

DRAFT

Obesity Action Scotland's response to UK government consultation questions on the White Paper on the Internal Market

1. 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?

No, we do not agree that the government should seek to mitigate against direct or indirect discrimination in areas which affect the provision of goods and services that are detrimental to public health.

Obesity Action Scotland is deeply concerned by the proposals outlined in the UK Government's White Paper (WP), in particular regarding the application of the principles of mutual recognition and non-discrimination. We believe these proposals, as currently framed, risk compromising the UK Government's commitment to maintain the 'Do No Harm' principle and the guarantee that "our high standards of health improvement, health security, food safety and environmental protection [will not] be compromised in any way [as we leave the EU]"ⁱ.

In his Foreword to the WP, the Secretary of State for Business, Energy and Industrial Strategy, Rt Hon Alok Sharma MP, says: "These principles will not undermine devolution, they will simply prevent any part of the UK from blocking products or services from another part while protecting devolved powers to innovate, such as introducing plastic bag minimum pricing or introducing smoking bans." Notwithstanding the Minister's statement, the WP appears to offer very limited circumstances, in which a devolved administration could over-ride the presumption of protecting the internal market in order to protect the health and wellbeing of its citizens: "The non-discrimination principle will allow scope for such differential treatment where this is necessary, for example, to address a public, plant or animal health emergency." (para 134). Such a defined emergency is not sufficient to deal with the chronic public health crises such as obesity or to ensure the protection of public health. The principles of any legislation should ensure the health-harming potential of goods or services is prioritised above business cost implications.

The nature and extent of public health problems can vary across UK jurisdictions. For example, the rates of overweight and obesity in Scotland have been slightly but consistently higher in Scotland than in England over the recent years,ⁱⁱ with Scotland earning the somber "fat man of Britain" or "sick man of Britain" reputation. It is right and appropriate that each administration is able to make their own assessment of how best to address the problems which each face within existing powers. The existing devolution settlement has allowed both the Scottish Government and the Welsh Assembly Government, for example, to implement minimum unit pricing (MUP) for alcohol within their jurisdictions. Previously, it enabled the Scottish Parliament to legislate to ban smoking in public places; an approach which was subsequently adopted by other UK jurisdictions. Even if the proposals do not actually preclude action by one UK administration, they could in practice undermine it, as it appears unlikely that regulation could be applied to goods and services from other UK jurisdictions. The WP specifically mentions the issue of labelling (para 49). The WP states "For example, if a good produced in Scotland, and adhering to the Scottish labelling regulations, can be placed on the Scottish market, it can also be placed on the English and Welsh markets without the additional need to comply with English or Welsh requirements." This could deter action by an individual administration to improve labelling as it would only apply to in-country production, thereby undermining its impact and placing local producers at a competitive disadvantage. Professor Nicola McEwen, Co-Director of the Centre for Constitutional Change, University of Edinburgh, in her recent blog considered effect of the proposed legislation on food standards "...if the Scottish Parliament decided to pass a law to limit the sugar content of goods produced in Scotland to tackle

the problem of obesity, it could not impose those standards on goods coming into Scotland from other parts of the UK, nor could it prevent those goods from entering the Scottish market, provided these satisfy regulations set anywhere in the UK. Such a law may also be challenged by Scottish producers as an unnecessary barrier to their ability to trade freely across the UK.”ⁱⁱⁱ

Furthermore, in the view of Professor Michael Keating, co-Director of the ESRC Centre for Constitutional Change, University of Aberdeen, the proposals would open the way for imported products that meet standards in one part of the UK to be marketed across the UK.^{iv} If a devolved administration tried to stop them, Professor Keating says, the UK Government could be in breach of the relevant trade agreement.^v

Such inability to protect population health in Scotland is unacceptable.

2. What areas do you think should be covered by non-discrimination but not mutual recognition?
N/A

3. What would be the most effective way of implementing the 2 functions outlined above? Should particular aspects be delivered through existing vehicles or through bespoke arrangements?

Obesity Action Scotland considers that any legislation seeking to facilitate the UK internal market should protect the existing rights of all UK and devolved administrations to legislate to protect and promote public health even where this may result in direct or indirect discrimination to the provision of goods and services, as long as they do so in a proportionate way. The proposed legislation does not allow this. The wording of para 134 of the WP regarding discrimination only in “public health emergency” clearly sets a far higher bar than that of the “protection of health” in the EU legislation.

Current European Single Market rules recognise and allow for policy objectives alongside market economic considerations, and they are not a barrier to trade. The Scottish Government in their response to this consultation stated that “barriers can be permitted if they serve a legitimate policy objective and can be justified as relating to the protection of public safety, health or the environment.”^{vi} We agree with this view.

We consider that Article 36 of the Treaty on the Functioning of the European Union (TFEU) provides a good starting point for any UK provisions:

“The provisions of articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ... the protection of health and life of humans ... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member states.”^{vii}

4. 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?

The WP envisages new governance arrangements building on existing intergovernmental relations (IGR), para 154 “ensuring a strong basis for political decision-making, oversight, and dialogue in relation to the Internal Market,” but without detail of what this would mean in practice it is difficult to comment. We note, however, comments by Professor Michael Dougan, of Liverpool Law School, that “*a laissez faire approach by the UK’s governments could open the door to private individuals and*

businesses using legal disputes before the courts, inviting the judges to articulate the basic principles that should govern the character and operation of trade relations between England, Scotland, Wales and Northern Ireland.”^{viii}

As public health advocates we know only too well that the threat of litigation can create regulatory chill among decision-makers. Given the recent experience of the MUP legal challenge launched by the Scotch Whisky Association against the Scottish Government, which took almost five years to conclude, those considering regulation are likely to think long and hard about not only the likelihood of winning a case but the opportunity costs of the process. It is therefore, essential that any system minimises the potential for legal action to deter, disrupt or delay legitimate action by governments to protect public health.

Final remarks:

In conclusion, we would note that public health and a sound economy should not be seen as - or placed in - opposition to one another. A good state of public health is essential to maintaining as healthy and productive a workforce as possible and, in turn, to securing our economic prosperity as we leave the EU and as we continue to respond to the coronavirus crisis. It should be possible to balance the protection of public health with the needs of the internal market in a proportionate way – as has been achieved in the EU over decades. In the long term, such protection will benefit the economy through stronger and more resilient workforce and reduced healthcare costs. The proposals in this paper put action on population health measures at an unacceptable disadvantage. We therefore do not support them.

ⁱ Then Secretary of State for Health and Social Care, Rt Hon Jeremy Hunt MP, 18 April 2018, <https://bit.ly/2HaMvfz>

ⁱⁱ Scottish Government (2019) Scottish Health Survey 2018. Main Report

ⁱⁱⁱ McEwen, N. (2020) Proposals for a UK internal market law: a sledgehammer to crack a nut? Centre for Constitutional Change, University of Edinburgh <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/proposals-uk-internal-market-law>

^{iv} Professor Michael Keating, Co-Director of the ESRC Centre for Constitutional Change, blog at: <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/response-internal-market-white-paper>

^v By email, Professor Michael Keating, 5 August 2020

^{vi} Scottish Government (2020) Factsheet - UK internal market: initial assessment of UK Government proposals <https://www.gov.scot/publications/uk-internal-market/>

^{vii} Op cit, UK Supreme Court, para 3.

^{viii} Professor Michael Dougan, briefing paper for the Finance and Constitution Committee of the Scottish Parliament, Roundtable Discussion on the UK Internal Market (19 June 2019)