

MAINTAINING THE UK INTERNAL MARKET FOR FOOD STANDARDS: FRAGMENTATION, COOPERATION OR CONTROL?

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KEY POINTS

- Post-Brexit food standards governance requires piecing together three new processes with very different – even opposite – implications.
 - Retained EU law gives devolved nations independent control over domestic food standards and allows ministers to make new rules in these areas.
 - Common frameworks aim to create harmonised food standards across the UK.
 - The Internal Market Bill (IM Bill) makes it very difficult for devolved nations to restrict or impede imports from other devolved nations.
- Putting these pieces together provides a picture that is unfavourable to the regulatory and political autonomy of Scotland and Wales.
- The IM Bill's market access requirements could override agreed harmonised standards set out in common frameworks, which are cooperative and consultative rather than legislative.
- The IM Bill also undermines permitted devolution as England's larger size and market power may make it difficult for devolved nations to maintain different regulations. Key IM Bill requirements also apply to imported goods, suggesting that devolved nations would not be able to ban or restrict products admitted as a result of new Free Trade Agreements.
- House of Lords' amendments address some of these problems by strengthening common frameworks and reducing the discretionary power of the Secretary of State to amend key elements of the Bill.
- The core of any approach to an internal market as integrated as the UK's should clearly be harmonised rules with a strong joint consultative process underlying them.
- Strengthening common frameworks would be an important step toward preserving the Union post-Brexit; primary legislation for core food standards areas, developed through an intergovernmental approach, is another route to providing a legislative basis for more harmony in food standards across the nations of the UK.

INTRODUCTION

Food standards raise important questions about how the UK will govern future trade, not only with other countries but also between the nations of the UK: the so-called internal market. Widespread public concern about weakening food standards¹ is being managed differently by the UK's constituent governments, with a clear rift between England and Scotland. Thus, food standards have become an existential issue, threatening to determine what an independent United Kingdom looks like – and even whether it will be possible to refer to it as 'united'.

As well as being politically-charged, food standards are highly technical. Post-Brexit food policy and legislation reveals significant changes to both *how*, and also *where*, regulation takes place. In this Briefing Paper we take stock of these developments. We conclude that the overriding outcome is the consolidation of power in the central UK Government, raising significant - and still unresolved - constitutional and trade questions.

THE POST-BREXIT FOOD STANDARDS JIGSAW

Post-Brexit food standards governance requires piecing together three new processes with very different – even opposite – implications:

- (1) So-called secondary legislation that preserves and amends EU law – a category known as 'retained EU law'
- (2) A UK-wide food safety and standards 'common framework'
- (3) The UK Internal Market Bill.

Under retained EU law (1), the devolved nations have powers to amend domestic food standards regulation independently of one another. These would allow, for example, Scotland to maintain a ban on the dreaded 'chlorinated chicken' even if England decided to allow it.

The developing common framework (2) aims to counter this problem by creating unified standards informed by a collaborative risk assessment process. This process is driven by cooperation and consent and it is ongoing. Through this process, England, Scotland and Wales can agree to maintain a unified

1 IPPR, Public willing to sacrifice US trade deal to protect food safety (07.04.18): <https://www.ippr.org/news-and-media/press-releases/public-willing-to-sacrifice-us-trade-deal-to-protect-food-safety>. Which, National Trade Conversation (Nov 2020): <https://campaigns.which.co.uk/trade-deals/national-trade-conversation/>

approach to the risk assessment underlying the ban on chlorinated chicken.

Finally, the Internal Market Bill (IM Bill) (3), like the common framework, also attempts to deal with regulatory divergence but in a completely different way: by requiring, with very narrow exceptions, all devolved nations to import and sell food products (alongside other products and services) from all other devolved nations. This means that if England decided to allow chlorinated chicken, Scotland wouldn't be able to prevent such chicken from being sold in its shops, even if it maintained a domestic ban. The IM Bill also challenges arrangements for Northern Ireland made in the EU-UK Withdrawal Agreement; to avoid introducing even more complexity, we sidestep those issues here.

In the subsequent sections, we say a bit more about each of these areas and how they fit together.

RETAINED EU LAW: CONSOLIDATING POWER BUT ALLOWING DIVERGENCE

In our previous analysis² of retained EU law for specific areas of food law – pesticides, GMOs and food hygiene – we noted that these follow a similar trend: while retained EU law initially maintains EU rules, ministers are provided with powers to make new rules in these areas. These powers would enable ministers to lower levels of protection for public and environmental health in the UK without full parliamentary scrutiny and with weakened requirements to take account of independent scientific risk assessment.

These changes consolidate power, but they also devolve power far beyond what was permitted under EU rules: England, Wales and Scotland could all have their own separate approach to food standards. If they did, questions would arise about how to maintain an open UK internal market, in other words, how would farmers and food producers cope with many different requirements in different nations in the UK, and would we need border checks at Gretna Green³ or along the River Dee to prevent products banned in England from entering Scotland and Wales or vice versa? It is precisely this problem that the subsequent two processes address, though in very different ways.

2 UKTPO Briefing Paper 39: <https://blogs.sussex.ac.uk/uktpo/publications/brexit-food-safety-legislation-and-potential-implications-for-uk-trade-the-devil-in-the-details/>

3 UKTPO blog: 'Border posts at Gretna Green? Loosening food safety legislation could put Union under serious strain': <https://blogs.sussex.ac.uk/uktpo/2019/11/05/border-posts-at-gretna-green-loosening-food-safety-legislation-could-put-union-under-serious-strain/>

COMMON FRAMEWORKS: FOOD LAW MADE THROUGH COLLABORATIVE EFFORT

In the past, EU rules provided the 'glue' of the UK's internal market, largely by harmonising rules for product standards, which may, after 31 December 2020, be amended at the discretion of Ministers under the retained EU law described above. The need to replace this potentially divergent system with a unified approach to food law has been recognised by both the UK Government and the devolved administrations.

The Joint Ministerial Committee (JMC) is the main mechanism for inter-governmental cooperation in the UK. A JMC sub-committee was formed in response to Brexit in October 2017 and set out principles for cooperation between the UK Government and devolved nations on developing UK-wide legislative frameworks. The Government's latest analysis⁴ identified 154 areas where there may be a need to establish UK-wide 'common frameworks' including food and feed safety law.

The Food and Feed Safety and Hygiene (FFSH) common framework is currently in the consultation phase. The most recent public statement⁵ of this framework suggests the aim is currently for food and feed law and policy to be 'as unified as possible, while allowing for evidence-based divergence in the public interest' and that policy development is to be delivered through collaboration and 'a shared risk analysis process'. It seems much effort has been devoted to agreeing this common framework and Food Standards Scotland's response⁶ to the Internal Market (IM) Bill indicates there is frustration that this work was under threat.

Some common frameworks are described as 'legislative frameworks' – but the meaning of this isn't entirely clear. Whilst common frameworks refer to specific areas of legislation, they do not tie down devolved nations to specific legislative commitments, but rather establish broad principles and create fora for discussion and dispute resolution. If there was a

dispute about common frameworks (for example, if one country wanted to change its food standards and the others disagreed), there is a strong emphasis on consultation to resolve things amicably. If consultation fails, disputes ultimately go to the JMC dispute resolution mechanism,⁷ but the JMC is a consultative, not executive body; its decisions are non-binding. In this sense, ultimately, the glue holding together the UK's internal market is cooperation and goodwill.

THE INTERNAL MARKET BILL: DIVERGENCE WITH A TWIST

The IM Bill introduces a more powerful statutory glue for the internal market, which binds quite differently. It preserves the newly-devolved powers in food standards we described above. However, the Bill introduces market access requirements for mutual recognition and non-discrimination that mean, in practice, that it *de facto* undermines devolved powers.

Why is this? Legislation that applies to, say, Scottish farmers or food producers can't be used to prevent or condition the entry of goods from other devolved nations (other than Northern Ireland, a separate case), even if the regulatory requirements differ. Thus, English producers could competitively undercut devolved nation producers with higher standards (as higher food standards are more expensive to maintain), making it difficult for the devolved nations to maintain different regulations than England.

Perhaps even more significantly, the IM Bill's mutual recognition principle applies not only to food produced in the UK, but also food imported into the UK (Part 1, Ss 2(1)); this means that, if food produced to lower standards were allowed into England – say, as a result of a Free Trade Agreement (FTA) negotiation – devolved nations would also be required to import it. Trade negotiation is a power reserved to the central UK Government. Whilst the UK Government has committed to consulting with devolved nations where devolved areas are affected, the precise scope of their influence in trade negotiations remains undefined, an issue which has recently attracted controversy.⁸

⁴ Frameworks Analysis 2020 Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919729/Frameworks-Analysis-2020.pdf

⁵ Food Standards Agency Board meeting – 16 September 2020: <https://www.food.gov.uk/sites/default/files/media/document/fsa-20-09-04-food-and-feed-safety-and-hygiene.pdf>

⁶ Food Standards Scotland, 'Food Standards Scotland shares concerns over UK Internal Market Bill': <https://www.foodstandards.gov.scot/news-and-alerts/food-standards-scotland-shares-concerns-over-uk-internal-market-bill>

⁷ See note 5 and Protocol for avoidance and resolution of disputes – MoU 2001: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/62121/avoidance-resolution.pdf

⁸ G Cameron, 'No seat for the devolved nations at trade talks' (24.09.20 The Times): <https://www.thetimes.co.uk/article/no-seat-for-devolved-nations-at-trade-deal-talks-qtzp69t7f>

The IM Bill's market access provisions do contain exceptions. Exclusions to both mutual recognition and non-discrimination principles are set out in Schedule 1. However, these are limited to 'threats to human, animal or plant health' – covering only movements of pests, outbreaks of foodborne illness or product recalls due to safety concerns. They do not include broader environmental or animal welfare concerns.⁹ In contrast, EU rules allow Member States not to mutually-recognise imported goods for a much wider array of reasons.¹⁰ In the IM Bill, the list of permitted exceptions can be modified – either expanded or contracted - by the Secretary of State, such that devolved nations have little control. The Lords' Amendment 17 proposes to remove these powers for the Secretary of State.¹¹

The Government recently amended the list to include fertilisers and approval of new active substances for pesticides. However, it didn't exempt maximum residue levels (MRL) for pesticides, making the addition of pesticides meaningless in practice. This is because, when food moves across borders, what can be measured and restricted is the amount of residue it contains. Because other devolved nations' MRLs have to be 'mutually recognised', if approved pesticides diverge, Scotland, Wales and England won't be able to exert any control over what types of pesticides their consumers ingest. Thus, the rationale for including this exemption is unclear.

The question then arises of whether devolved nations could introduce food labels to ensure that at least their consumers were aware that they were eating, say, chlorinated chicken or food with residues of pesticides that were banned domestically. There is a common framework for labelling,¹² under which nations as a whole could decide that certain previously prohibited products need labels. However, the IM Bill's mutual recognition principle, which stipulates that legal compliance in one devolved nation constitutes legal compliance in the others,

⁹ A useful discussion of the exemptions can be found in P Oliver, 'Goods in the UK internal market: a closer look at the exception clauses' (12.10.20 EU Relations Law): <https://eurelationslaw.com/blog/goods-in-the-uk-internal-market-a-closer-look-at-the-exception-clauses>

¹⁰ Article 36 TFEU lists: 'public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property'.

¹¹ House of Lords Amendments (12.11.20): <https://publications.parliament.uk/pa/bills/lbill/58-01/150/5801150-II.pdf>

¹² Nutrition Related Labelling, Composition and Standards Provisional Common Framework: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925713/Nutrition_related_labelling_composition_and_standards_provisional_common_framework_web_accessible.pdf

also applies to labelling requirements. This means that one devolved nation couldn't unilaterally impose labelling requirements on products imported from another, as this would constitute an additional import requirement. This is further supported by the IM Bill's White Paper, which explicitly highlights a requirement to comply with another devolved nation's 'more stringent labelling regime' as the type of regulatory cost that the IM Bill intends to prevent.¹³ (Another important point about labelling requirements is that many of these foods may be processed into others – for example, chicken nuggets).

HOW DO THESE PIECES FIT TOGETHER?

Whilst this is complex, there is a unifying theme: centralisation of power. Even where power is devolved, England's status as the dominant market power combined with central UK Government oversight over trade negotiations (a reserved, not devolved, power) gives England outsize influence in shaping UK-wide food standards, undermining permitted divergence.

The core of any approach to an internal market as integrated as the UK's should clearly be harmonised rules with a strong joint consultative process underlying them – they can't be set by just one of the nations. The EU provides quite a formalised legislative approach to achieving this, which involves all EU bodies. The EU's approach to maintaining its internal market relies largely on harmonisation of the product standards required to achieve free movement of goods. In areas where Member States can diverge, they are obliged to mutually recognise each other's goods, subject to some exceptions.

The UK is trying to replicate this with a set of cooperative commitments that are not as clearly underpinned by legislative requirements, i.e. common frameworks. The crux of the problem is the weakness of common frameworks vis-à-vis the IM bill. As Gravey argues,¹⁴ the UK is replacing an approach governed by positive integration – that is to say, harmonisation of standards – with an approach that puts all its legal weight behind negative integration – that is to say, market access requirements.

The recent formulation of the FFSH common framework acknowledges the relationship between the common framework and the Internal Market Bill is unresolved, distinguishing between the 'legislative IM approach'

¹³ BEIS, UK Internal Market (July 2020), p78:https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901225/uk-internal-market-white-paper.pdf

¹⁴ V Gravey, 'The Internal Market Bill: why negative integration is causing such negative feelings' (16.10.20 Brexit & Environment): <https://www.brexitenvironment.co.uk/2020/10/16/internal-market-bill-why-negative-integration-is-causing-such-negative-feelings/>

and the common frameworks, and suggesting they would 'operate at different levels to provide complete coverage'. Food Standards Scotland has strongly questioned the application of the Internal Market Bill to food and feed law, suggesting this third legislative framework is unnecessary. The Select Committee on the Constitution's report on the Internal Market Bill also doubts the need for the Bill: "The Government has failed to explain why a combination of retained EU law, its existing powers to amend that law, and common frameworks could not provide the certainty required at the end of the transition period to secure an effective UK internal market. Such an approach would obviate the need for the Bill."¹⁵

This tension in turn increases poor relations and mistrust, and may even make divergence in food standards more likely. Scotland has stated its aim of 'keeping pace' with EU law and has proposed legislation to do so.¹⁶ Given the stated importance of 'taking back control' of UK regulation, the UK will at some point diverge from the EU. This also challenges the maintenance of common frameworks.

CONCLUSION

If common frameworks fall apart, newly-permitted divergence perversely works against devolved nations. England can unilaterally set and export whatever set of food regulation it wishes, making much more radical changes than would have been allowed in the EU's Single Market, with little incentive for Scotland and Wales to maintain divergence. For this reason, and its expansion of powers reserved to the central UK Government, the devolved nations have refused to consent to the IM Bill.¹⁷

Under the current arrangements, the only way to prevent the regulatory preferences of devolved nations being overruled by the heavy-handed application of the IM Bill is through cooperation and goodwill. Assuming that neither is in great supply right now, formalising the influence of devolved nations would be an important step toward preserving the Union post-Brexit. This could happen through making clear that market access principles supplement rather than override common frameworks (Lords' Amendment 1) and decreasing the discretionary power of the Secretary of State (Lords' Amendment 7).¹⁸

Other options include:

- Strengthening commitments to maintain alignment with the core EU-derived precautionary approach to food standards that has provided coherence between devolved nations;
- Introducing primary legislation for core food standards areas, making it harder to change this legislation without debate and scrutiny (an issue we have addressed in more depth in a previous blog¹⁹) and
- Giving the devolved nations stronger oversight over national-level FTA commitments.

¹⁵ House of Lords Select Committee on the Constitution, United Kingdom Internal Market Bill (17th Report of Session 2019–21 HL Paper 151), para 62: <https://committees.parliament.uk/publications/3025/documents/28707/default/>

¹⁶ UK Withdrawal from the European Union (Continuity) (Scotland) Bill [2020] <https://beta.parliament.scot/bills/uk-withdrawal-from-the-european-union-continuity-scotland-bill-2020>

¹⁷ Business News 'Scotland and Wales say British government's bill threatens UK unity' <https://uk.reuters.com/article/uk-britain-eu-wales-idUKKBN2600QR>

¹⁸ UK Parliament, Lords votes to amend the UK Internal Market Bill (19.11.20): <https://www.parliament.uk/business/news/2020/october/lords-debates-internal-market-bill/>

¹⁹ 'UK food safety Statutory Instruments: A problem for US-UK negotiations?' (12.09.19 UKTPO): <https://blogs.sussex.ac.uk/uktpo/2019/09/12/uk-food-safety-statutory-instruments-a-problem-for-us-uk-negotiations/>

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FURTHER INFORMATION

The UK Trade Policy Observatory (UKTPO), a partnership between the University of Sussex and Chatham House, is an independent expert group that:

- 1) initiates, comments on and analyses trade policy proposals for the UK; and
- 2) trains British policy makers, negotiators and other interested parties through tailored training packages.

The UKTPO is committed to engaging with a wide variety of stakeholders to ensure that the UK's international trading environment is reconstructed in a manner that benefits all in Britain and is fair to Britain, the EU and the world. The Observatory offers a wide range of expertise and services to help support government departments, international organisations and businesses to strategise and develop new trade policies in the post-Brexit era.

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