the devolved legislatures will be asked to approve.¹² Such an arrangement falls short of the co-decision that currently occurs in the EU Single Market from which the UK is withdrawing and of good practice in respect of devolution.
- 20** Legislation relating to the UK Internal Market would almost certainly impact on devolved competences and, therefore, require the consent of the devolved legislatures under the Sewel Convention. Any outcome which sees the Sewel Convention being overridden must be considered a failure of intergovernmental relations and only constitutionally justified in exceptional circumstances. 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.
- 21** 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.
- 22** In paragraph 12 of the White Paper it is suggested that the UK's withdrawal from the EU would provide the devolved administrations with “*unprecedented new powers*”.¹³ This statement is made in the context that until now the legislative and executive competence of Scotland's devolved institutions has required compatibility with EU law.
- 23** The Scottish Parliament has jurisdiction over all areas except those which are expressly reserved to Westminster. Therefore, the expectation should be that on leaving the European Union any areas of law no longer subject to the pre-emptive effect of EU law and which do not fall into the reserved category should go to the devolved level. The basic architecture of the devolution settlement should be respected with any limitations on devolved competence only pursued through clearly established and agreed principles and mechanisms. As a part of the EU, Scotland was afforded the same discretion in interpreting EU regulations and implementing EU directives as a Member State. This has seen Scottish policy diverge markedly from that of England in certain areas, for example agriculture. Although common frameworks are yet to be agreed, there must be an expectation that Scotland will continue to be afforded the same level of discretion and will not see its authority weakened.

¹¹ https://www.qmul.ac.uk/law/maccormick/media/maccormick/timeline/15_06_09_alman.pdf

¹² White Paper, paragraph 154

¹³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901225/uk-internal-market-white-paper.pdf p12

Consultation Questions

Do you agree that the government should seek to mitigate against both ‘direct’ and ‘indirect’ discrimination in areas which affect the provision of goods and services?

- 24** Any decisions by the UK Government to mitigate what it perceives to be discrimination in the UK Internal Market should be taken in consultation, cooperation and communication with the Devolved Administrations. The White Paper does not make a convincing case for the need to legislate for a principle of non-discrimination in trade between the different political units in the UK.
- 25** Consideration should be given to whether the Independent Secretariat proposed by RSE could serve as a mechanism for addressing concerns over unfair market practices. Providing the Secretariat with an analytical capacity would allow it to investigate complaints and propose potential solutions (rather like the Parliamentary Commissioner for Administration does in relation to maladministration), although it would not be appropriate for it to have any administrative enforcement function.

Could you provide examples of indirect discrimination that would affect the functioning of the Internal Market?

- 26** No. Nothing in the White Paper demonstrates that this is a significant issue requiring a legislative solution.

What areas do you think should be covered by non-discrimination but not mutual recognition?

- 27** The White Paper has not made a convincing case for the need to legislate for a principle of mutual recognition in order to maintain the already highly successful UK Internal Market. No evidence is provided that any of the four political units have created barriers to the smooth functioning of the UK Internal Market which should be counteracted by an overriding principle of mutual recognition (certainly not

a principle with no exceptions permitting differing regulatory regimes on sensitive issues like public health and the environment). As the White Paper acknowledges there should be matters that fall outside the scope of mutual recognition, e.g. the different legal systems in England and Wales, Northern Ireland, and Scotland mean that legal professional qualifications in one of those legal systems should not be subject to a principle of mutual recognition in the others. The principle of non-discrimination is not the answer to this issue either. What is required is positive agreement at a UK wide level, with the consent of the Devolved Administrations, on what sort of supplementary exams and experience is needed for a person legally qualified in one part of the UK to become legally qualified in another part of the UK.

- 28** One potential difficulty for the principle of “mutual recognition” in the UK, as opposed to some of the other political entities where it has been used, is that England accounts for more than four-fifths of both the total economy and total population in the UK. It is difficult to envisage this disparity leading to an outcome other than the regulatory standards desired by English businesses and consumers, and set by the UK Government, being dominant throughout the UK. Therefore, if UK wide legislation on the Internal Market is adopted some protection of the core values of each of the nations of the UK is necessary in law to protect the devolved settlements and the integrity of the Union. Cross-cutting limits on the principle of mutual recognition should be built into the legislative framework to allow for the protection of “public policy” in each of England, Northern Ireland, Scotland and Wales. Such a public policy (including public health) exception is familiar in EU law under the four freedoms and in other legal mechanisms for recognition of foreign standards (e.g. private international law). Courts would have a role in policing the outer limits of such a public policy exception to mutual recognition.

What would be the most effective way of implementing the two functions outlined above?

- 29** The RSE notes that the White Paper says: *“The UK Government recognises the range of potential vehicles for the two independent functions that could be explored including an independent body with close links to the UK Parliament and devolved legislatures; an expert committee; or a body accountable directly to the UK Parliament.”*¹⁴
- 30** The RSE strongly supports giving these and other functions to a new Independent Secretariat. It should not be accountable only to the UK Parliament but should have mechanisms for accountability to both the UK Parliament and the Devolved Legislatures. An expert committee would not have the constitutional status required to help improve intergovernmental relations as well as help to strengthen a successful UK Internal Market. The scope of the analysis carried out by the Independent Secretariat should extend to the many aspects of the UK Internal Market which are within the sole competence of the UK Government and Parliament to ensure that UK wide regulation (e.g. on state aid, competition law, company law and insolvency) is sensitive to the needs and aspirations of all four political units within the UK.

Should particular aspects be delivered through existing vehicles or through bespoke arrangements?

- 31** As stressed earlier in this response, RSE considers current arrangements to be inadequate in supporting consistent and successful intergovernmental relations. The Society is far from alone in this analysis, with a 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...”*¹⁵ in the United Kingdom.

- 32** In the White Paper the UK Government recognises the need in the UK Internal Market for *“independently-delivered functions removed from...”* the political influence of governments.¹⁶ The RSE considers that an Independent Secretariat should play the key role in guiding, developing and researching productive UK Internal Market practices. Such a body should provide a forum for contentious issues to be raised and potential solutions researched and developed.

How should the government best ensure that these functions are carried out independently, ensure the smooth functioning of the Internal Market and are fully representative of the interests of businesses and consumers across the whole of the UK?

- 33** To ensure an independent, representative and smoothly functioning UK Internal Market, the RSE, once again, highlights the importance that decisions are made in consultation, cooperation and communication with different levels of government.
- 34** As discussed, the Society considers that an Independent Secretariat should deliver the independent functions mentioned in the White Paper. It should also be tasked with additional functions in facilitating agreement between the UK Government and the Devolved Administrations on common frameworks, in assisting more generally in providing support for a revitalised, post-Brexit system of meetings between the UK Government and the Devolved Administrations on all aspects of common interest (including some matters that are matters of UK exclusive competence – e.g. trade deals, competition law, the State subsidy regime and its practical operation and any other matters with a capacity to significantly impinge on the UK Internal Market).

¹⁴ White Paper, paragraph 167

¹⁵ <https://publications.parliament.uk/pa/cm201719/cmselect/cmpublicadm/1485/1485.pdf> p41

¹⁶ White Paper, paragraph 155

35 The RSE welcomes the statement in the White Paper that:

“The devolved administrations will remain responsible for their own spending decisions on subsidies (how much, to whom and for what) within the architecture of any future subsidy control mechanism. We will continue to work closely with all the devolved administrations to seek to agree the shape of a UK-wide domestic subsidy control regime.”

36 The RSE believes that this constructive approach would be facilitated by giving the proposed Independent Secretariat the power to do, and to commission, research on State subsidy regimes and to facilitate the dialogue on this issue between the UK Government and the Devolved Administrations within a coherent and cross-cutting framework for Intergovernmental Relations in the UK. The Secretariat will need an independent budget provided for by the UK Government and the Devolved Administrations which is sufficiently large for it to have a strong core staff and to be able to commission outside research.

Additional Information

Any enquiries about the Advice Paper should be addressed to Craig Denham (cdenham@therse.org.uk).

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

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