

Institute of Alcohol Studies response to UK Internal Market White Paper

About the Institute of Alcohol Studies

The Institute of Alcohol Studies (IAS) is an independent institute bringing together evidence, policy and practice from home and abroad to promote an informed debate on alcohol's impact on society. Our purpose is to advance the use of the best available evidence in public policy decisions on alcohol. For more information please visit www.ias.org.uk.

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?

IAS shares the concerns held by public health bodies about 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). The World Health Organization (WHO), in its Global Strategy to reduce non-communicable diseases, emphasises the importance of creating "health-promoting environments" which reduce consumption of tobacco, alcohol and unhealthy food (ii). However, the Government's proposals could potentially limit the adoption of the WHO's most cost-effective policy recommendations for tackling non-communicable diseases (described as "best buys") (iii) across the UK as regulatory action on the marketing, price and labelling of these commodities may be regarded as "indirect discrimination".

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 override 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" (iv). This would appear to set a very high bar for exceptions, going far beyond those included in many trade agreements, and leaving limited scope for protecting public health. It would seem doubtful that long-term public health issues, such as alcohol misuse, would be considered a public health emergency.

Whilst the WP states that the “mutual recognition system [will] reflect the different ways goods and services are currently treated under UK law” (v), it is not clear how in practice the proposals would respect devolved competence. As the House of Lords held in the *Imperial Tobacco v Lord Advocate* decision (which concerned the applicant’s challenge to the Scottish legislation on tobacco control that introduced, inter alia, specific obligations not to show tobacco products in shops), the UK’s internal market does not require that all trading rules should be the same across the whole of the UK (vi). Rather, it is legitimate for devolved powers to affect the trade in goods or services coming from other parts of the UK into, for instance, Scotland, without infringing the limits of these powers so long as this enactment pursues an objective falling within the realm of the plenary legislative powers that the Scottish Parliament enjoys (vii). However, it is not clear that the WP proposals would preserve this position.

The nature and extent of public health problems can vary across UK jurisdictions and devolution enables each to innovate in how it responds. This, in turn, can help to drive UK-wide public health improvements. For example, the rate of alcohol-specific mortality in Scotland remains significantly higher than that in England (viii). The existing devolution settlement has allowed the Scottish Government to develop and implement the internationally path-breaking policy of minimum unit pricing for alcohol (MUP), which is estimated to have reduced net off-sales purchases in Scotland, compared to England and Wales, by between 4% and 5% in the first year of implementation (ix). MUP has now also been implemented by the Welsh Assembly Government. The Northern Ireland Health Minister, Robin Swann, has recently announced his government’s intention to consult on the policy (x). Similarly, the Scottish Parliament legislated to ban smoking in public places in 2006; an approach which was subsequently adopted by other administrations, and which has saved and improved tens of thousands of lives across the UK (xi).

The opportunity for different administrations across the UK to innovate in public health policy can be of mutual benefit as the evidence obtained from implementing such policies in one country can help inform decision-makers in others. The UK government has previously noted that, while it has no plans to introduce MUP in England, “it will continue to monitor the progress of MUP in Scotland and will consider available evidence of its impact” (xii).

The WP indicates that the powers of devolved administrations to innovate would be protected. The WP and UK Ministers have explicitly stated that MUP would not have been affected by the proposals (xiii). However, it is not clear that the mutual recognition and non-discrimination principle outlined in the White Paper would have allowed the Scottish and Welsh legislatures to implement MUP, or will permit the Northern Ireland Assembly to follow in future, should they wish to do so. Furthermore, it is unclear whether the proposals could prevent the duration of MUP in Scotland from being extended, or the minimum unit price from being modified, as both would require further secondary legislation.

It is essential to recognise that both the mutual recognition and non-discrimination duties should not be absolute and that a system of justifiable derogations that

recognises the need to preserve regulatory autonomy should be implemented for both. Further detail is therefore required on the proposed scope and mechanisms for derogating from these duties. In existing trade and internal market agreements these usually involve varying combinations of exhaustive and/or open-ended lists of exceptions, overriding principles which can be invoked including human rights, environmental standards, public health as well as more substantive tests such as those of proportionality and necessity.

The WP proposals appear to go far beyond the equivalent provisions to protect the EU internal market, placing frictionless trade as the sole objective without consideration of how this is balanced against devolved regulatory autonomy. As indicated above, the wording of para 134 of the WP contains very limited examples of where discrimination would be regarded as a “necessity”: to “address a public, plant or animal health emergency.” Such a definition is far more restrictive than the wider justification of public health protection currently afforded to member states through European Union law under the ‘Do No Harm’ principle; a principle which the UK Government has committed to upholding following Brexit ^(xiv).

The issue of whether interference in the EU internal market was justified in order to protect public health was core to the legal challenge to the Alcohol (Minimum Pricing) (Scotland) Act 2012. The Scottish Government contended that Article 36 of the Treaty on the Functioning of the European Union (TFEU) applied, i.e. “The provisions of articles 34 and 35 [protecting the free market] 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.” ^(xv). The UK Supreme Court judgement concluded: “That minimum pricing will involve a market distortion, including of EU trade and competition, is accepted. However, I find it impossible, even if it is appropriate to undertake the exercise at all in this context, to conclude that this can or should be regarded as outweighing the health benefits which are intended by minimum pricing.” ^(xvi). Unlike the TFEU, the phrasing of the WP would appear to place protection of the internal market above the protection of public health except in emergencies.

However, 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 ^(xvii) and 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.” Labelling is an area on which IAS, as a member of the Alcohol Health Alliance UK, has long been active in calling for statutory regulation given the alcohol industry’s on-going failure to provide basic health information on a voluntary basis. The Scottish Government (SG) has made clear its preference for mandatory labelling across the UK but has supported the UK Government’s attempts to encourage voluntary approaches by the industry. The SG’s Alcohol Framework, however, reserved the right to legislate: “if insufficient

progress is made by the time of the UK Government's deadline of September 2019, the Scottish Government will be prepared to consider pursuing a mandatory approach in Scotland." (xviii). The WP would appear to prevent or undermine this option, as such legislation would only apply to goods produced in Scotland, delivering minimal impact and placing local producers at a competitive disadvantage.

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

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?

IAS advocates that any legislation should protect the existing rights of all UK and devolved administrations to legislate to protect and promote public health. This should apply 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. Such protection must be explicitly enshrined in any forthcoming legislation. The wording of para 134 of the WP regarding discrimination only "where this is necessary, for example, to address a public...health emergency" clearly sets a far higher bar than that of the "protection of public health" established in EU law (xxi).

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." (xxii).

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), "ensuring a strong basis for political decision-making, oversight, and dialogue in relation to the Internal Market" (xxiii), but without detail on how dispute avoidance and resolution would be handled it is difficult to comment. The current IGR mechanisms, with their episodic and dispute-focused

nature, appear unsuitable to allowing long term discussions on complex matters and might not foster long term dialogue in this area, as the UK Government envisages.

Given the volume of trade going to and from England, traders in the devolved nations would be at a competitive disadvantage if only they were subject to higher devolved standards. This imbalance has ramifications for the volume and nature of the litigation that may arise (as this will be inherently geared towards challenging devolved regulation), as well as for the balance of influence within institutions like the independent body suggested in these proposals. Comments from Professor Michael Dougan, of Liverpool Law School, regarding the potential for litigation also give cause for concern: “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.” (xxiv).

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.

In relation to the rights of consumers, again we consider that the WP places disproportionate emphasis on economic considerations, placing these above all else. Even focusing on people as consumers, they have wider interests than the costs of products and services. For example, they have a right to labelling which enables them to make informed decisions about the products they consume. We consider, however, that these proposals should acknowledge and protect a wider range of people’s rights and interests, in particular those relating to their 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 high level 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 up until now.

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- (i) Then Secretary of State for Health and Social Care, Rt Hon Jeremy Hunt MP, 18 April 2018, <https://bit.ly/2HaMvfz>
- (ii) World Health Organization (2017). 'Best Buys' and Other Recommended Interventions for the Prevention and Control of Noncommunicable Diseases: Updated (2017) Appendix 3 of the Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013-2020: https://www.who.int/ncds/management/WHO_Appendix_BestBuys_LS.pdf
- (iii) Ibid, WHO
- (iv) Internal Market White Paper, paragraph 134
- (v) Internal Market White Paper, paragraph 133
- (vi) *Imperial Tobacco Ltd v Lord Advocate*, [2012] UKSC 61, per Lord Hope, para. 7-8; see also para. 15, 39-42.
- (vii) Ibid., para. 42.
- (viii) In 2018, alcohol-specific death rates were nearly twice as high for men and 87% higher for women in Scotland compared with England & Wales (based on data from National Records of Scotland and Office for National Statistics). Giles, L. & Richardson, E. (2020). *Monitoring and Evaluating Scotland's Alcohol Strategy: Monitoring Report 2020*. Edinburgh: Public Health Scotland; 2020. <http://www.healthscotland.scot/media/3103/mesas-monitoring-report-2020.pdf>
- (ix) Robinson, M., Mackay, D., Giles, L. et al. (2020). *Evaluating the impact of Minimum Unit Pricing (MUP) on sales-based alcohol consumption in Scotland: controlled interrupted time series analyses*. Edinburgh: Public Health Scotland. <http://www.healthscotland.scot/media/3097/evaluating-the-impact-of-mup-on-sales-based-alcohol-consumption-in-scotland-controlled-interrupted-time-series-analyses.pdf>
- (x) Northern Ireland Department of Health (2020). Minister Swann committed to full consultation on alcohol pricing. <https://www.health-ni.gov.uk/news/minister-swann-committed-full-consultation-alcohol-pricing>
- (xi) For example, Sims, M., Maxwell, R., Bauld, L., & Gilmore, A. (2010). Short term impact of smoke-free legislation in England: retrospective analysis of hospital admissions for myocardial infarction. *BMJ*, 340, c2161 <https://doi.org/10.1136/bmj.c2161>; Frazer, K., Callinan, J. E., McHugh, J., van Baarsel, S., Clarke, A., Doherty, K., & Kelleher, C. (2016). Legislative smoking bans for reducing harms from secondhand smoke exposure, smoking prevalence and tobacco consumption. *Cochrane Database of Systematic Reviews*, (2) <https://doi.org/10.1002/14651858.CD005992.pub3>.
- (xii) Lord Bethell, Parliamentary Under-Secretary (Department of Health and Social Care) response to written question HL1749, *Alcoholic Drinks: Minimum Prices*, on 6 March 2020, <https://www.parliament.uk/written-questions-answers-statements/written-question/lords/2020-02-24/HL1749>
- (xiii) Letter from Rt Hon Michael Gove MP, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, UK Government to Michael Russell MSP, Cabinet Secretary for the Constitution, Europe and External Affairs Scottish Government (15 July 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901338/Letter_to_Michael_Russell_MSP.pdf
- (xiv) Op cit, Rt Hon Jeremy Hunt MP
- (xv) UK Supreme Court judgement, [2017] UKSC 76, para 63, <https://www.supremecourt.uk/cases/docs/uksc-2017-0025-judgment.pdf>
- (xvi) Op cit, UKSC 76, para 3,
- (xvii) Internal Market White Paper, paragraph 49 and box on paragraphs 78-79
- (xviii) The Scottish Government, Alcohol Framework 2018, Action 15: <https://www.gov.scot/publications/alcohol-framework-2018-preventing-harm-next-steps-changing-relationship-alcohol/>
- (xix) 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>
- (xx) By email, Professor Michael Keating, 5 August 2020
- (xxi) The Cassis de Dijon ruling (judgment of the Court of Justice of 20 February 1979, ReweZentral AG Bundesmonopolverwaltung für Branntwein (Case C-120/78) [1979] ECR 649)
- (xxii) Op cit, UKSC 76, para 3.
- (xxiii) Internal Market White Paper, paragraph 154

^(xxiv) 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)

https://www.parliament.scot/S5_Finance/General%20Documents/Michael_Dougan.pdf