BRC response to UK Internal Market Consultation

Our key conclusions on the plans

- We believe there is a wider consumer benefit in terms of supply chains, marketing and price of consumer goods for a combination of measures, whether by common standards frameworks, bolstered by legislation where appropriate, to create a new underpinning for the UK Internal Market. This allows goods to move freely within the UK market (the provisions of the Protocol excepted) while maximising choice, availability and quality for consumers.

- We note the research evidence within the consultation paper which estimates that the tariff-equivalent of not acting could initially amount to 2-3% on costs for the retail industry, rising to between 6-8% if divergence accelerated. Retail in the UK operates on the basis of supply chains across the four UK nations and are sensitive to regulatory divergences which can increase costs ultimately met by consumers.

- Retailers generally operate a single pricing strategy for the UK so all consumers get the best value wherever they live. Increases in cost from regulatory divergence within the UK will lead to higher prices for consumers.

- We find merit in the interaction between the "5+2" formula on common frameworks and devolved powers within the European Union (Withdrawal) Act 2018 and the proposals here for measures to further underpin the UK internal market.

- We would seek further clarity on the concept of "unfettered" access of goods from NI to the GB element of the UK internal market and how this will be guaranteed by forthcoming statute and how consumers could benefit from this approach.

- We would seek further details on how UK negotiated trade deals will operate in NI, given that NI will not have access to EU trade deals, but EU products and inputs may circulate in NI. Clarity on how "venue shopping" could be avoided which in itself may create distortions in the UK Internal Market is required.

Introduction

The British Retail Consortium (BRC) is the UK trade association for retailers. Our members include online and non-food retailers, including household furniture and home improvements, clothing, footwear, textiles, medicines, cosmetics, and many of the major food retailers, who between them account for over 60% of the UK's grocery sales, as well as several food-to-go companies.

Retail is an exciting, diverse and dynamic industry undergoing transformational change. The BRC is at the forefront – enhancing, assisting, informing and shaping. Our mission is to make a positive difference to the retail industry and to the customers it serves. Our broad range of stakeholders demonstrates how retailing touches almost every aspect of our society. The BRC leads the industry and works with our members to shape debates and influence issues and opportunities that will help make that positive difference.

We care about the careers of people who work in our industry, the communities retail touches and competitiveness as a fundamental principle of the industry's success – our 3Cs.

In addition to publishing leading economic indicators on UK retail sales, footfall and shop vacancies in town centres, our policy positions are informed by our over 160 strong membership and determined by the BRC Policy Board.

We welcome the opportunity to contribute to the BEIS consultation on the UK Internal Market Consultation Paper and future legislation.

The UK Internal Market after leaving the EU Single Market

EU legislation has played a significant role in underpinning the UK Internal Market since 1973, particularly that legislation surrounding product standards and regulations. This has afforded a common regulatory approach even in an era where powers have been devolved to Parliaments in Scotland and Wales and the Assembly in Northern Ireland.

As the UK leaves the Single Market and Customs union on 31 December, we recognise that without an appropriate policy response in the UK, there would be no legal underpinning of common standards within the UK on goods in those areas devolved to Edinburgh, Cardiff and Belfast, and the potential for product divergence would rise, alongside costs for retailers and consumers. In non-devolved areas, some products and services would be covered by UK-wide regulation (excluding those areas subject to the Protocol on Ireland/Northern Ireland), but in devolved areas such as food and plants, four nation divergence could emerge quickly in the UK. There requires therefore to be a policy response plus new institutions set up to supervise and enforce the powers until 31 December residing with the European Commission.

We note that the UK Government has chosen a different model to that within the EU Single Market. The Single Market created a distinction between harmonised, highly-regulated goods and non-harmonised goods. Harmonised goods could only circulate if they were made and marketed under the same regulations with common approaches to marketing, labelling and consumer rights in respect of those goods. Common means of market surveillance, inspection and enforcement derived from EU rules in place across all 28 member states. Non-harmonised goods could be lawfully marketed in all member states owing to the principle of mutual recognition building upon principles from EU caselaw. This meant that within the Single Market, for goods such as furniture, goods manufactured lawfully in terms of UK rules could be lawfully placed on the market in the other 27 member states. This principle goes significantly beyond the "mutual recognition" ideas found in other trade agreements or relationships, such as Australia-New Zealand.

The UK Internal Market proposal by contrast attempts to provide a legal underpinning to the right to market goods across the UK (subject to the terms of the Protocol) by virtue of the common frameworks (where these are established) with the underpinning of legal rights to mutual recognition of (devolved) product regulations and standards across the four UK nations, supported by a right of non-discrimination applicable to trading companies in each of the four UK nations.

We have concerns with the potential of devolved administrations introducing new rules on product composition (e.g. product-specific compositional rules) for certain products particularly in food, and labelling. We would also have concerns about regulatory encroachment from voluntary measures in addition to mandatory

measures. On top of the costs which could be incurred by businesses in having to adapt their products and labels to meet local requirements, there are additional costs relating to the familiarisation with different rules and conformity and qualification costs, as highlighted in the white paper, as well as operational costs. Using an example provided in the Consultation Paper to illustrate just a fraction of these costs, is the cost of creating new product labels, which can range between £4K-£7K per label. On top of these consideration must be had to operational costs relating to changes in product runs to change a label, etc. Increases in cost from regulatory divergence within the UK will lead to higher prices for consumers.

We also have concerns about the level of complexity and confusion this would create for consumers, potentially leading to loss of credibility in the robustness of local food standards. Another area of concern is in relation to enforcement, when different rules apply in different countries. Retailers generally operate a single pricing strategy for the UK so all consumers get the best value wherever they live.

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On other products, some members have expressed concerns about the proposed mutual recognition principle being capable of being influenced by commercial or input cost pressures. It could create a distortion on supply chains in different nations (ie. displacement of activity as those suppliers in the UK nations with the highest standards are effectively undercut by goods with lower standards elsewhere in the UK. On maintaining high standards but not involving unnecessary cost, some members have advocated a framework which provides for minimum common standards - for production and imports – to apply in GB, taking account of the special status of the Protocol, and what it means for goods in NI.

Answers to the Consultation Questions

1. Do you agree that the (UK) Government should seek to mitigate against both 'direct' and 'indirect' discrimination in areas which affect the provision of goods and services?

   If direct and indirect discrimination are to receive similar definitions to those in the Equalities legislation, we would see a strong case for legislating against discriminatory practices on goods and services on both grounds. Direct discrimination would be the adoption of a clear rule to keep out products or classes of product from one or more parts of the UK from another, eg. labelling or compositional requirements. Indirect discrimination would be the adoption of a rule which is ostensibly non-discriminatory, but which can only or is far more likely to be met by producers, manufacturers or those marketing goods in one part of the UK rather than any of the others. Labelling could potentially fall into this category too depending upon the design of the policy.

   Any such legislation would have to take account of the special place and legal status of the Protocol in terms of trade in NI, and how it is enforced but regulatory coherence across the four UK nations is important.

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

   Mutual recognition could cover goods which are not highly regulated (akin to the EU Single Market model) as well as food. The mutual recognition principle will have to take account of the terms of the Protocol in any case in NI, whereby certain goods may not be marketed in NI if they are not in conformity with the Protocol acquis. Electrical and industrial goods, chemicals and pharmaceuticals will continue to be regulated on a cross-GB basis so would not require a mutual recognition principle as they can already be lawfully marketed in England, Wales and Scotland. Regulation in NI in these areas will be determined by the Protocol. Nevertheless, the non-discrimination principle could continue to apply in all these sectoral areas, even if the mutual recognition principle does not.

   By contrast, services (not covered by the Protocol) could be subject to the mutual recognition principle in NI and the other three UK nations.

The non-discrimination principle should cover all commercial activity (taking account of the Protocol in NI) and should be drawn widely enough to capture this. While it is intended that the non-discrimination duty does not cover tax or fiscal measures, these can have an effect on fair competition, and the future of supply chains across the four UK nations. Some members have expressed concerns about lower cost inputs sourced from other trading jurisdictions, so the interplay between this non-discrimination principle, and UK state aid rules, together with the impact the Protocol has on companies (even from GB) operating in NI is important to consider and get right.

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?

   The two functions could be implemented by giving commercial actors a right to seek enforcement of the principles by an independent regulatory body (while taking account of the particular enforcement powers within the Protocol) which could itself issue binding guidance or decisions upon private sector actors or the devolved administrations. It would be important that such guidance or decisions should apply and be followed by the UK, Scottish and Welsh Governments, and in areas not governed by the Protocol, in NI too. In areas governed by the Protocol in NI, then the regulator should not act in a way contrary to the regulatory processes established under the Protocol on market access in NI.

   The alternative would be to provide commercial actors a right of action against any breaches of the two principles by litigation. This could involve a right of action against another commercial actor or the UK Government or devolved Government or Executive concerned, but not for the regulator to have strong enforcement powers of its own. We believe there are stronger merits in the former approach, but companies require clarity on how their rights can be efficiently enforced at as low a cost as possible.

   Additionally, an existing (eg. the Competition and Markets Authority) or a new bespoke regulator could be given the role of reporting on practices across the four UK nations on the marketing and availability of goods, and on how high and low-regulated products are circulating in GB (and where appropriate in NI). This regulatory body could assume a key role in relation to surveillance, detection, reporting and dealing with complaints from companies raising issues

of discrimination. Close monitoring of how the Protocol operates in NI, and how that affects enforcement of decisions or guidance by the regulator is vital.

We would not propose any alteration in the role of the Law Officers by recommending powers of legal enforcement by the regulator in pre or post-assent legislative processes in any of the devolved legislatures. There could however be a new duty upon the UK Parliament and devolved legislatures to issue reports accompanying new legislation providing results on assessments that any new legislative measures proposed to be adopted do not cause detriment to intra-UK trade.

We would envisage the new regulatory powers and mechanisms working in tandem with the common framework arrangements (where these can be set up and continue to function effectively). Functional common framework arrangements could act front and centre in resolving intra-UK legislative and regulatory disputes before any recourse to legal processes.

4. How should the (UK) 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?

   Surveillance, monitoring and enforcement functions could be given to an existing or new statutory independent regulatory body (as set out in answer 3 above). Appointments to the monitoring board of this body could reflect consumer and business interests as to how the statutory duties of mutual recognition and non-discrimination should be applied and monitored. There should also be business and trade body representation from all four nations of the UK.

   In light of the potentially negative consequences of regulatory divergence for UK businesses, the legislative underpinning for the UK Internal Market should seek to ensure not only that discriminatory measures are swiftly remedied, but also that such discriminatory measures do not arise in the first instance. In this regard, the Human Rights Act 1998 is potentially a useful precedent. Under s. 19 (1) (a) of that Act, the relevant UK Government minister in charge of introducing new primary legislation is required to provide a view as to whether the provisions of a proposed bill are compatible with the rights enshrined in the ECHR. Introduction of a similar mechanism – which could require UK

government ministers and or ministers of the devolved administrations to attest that, in their view, a new measure is compatible with the principles of mutual recognition and non-discrimination as they apply to the UK Internal Market – could provide reassurance to businesses. Such a principle could be extended to delegated legislation too.