

The UK Internal Market Michael Keating Professor of Politics, University of Aberdeen and Director of Centre on Constitutional Change Scottish Parliament Finance and Constitution Committee

Economic Unions

1. Economic theory recognizes different stages of economic union. These include:
 - a. A free trade area, in which there are no tariffs or quantitative restrictions;
 - b. A customs union, in which there is a common external tariff with third countries;
 - c. A single common, or single market, in which non-tariff barriers, including regulatory standards and government procurement rules are eliminated;
 - d. Monetary union, with a single currency.
2. The European Union has long been committed to economic and monetary union and aimed to complete a single market in the 1990s although in some respects that is still to be achieved.
3. Great Britain has had free trade and a customs and monetary union since the Anglo-Scottish union of 1707. It took a little longer for the United Kingdom to reach this stage after the Irish union of 1801.
4. It is widely assumed that the UK is a single market, but this has never been spelled out. Before devolution, it hardly mattered. In the devolution statutes, the only reference is in the Northern Ireland Act. Lord Hope, in *Imperial Tobacco*, argued that such a principle could be derived from the devolution acts, but this has never really been followed through. Otherwise, it is the provisions of the EU Single Market that largely secures the UK's own single or internal market.

Brexit Effects

5. Brexit removes this European framework. The initial response from the UK Government was that this meant that there was a need to secure the 'UK single market'. It then changed the formulation to UK 'internal market'. This does not alter the basic issues at stake.
6. The analogy with the European Single Market was, however, misleading since that works according to principles and institutions embedded within the distinct EU regulatory order.
7. The EU Single Market is a unifying process, creating something that did not previously exist. Provision for the UK internal market would be to retain something that already exists.
8. It is a transversal principle, cutting across competences and often invoked in unanticipated ways
9. It is built according to the 'community method' by which the Commission initiates measures and the Council of the EU, representing member states, decides, usually by qualified majority voting.
10. It is policed by the Commission and the Court of Justice of the EU.

11. Measures are subject to the principles of proportionality (they must be no broader than necessary) and subsidiarity (taken at the lowest level possible).
12. The principle of mutual recognition means that products approved under the regulation of any member state can be marketed in any other member state.
13. The UK devolution settlement lacks any comparable features.

Discussions so far

14. Intergovernmental negotiations on resolving these issues have taken two tracks.
15. There are discussions around a list of specific competences that might be subject to UK-wide sectoral frameworks. These include regulations (notably in agriculture and the environment) and subsidies including agricultural support and aid to industry.
16. There is discussion around the appropriateness of a broader, transversal framework to pick up issues that might not fit into the detailed framework or were unanticipated.
17. This has produced a debate around the concept of the UK internal market, its meaning and scope.
18. There is wide agreement that it would be desirable to avoid regulatory barriers to trade and movement of people around the UK; much of this might be address in the sectoral frameworks.
19. There is also broad agreement on the need to avoid unrestricted competition over state aids, which could impoverish all the nations without adding to the sum of development.
20. There is, however, scope for disagreement on how far internal market principles should go, as there has been in the EU.
21. Some of this concerns the concept of the market itself and how far it should be subject to regulation or subordinated to social principles. Rules in public procurement favouring local suppliers, or defining a service as an essential public service, could be contentious. Support for ferries has been a problem in the past. If contracting out of health services is extended in England, or brought in through internal trade deals, private providers might demand that it be extended to Scotland, Wales and Northern Ireland. Tobacco and alcohol regulation might be affected; they have already provided challenges.

Frameworks

22. Another issue concerns the form of frameworks and whether they would be statutory. If they were, this could provide an opportunity for private interests to use the courts to challenge government regulation.
23. There is the question of how frameworks could be negotiated. The UK Government agrees that they would be subject to consent from the devolved legislatures but, as the EU Withdrawal Act now makes clear, none of the various consent mechanisms prevents the UK Parliament from acting unilaterally. That is very different from the EU model and arguably amounts to little more than consultation.
24. The internal market could thus become a mechanism for centralization, especially if it were defined in broad terms. It was these concerns that led to the reinforcement of the proportionality and subsidiarity principles in the EU.

25. To be a genuinely UK measure, an internal market principle would have to apply to England. Yet there is no mechanism in the present devolution settlement for England to be subordinated to an overall UK provision. Westminster legislates for both. The UK Government speaks for both England and the UK. Short of a federal UK and the demarcation of England from the UK, there is no complete answer to this, but the Welsh Government has suggested a Council of the United Kingdom, to work on similar lines to the Council of the EU.

26. There is a question of the relationship between whatever machinery is set up to deal with the internal market and the sectoral frameworks being discussed elsewhere.

27. It has been suggested that there will be a need for some analytical capacity to examine how the internal market should be defined and how specific issues might relate to it. This might take the form of an intergovernmental secretariat, with operational independence from both the UK and devolved governments.

Wider Considerations

28. The UK internal market will not be isolated but will be subject to trade agreements and other international treaties (for example on the environment). These will allow products and services to be offered throughout the UK, although they might be in areas subject to devolved regulations. This could be contentious, if standards differ. It does suggest that there needs to be provision for devolved governments to participate in international negotiations where devolved competences are at stake. Again, the UK Government has proposed consultation.

29. It is by no means clear whether any of this will really matter. It may be that any distortions to the UK internal market caused by devolved policies will have little effect in the larger order of things. If the Scottish Government were to continue to provide production-linked payments to farmers for sheep, it might disadvantage farmers in Wales and Northern Ireland, but the UK Government may not see this as a major issue. It may, indeed, be the case that devolved governments will not have the means to continue such payments. Minor regulatory differences may also not matter, unless private producers decide to take them to court, if that is allowed.

30. The principle of the internal market cannot be separated from that of competition. The matter might be left to whatever competition policy is adopted after Brexit. The role of the Competition and Markets Authority might be important.

31. The principle of the internal market also needs to be set against the problem of economic disparities. The EU itself has recognized that the single market may exacerbate spatial inequalities, as some places are better placed to compete. For this reason, it has put in place structural and cohesion policies and allowed states to provide aid to businesses in specified lagging areas. The UK no longer has UK-wide regional policy, as it did in the past. The proposed Shared Prosperity Fund (as David Bell demonstrates) will not be able to provide the resources to overcome these disparities. A UK internal market framework would at least need to take into account the need for active regional development

policies on the part of the devolved governments themselves, while avoiding the dangers of a free-for-all in state aids.

32. The concept and implications of the internal market remain politically charged issues. There may be a role for professional advisors in helping define the issues and providing evidence. There is also a role for civil society actors to express the views of business, trades unions and social actors. Ultimately, however, these will be matters for political decision.

Spain

33. In 2013, the Spanish Parliament adopted a Guarantee Law of the Unity of the Market. The intention was to complement EU Single Market provisions by limiting the ability of the regions to impose obstacles to economic operators from other regions.

34. The basic principles are: non-discrimination; cooperation and mutual confidence; necessity and proportionality; efficacy; simplification; and transparency.

35. There is a Council for the Unity of the Market, representing the central government and the regions.

36. It is supported by a Secretariat, which undertakes analysis and examines good practice.

37. Much of the detailed work and resolution is passed to the various Sectoral Conferences, which are the main bodies managing intergovernmental relations.

38. Governments, business associations, firms or others can raise cases. There is an elaborate set of mechanisms for resolving disputes, starting with the Secretariat and going to the Council. Appeal is possible to the Markets and Competition Authority. Eventually, matters can come to the Courts under administrative law provisions, but the intention is clearly to avoid this where possible.

39. Critics argued that this was unnecessary and should be confined to matters where there was already a state-wide law; that the mutual recognition provisions allowed regions to effectively overturn the law in other regions.

The Catalan Government regarded it as a recentralizing measure and appealed it to the Constitutional Court.

40. In 2017, the Constitutional Court upheld some of these objections, including mutual recognition where there is not a national law, and the provision suspending regional laws while they were being appealed.

41. It is too early to say how all this is working.