

RESPONSE

by

THE FACULTY OF ADVOCATES

to

THE UK INTERNAL MARKET WHITE PAPER CONSULTATION

Introduction – The Faculty of Advocates is the independent referral Bar in Scotland. The Faculty has been invited by the Scotland Office to respond to the consultation questions in the UK Internal Market White Paper, and therefore offers comment on the proposals in the Paper, as outlined below.

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?

1.1 The issue of what the UK government should or should not do is a policy matter, on which we do not offer comment. We do, however, note areas in which the practical operation of the proposed principles would benefit from greater clarity and possible supplementation.

1.2 The proposed principles are:

- mutual recognition – that an item produced in any part of the UK and capable of sale there can be sold in any other part; and
- non-discrimination – that one part of the UK cannot afford to goods or services originating in another part of the UK treatment which is different and unfavourable compared to the treatment it affords to its own goods or services. Paragraph 135 appears to indicate that both direct and indirect discrimination will be unlawful.

1.3 In light of these stated aims, it is instructive to consider how a measure which a devolved administration considers necessary on the basis, for example, of the health of citizens in that part of the UK, could be implemented in future.

1.4 If the devolved administration in Wales, say, were to decide to introduce a measure limiting the quantity of sugar in soft drinks sold in Wales, that would appear to be a provision related to composition of a product, as referred to in paragraph 133. Yet a soft drinks manufacturer based elsewhere in the UK might wish to continue to sell its drinks in Wales, despite their containing a higher quantity of sugar. It is not wholly clear whether that manufacturer would be lawfully able to sell its products, disregarding the provision on the basis of entitlement to sell in other parts of the UK (the mutual recognition principle), or whether the measure would be unlawful from the outset because of its differential effect on products from elsewhere in the UK (the non-discrimination principle). Either way, it is difficult to envisage the possibility of introducing a measure which would in fact curtail the availability and hence consumption of sugary drinks in Wales.

1.5 The White Paper also refers to the position concerning international trade, dealt with in the Trade Bill currently progressing through the Westminster Parliament. According to paragraph 124, having power to 'deal with regulatory barriers within a country [helps] its ability to develop and implement ambitious trade deals'.

1.6 The most controversial issue in Scotland in recent years concerning the interaction of freedom to trade with restrictions based on public health has been the minimum pricing of alcohol. The potential for the legislation to operate as a measure having effect equivalent to a quantitative restriction on imports was highlighted by the Scotch Whisky Association. It required to be ascertained, in litigation before the Court of Session, the European Court of Justice and the Supreme Court,¹ whether the national rules could be justified on grounds of the protection of human health under Article 36

¹ *Scotch Whisky Association v Lord Advocate*; sequential stages reported at 2013 SLT 776; [2016] 1 WLR 2283; 2017 SC 465 and 2018 SC (UKSC) 94.

of the Treaty on the Functioning of the European Union. Issues of proportionality as a matter of fact, ultimately assessed by the Court of Session, whose decision was appealed to the Supreme Court, were addressed at the domestic level.

1.7 It is not clear to us whether a like measure, considered to be justified on grounds of health, could be implemented in future under the regime proposed in the White Paper, combined with the provisions of the current UK Trade Bill. It appears that the whole question of the minimum pricing of alcohol is in contemplation within the White Paper, as there are eight publications in the 'References' section of the White Paper relating to alcohol (consumption and/or minimum pricing), but the topic is not mentioned specifically in the paper itself.

1.8 Given that there is a stated intention to respect the devolution settlement (paragraph 3 of the Introduction to the White Paper) and the position of the UK Government that

'Every decision that a devolved administration could make before exit day, they can make afterwards';² and

'Frameworks will also maintain, as a minimum, the same degree of flexibility for tailoring policies to the specific needs of each territory as was afforded by the EU rules'.³

the Faculty considers that there is scope for inclusion of a further principle which will secure these aims. This would ensure the continued ability of the devolved administrations – governments and legislatures – to adopt measures which, albeit they may have an effect on trade, are a proportionate means of addressing a different goal, such as the maintenance or improvement of public health, within their

² Department for International Trade website, Guidance dated 20 March 2020 <https://www.gov.uk/government/publications/trade-bill/trade-bill>

³ White Paper, paragraph 89

jurisdiction. The reach of such a principle would benefit local solutions in the field of services as well as in relation to goods.

1.9 Moreover, there may be at least one situation where direct discrimination on the basis of place of origin of products will require to be permitted under the new regime. The Faculty is aware of the intention of the UK Government to maintain protection of particular descriptions of products according to their geographical origin. The GI (geographical indicator) schemes are to 'provide a set of rules to protect the geographical names of food, drink and agricultural products'.⁴ It is not clear to the Faculty how these schemes will operate within the UK under the arrangements for non-discrimination in the marketing of goods. Without provisions to prevent the sale of products which inaccurately use such a geographical indicator label, it is difficult to see how such protections can operate, but it is also difficult to see how they will be reconciled with a principle of non-discrimination within the UK. Paragraph 134 of the White Paper states

Direct discrimination is where an individual or business is treated differently and unfavourably by another administration, in an explicit manner, compared with local operators when operating in another part of the UK, expressly on the grounds of residence or geographical origin.

1.10 If Clotted Cream were to be produced in Wales, labelled as 'Cornish' and then prevented from being sold in Cornwall, that would appear to constitute differential treatment of a business based on the geographical origin of its product. This may be capable of being addressed by legislative provision containing a clear and express exception for products protected in this way. That seems to us indicative of the likely complexity of the interaction of the principles set out in the White Paper.

1.11 Turning to other parts of the White Paper, it may not have been understood that, in many areas, there has been legislation tailored to circumstances in Scotland since

⁴ <https://www.gov.uk/guidance/protecting-food-and-drink-names-if-theres-no-brexit-deal>

long before the legislative and administrative devolution effected in 1998. Taking construction as an example, the White Paper states

If England and Scotland diverged on their approach to building regulations or processes for obtaining construction permits, it would become significantly more difficult for construction firms to design and plan projects effectively across the UK.⁵

1.12 Scotland has had its own building regulations for some decades, yet the modelling conducted by the Department for Business, Energy and Industrial Strategy and the Treasury and set out in Annex A appears to be postulated on there being unified regulation at present.⁶ The Building (Scotland) Act 1959 created the power to pass secondary legislation relating to building standards for Scotland, exercised first in the Building Standards (Scotland) Regulations 1963 and consistently since then. Yet the ability to legislate differently frequently results in standards that are very similar. De facto alignment has evolved naturally, and operates satisfactorily in many areas.

1.13 In relation to professional services, paragraph 97 of the White Paper states that the UK Government plans to review the objectives for regulating professions and recognising international qualifications.

The Government wants to make sure that professional qualifications support a productive economy and help maintain workforce supply after the end of the Transition Period. These findings will be implemented alongside, and will work together with, the approach to professional qualifications in the UK Internal Market.⁷

1.14 Again, the existing arrangements may need to be mentioned. So far as professional regulation is concerned, Head G of Schedule 5 to the Scotland Act 1998 reserves only regulation of the health professions, and the regulation of architects and

⁵ at paragraph 17

⁶ For example, at pages 84 to 85 of the White Paper.

⁷ Paragraph 97

auditors. Regulation of other professions, such as law and accountancy, is devolved, and has in fact been the subject of devolved legislation in relation to the legal profession.⁸ Where the different United Kingdom jurisdictions have separate rules regulating access to professions, there are already rules in place that allow transfer/cross-qualification from one part of the United Kingdom to other. That approach generally works satisfactorily; we see no case for any different regulatory approach simply as a result of leaving the European Union.

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

2.1 We are not in a position to identify areas which should be covered by one but not the other. At a practical level, an area of operation of non-discrimination, especially where indirect discrimination is concerned, is difficult to conceptualise as a principle separate from mutual recognition. The prohibition of indirect discrimination appears to be the corollary of mutual recognition.

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

3.1 It appears to the Faculty that there are several levels at which 'legal architecture'⁹ will be required. Our comments can only be offered at a level of generality, based on our experience of working within the current 'internal market', namely the systems operated by the EU. These systems provide for the framing of policy, achieving implementation of it locally, and resolving any disputes which arise as to compliance, either with the policy set or with general principles according to which the market is organised.

⁸ Legal Services (Scotland) Act 2010. The same position obtains in Northern Ireland, where there is also devolved legislation about legal services: Legal Complaints and Regulation Act (Northern Ireland) 2016.

⁹ paragraph 94 of the White Paper

3.2 Thus, there is the question of designing the apparatus for setting policy by the use of common frameworks. Such design would, itself, involve negotiations among representatives of the four constituent parts of the United Kingdom. The necessary outcome would be processes allowing the relevant representatives of the governing arm in each jurisdiction within the UK to negotiate, from time to time, regarding any subject matter where frameworks are thought to be needed. Attention will require to be paid to how the interests of England are to be represented in such negotiations, so that the resulting apparatus forms a method of agreeing common policy in any area where it is required. The apparatus will also have to provide for the agreement reached on any area to be recorded in an instrument according to which each constituent part would then legislate as necessary for its territory in a given subject-area.

3.3 If there is no agreement in a particular area, an individual administration may then introduce a regulatory measure on its own initiative. Alternatively, an administration may introduce a measure which is alleged to breach an agreed common framework. In either situation, there may be challenge of the measure introduced. It appears to the Faculty that the ultimate method of resolving the issue will necessarily be through the Courts, as occurred with the alcohol minimum pricing litigation. There are a number of reasons for that: fundamental legal and economic rights are engaged; courts are experienced in the interpretation and application of statutory schemes such as will necessarily underpin the operation of these principles; and a transparent and independent decision-making process is necessary for consumer and business confidence.

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?

4.1 The chances of smooth functioning would appear to be maximised by clear provisions concerning the applicable principles, a fully articulated and representative mechanism for the reaching of agreement in relation to matters to be covered by common frameworks, and a well-understood method of resolving disputes by application to a court, where agreement proves impossible or alleged breach has occurred.

Edinburgh

10 August 2020