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## Internal Market White Paper July 2020

### FROM THE PRESIDENT

Thank you for the opportunity to respond to this very important stakeholder engagement document. The Ulster Farmers' Union (UFU) is the largest farming organisation in Northern Ireland representing approximately 11,500 farming families. The UFU represents farmers from all areas of Northern Ireland and across all sectors.

The UFU has a vision of a productive, profitable and progressive farming sector. The UFU want to work in partnership with Government to achieve this. Northern Ireland stakeholders have an interest in influencing UK trade policy given the importance of trade to NI.

**Victor Chestnutt**  
**UFU PRESIDENT**

Firstly, and before moving on to engage with the issues this consultation raises, UFU wishes to take this opportunity to put on record some of its concerns around this consultation, its timing, and the apparent haste with which the proposals within it are being pursued.

Consultation on something as important and complex as the future architecture and functioning of the UK's internal market should not be rushed. It is our view that a four week consultation, on a matter of such significance is inadequate, and provides stakeholders such as ourselves with only the narrowest of response

windows, particularly as we have yet to emerge from the coronavirus pandemic which continues to impact on our working patterns and divert resources away from our day to day functions.

In developing its response to the consultation, this position paper addresses, in turn, each of the four questions raised by the UK Government and also identifies a series of additional issues associated with each question which the UK Government also needs to address in legislation. Thereafter, additional issues are also raised which are of relevance to the UKIM but not directly related to the questions posed. Again, these issues also need to be legislated for to ensure that NI's unique position within the UK Internal Market and its relationship with the EU can successfully co-exist.

UFU has supported the development of common frameworks as an important component of ensuring we have a functioning internal market after 31<sup>st</sup> December 2020. This support has always been predicated on such frameworks being arrived at by mutual agreement between the UK and Devolved Governments, and not by imposition from the centre.

This consultation appears to signal quite a departure from the sort of consensual approach that we had seen in relation to common frameworks and we consider it regrettable that the UK Government does not appear to have meaningfully involved the devolved governments in the preparation and operation of this consultation, despite the obvious implications for the exercise of devolved powers that flow from these proposals. It is our view that the development of provisions around the UK internal market should be a process which is co-owned and jointly agreed by each of the home nations.

We note also that the consultation has come out at a time when Parliaments across the UK are on the cusp of their summer recesses, something which greatly diminishes their ability to engage with these proposals.

The UFU welcome the UK Government's initiative to put in place a legislative framework to safeguard the functioning of the UKIM, it must be acknowledged that there is no universal Brexit outcome that will protect the integrity of the UK market, protect all of the interests of UK farmers and businesses and allow existing supply chains to continue without changing. This position paper attempts to address some of the key challenges posed, following a serious consideration at industry level. Unfortunately, the suggestions are made without the benefit of foresight, with respect to UK trade policy and the future UK-EU relationship. However, these proposals will at least help to ensure the future integrity of the UKIM which will be crucial when it comes to negotiating RTAs with third countries whilst respecting NI's unique position with respect to the UK's future

relationship with the EU. They will also help to protect the interests of NI farmers, processors and consumers as well as their GB counterparts without undermining the integrity of the UK Internal Market.

### **Views on the internal market**

UFU fully accepts that upon our departure from the European Union's single market, and the regulatory convergence it imposes, there is genuine potential for new barriers to intra-UK trade to arise as a result of diverging regulation in each of the UK's home nations, as areas previously occupied by Community law revert to the competence of London, Cardiff, Edinburgh and Belfast.

The UK Farming Unions meet regularly to ensure that farms in all parts of the UK have a common voice as the UK leaves the EU's single market and forges its own agriculture and trade policies. The Unions have agreed the following principles, mindful of the Northern Ireland protocol, that should guide policy development and implementation following the UK's departure from the single market:

1. The current devolution settlement of policy and regulation to the constituent parts of the United Kingdom should be respected and maintained.
2. The UK's various Governments, Parliaments and regulators should take every step to retain and protect a well-functioning single market for food, agricultural commodities, part/processed agricultural products, live animals and breeding material, and plant and plant products throughout the UK.
3. In developing distinct agricultural policies to replace the Common Agricultural Policy, Farming Ministers across the UK should ensure that the funding, design, and application of their agricultural policy should not adversely impact the functioning of the UK single market.
4. The impact of future trade policy, which is a reserved matter for the UK government, should be considered by UK farming ministers in determining these future agriculture policies.
5. Farming Ministers and agricultural departments across the UK must establish and maintain regular, formal, and cooperative arrangements to manage policy, legislation, and delivery of regulation across the UK economic area. A guiding principle should be that no single country determines or curtails UK policy in the rest of the UK.
6. No part of the UK should be able to act, or avoid action, that threatens to curtail access for other parts of the UK to third country markets, or that question the UK's adherence to its international agreements.

7. The UK Government should retain its commitment to provide in the long term at least the same level of public investment and distribution in agriculture across the UK.

It is very important to NI farmers that the same basic regulatory requirements are in place in each of the home nations in order to ensure a broadly level playing field for the agricultural sector across the UK, to ensure that what we continue to be able to access vital markets in England, Scotland, Wales and Northern Ireland.

The consultation document speaks of the UK internal market as something which has subsisted for some three centuries, we are not entirely in agreement with this assessment, and would suggest that a true internal market in which barriers to the free movement of the factors of production have been dismantled, can only really arise with the advent of a modern, regulatory state.

### **Devolution**

Devolution also represents a major, comparatively recent development in the UK's constitutional landscape. That landscape is different to the one which existed when the UK joined the EEC. We have moved from an arrangement in the 1970s in which power was concentrated in London, to one in which devolved institutions have law making responsibility in relation to a number of subject areas, and have become permanent features of the UK's constitutional architecture.

As we know, from 1<sup>st</sup> January 2021 a range of powers previously exercised at EU level will revert to the competence of the UK and devolved governments. The consultation foreword speaks of the unprecedented regulatory freedoms that the devolved administrations will have (within the new UK frameworks) allowing them to benefit from opportunities to innovate.

We cannot however overlook the sheer size of the English economy and population relative to those of the other home nations, which makes it the dominant force within the UK. This dominant position means that the views of English businesses, consumers, and indeed the UK government in legislating on behalf of England, will exert an incredibly strong influence on regulatory standards across the UK. In practice, and owing to its comparative size, Northern Ireland, although notionally able to 'do its own thing' within its borders may well have to align itself with English rules. It is therefore likely that rules set in Westminster for England, will very probably ripple out from the centre to the rest of the UK, and mean to a greater or lesser extent, the foreclosing of devolved policy choices.

The Union's concern over production methods used elsewhere in the world, such the use of chemical washes for chickens as a means compensating for poor standards of production, or the hormone treatment of beef cattle are of course well known. We note the government's assurances that it will not lower standards in trade deals and its commitment to a Trade and Agriculture Commission.

Whilst in theory decisions on matters such a chemical washes or hormone treatment of beef rests with devolved governments, were the UK government to decide to allow products produced to standards which would be illegal here onto the market in England then the principle of mutual recognition would mean that they would be in free circulation across the UK, with devolved governments powerless to exclude such products from their territories. Presumably, devolved governments would also find themselves unable to use their powers over food labelling to draw attention to the particular method of production. We would be deeply concerned about the damaging effect this could have on Northern Ireland farmers who adhere to world-leading standards.

Therefore, although regulatory freedoms for the home nations in areas previously occupied by EU law will of course arise from next year, when we consider how the exercise of these powers will of course be subject to the obligations of mutual recognition and non-discrimination, as well as wider economic considerations, then it is arguable, that in practical terms at least, the transfer of these powers may prove somewhat nugatory.

The white paper on the UK internal market has co-opted some of the well-established language of the EU's and internal market, using terms and concepts such as mutual recognition and non-discrimination. Despite the use of such terms, there are some profound and important differences between what is proposed for the nascent UK internal market, and that of the EU which are worth pointing out.

The European Union is a block of 27 countries, and irrespective of size no one EU member state can change EU rules, neither can the EU expand its competencies without the approval of Member States. Furthermore, EU legislation once initiated by the European Commission must be agreed by the Council of the European Union and approved by the European Parliament.

This contrasts with the UK situation of three sub-national legislatures subordinate to a sovereign Westminster Parliament, with the Westminster Parliament capable of acting as both a UK wide legislature and the legislature for England. In addition, of course, Ministers in the devolved governments hold no power of veto.

## **Common Frameworks**

Work on common frameworks is as yet incomplete, and there are serious doubts over whether common frameworks across the 160 or so specific policy areas identified, will be operationalised by 1<sup>st</sup> January 2021. This is concerning as presumably such frameworks have a very important role in setting out those minimum product standards which will in turn be underpinned by the twin principles of mutual recognition and non-discrimination.

In the absence of common frameworks establishing minimum standards, it is possible that we could see standards lowered as one home nation seeks to leverage in competitive advantage by lowering its standards, in the knowledge that the other home nations will be obliged to accept its products according to the internal market principles of mutual recognition and non-discrimination.

This would then leave the other home nations in the invidious position of having to choose between upholding high standards of production or maintaining the competitiveness of businesses in its own territory by lowering its own standards. Outside the discipline imposed by trade agreements, this risk is amplified, and our concerns around this point would for example be particularly keenly felt, if for example the UK had not concluded a trade deal with the EU27 to take effect from 1<sup>st</sup> January 2021.

We very much see common frameworks as integral to the functioning of the UK internal market and we believe that there is an urgent need for the UK Government to re-double efforts to ensure that the common frameworks project is delivered in a timely manner. We do understand that finalising many common frameworks will not be possible until we know the shape of any trade deal with the EU27, however unless and until the home nations have all committed to common frameworks around standards, the risk of standards being lowered in pursuit of competitive advantage is not negated.

## **Mutual Recognition**

The White Paper seeks to establish a mutual recognition regime which will 'cover mandatory requirements relating to lawful sale' (para. 133). This includes product standards and related processes such as labelling. As noted above, all goods produced in, entering and leaving Northern Ireland will have to comply with EU rules. If the intention of a mutual recognition regime is to ensure that goods placed on the market in one territory can be lawfully sold in another, then any such UK-wide regime would have to bear in mind that GB goods would need to meet EU standards if they are to be lawfully sold in NI. Legislation would,

of course, always be setting the baseline rather than the ceiling of standards, and there is nothing to prevent producers or manufacturers meeting higher standards.

The consultation paper is silent on how Market Access commitments of mutual recognition and non-discrimination might be enforced, and what remedies might be available to claimants. Enforcement and remedy are of particular salience to the smooth operation of internal markets, and we would have welcomed an insight into the UK Government's thinking on these two matters.

We surmise that businesses will have a cause of action to challenge any law or administrative decision which they consider to have impeded their ability to trade in a frictionless manner in any part of the UK, perhaps in a way akin to judicial review, but we would welcome clarity on this point.

### **Non-discrimination**

The principle of non-discrimination is the second part of the Market Access Commitment to be put into action. It means that it would be 'unlawful for a government to regulate in any way that affords less favourable treatment to goods, professionals or service providers from another territory' (para. 132)

The Protocol means that there are two dimensions to this for Northern Ireland. First, NI goods and services etc. shall not be discriminated against in GB. This, as we have seen, is something that the Protocol does not prevent the UK from legislating for. On the other hand, this principle cannot apply in full with respect to Northern Ireland because a core tenet of the Protocol is, in some sense, the ability to discriminate between NI and GB goods. What this means in practice and the consequences of it will depend in large part on:

- (a) the Joint Committee decisions on implementing the Protocol,
- (b) the UK-EU Agreement (especially with respect to trade, inc. mutual recognition), and
- (c) future UK-wide legislation in the relevant areas.

There is also the possibility that it could depend on dynamic alignment of NI to relevant EU policy, for example if standards are increased in a particular area within the scope of the Protocol.

While we support the UK Government's commitment to legislate for unfettered access for NI qualifying goods and businesses, we are concerned that NI goods could still face commercial discrimination in the market as a result of differentiation that arises as a result of the protocol. Issues could emerge as a result of differences in labelling or standards and will be exacerbated if NI comes to be regarded as a backdoor for EU and non-EU produce by the GB industry and customers. This must also be addressed.

It would be useful to know who might have standing in these matters, would it for example also be open to consumer groups, trade associations, NGOs and even governments and legislatures in the home nations to initiate litigation around mutual recognition and non-discrimination?

There is also the question of what remedies might be available in the event of a finding of discriminatory treatment or a failure of mutual recognition - Would it for example result in the award of damages, the payment of a fine or perhaps merely the vindication of the claimants' rights?

### **State Aid**

The UK White Paper proposes 'a single uniform subsidy control regime' for the UK. Subsidy control will be reserved to the UK Parliament. In NI, EU state aid provisions will continue to apply as relevant to the movement of goods and wholesale electricity. This is recognised in the UK Command Paper (para. 40). As the EU sees it, the UK has 'committed to comply with:

- applicable notification and stand-still obligations in respect of relevant new aid;
- any reporting obligations in respect of relevant aid measures; and
- any decision adopted by the Commission addressed to the United Kingdom.'

This means that the ceiling put on state aid by the EU still applies in Northern Ireland in relation to trade and also that the UKG will have to have Commission approval for new aid measures. Any UK-wide subsidy control regime will apply to Northern Ireland with respect to services, but when it comes to goods there will have to be exceptions for Northern Ireland. In this respect, a certain degree of compatibility between the UK and EU state aid regimes would ease NI's position.

It mentions that State Aid has to be sorted at a later date. However, if you do not know what your state aid rules look like it is hard to know how the internal market is going to function properly. State Aid in principle, is about stopping subsidizing a sector to the disadvantage for other parts of the UK. We want to make sure that there is a State Aid regime that works for the whole of the UK. A complication for NI is that we are constrained by the EU state aid rules. We are not saying that the UK should sign up to the EU state aid rules however they should not be that much difference. It should not permit other parts of the UK to heavily subsidise however we in NI cannot. A subsidy comes in all forms not just grants but with tax reliefs etc

We will be constrained under NI protocol to a certain level of agricultural support and only a certain proportion of that can be spent on for instance coupled payments. So for example there will be a total amount under the NI protocol that will be a maximum we can give to agriculture in the form of support and there will be a certain percentage that we could give as coupled support. This obviously still needs to be negotiated however this is something that when is finally sorted and agreed, NI could be constrained by. Effectively if we are constrained, we are not saying the rest of the UK should be exactly the same as us but there should be little difference and recognition that NI should not be disadvantaged because it is under the protocol

### **Transiting via Republic of Ireland**

Approximately 50% of the produce sold by NI processors to the GB market is routed via Dublin. The UFU welcome the prospect of unfettered access for NI to the GB market, it notes that this has only been guaranteed by the UK Government with respect to goods traded directly from NI to GB. Produce is shipped via Dublin as it is the only route that is feasible for meeting just-in-time requirements. There are important outstanding questions as to how unfettered access to the UKIM can be delivered via Dublin.

This should be tackled by putting in place special procedures for businesses which are identified as being of minimal risk (to both the UKIM and the EU) based on risk assessments and a history of compliance. A non-qualifying business would not have been risk assessed or may have a poor compliance history. These businesses would be subject to portal inspections. Such 'qualifying businesses' should be entitled to unfettered access. This could be achieved via the concept of Green (for qualifying businesses) and Red Channels (for non-qualifying businesses). Green channel shipments would be subject to zero checks with compliance inspections taking place on the business premises. Red channel shipments would be subject to full UK customs checks and may be conducted on certain routes. NI companies would require green channels at Dublin port (both outbound and inwards) with similar arrangements at NI ports.

As such, it is proposed that qualifying goods, shipped by qualifying businesses would have fully unfettered access to the GB market. Where a qualifying business is processing and shipping non-UK qualifying goods, these goods would be subject to the appropriate customs procedures and declarations. However, it is proposed that these arrangements are managed online with compliance inspections undertaken at the business premises using a combination of customs, country of origin labelling inspections and traceability inspections. DAERA beef labelling inspections would provide a good basis for ensuring compliance, albeit, with increased resource. Compliance failures could result in a loss of qualifying status.

## Consultation questions

The UKG has posed four questions that it wishes people to address in the consultation. These are not specific to NI. What NI needs clarity and progress on vis-à-vis access to the GB market has long been known and remains outstanding (see p.3), including legislation on unfettered access. And when it comes to movement of goods from GB into NI, UK legislation cannot guarantee this out with the final UK-EU Agreement. If there is no such deal, the uncertainties Northern Ireland would face would be far greater than the scope of any White Paper.

Although the consultation document is 104 pages long, we do consider the substantive treatment of the concepts at its heart, such as mutual recognition and non-discrimination, their operationalisation, oversight, and enforcement to be somewhat lacking. This in turn makes meaningful engagement with the consultation questions difficult

### **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?**

Yes, we believe that the government should seek to mitigate against both "direct and indirect" discrimination. UK farmers must be in a position to supply UK customers across the whole of the UK free from discrimination or barriers to trade.

The UFU very much wants to see a properly functioning UK internal market across the UK's internal borders, and therefore as a general rule we would wish to see mitigation against direct and indirect discrimination in relation to the provision of goods and services. There may however be some carefully defined circumstances in which direct and indirect discrimination might be appropriate.

We note that paragraph 134 of the consultation deals with direct discrimination and introduces the possibility of permitting differential treatment in relation to non-discrimination where necessary, for example to address a public, plant or animal health emergency. It would be useful to explore the UK Government's thinking on where such differential treatment might be permissible in order to better understand the implications which might flow from this.

Similarly, paragraph 135 references indirect discrimination, holding out the possibility that indirect discrimination may be permissible in pursuit of a clearly stated policy objective. Again, it would be useful to gain a better understanding of the UK Government's thinking in relation to what might constitute the sort of clearly stated policy objective, under which indirect discrimination might be permitted.

Although it is not expressly stated in the consultation, we assume when an economic operator considers that they have been subject to a case of direct discrimination, this will found a cause of action. We note as regards indirect discrimination the UK Government is undecided as to whether indirect discrimination is to be prohibited as a justiciable right for business.

At paragraph 137 the possibility of safeguarding against indirect discrimination via robust administrative or intergovernmental processes is introduced. There are no further details as to how this might be achieved, we would however be interested in gaining further understanding of the UK Government's thinking here, how might such processes work, who would have the final say and would these processes take place at a pre-legislative stage?

Both forms of discrimination must be prevented, provided the products (and services) concerned meet certain baseline standards. These baseline standards must take cognisance of the fact that Northern Ireland will be applying the regulatory standards of the EU as a result of the NI Protocol. How the UK chooses to apply its standards in the future will have direct implications for both the baseline standards and the scope for discrimination against NI produce.

If standards are lowered in another part of the UK in such a manner that they go below the baseline applied in Northern Ireland, it will mean that NI producers would legally be unable to react competitively to this change. As a result, NI producers would be discriminated against when selling into the rest of the UK. Such discrimination also needs to be mitigated against. Based on the suggestions put forward in the white paper, there remains insufficient detail on how this would be achieved.

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

One of the acclaimed benefits of Brexit has been the ability to approach public procurement differently once we are outside of the EU's single market. As a Union we have consistently made the case for the greater use of NI produce in public procurement contracts in NI.

UFU would very much like to see a greater share of NI produce going in to NI Government and NI public sector procurement contracts. We would consider it a real missed opportunity if having left the EU's single market, the UK government were to pass legislation which effectively made it impossible for public sector procurement contracts to stipulate NI produce.

We believe that there may be times when NI public bodies may wish to specify local or NI produce, and that they should have the latitude to do so. We therefore ask that the UK Government look to develop suitable exceptions to place public bodies looking to procure local produce, outside of the scope of the non-discrimination principle.

It also has to be remembered that stipulating NI produce in a procurement contract would not in any way bar English, Scottish or Welsh companies tendering for a public procurement contract in NI, they would be free to do so in just the same way as a NI business. All that any requirement around the use of NI produce would do, would be to oblige the company awarded the contract to source NI produce for the performance of the contract. We do not think that making this sort of stipulation would act as a significant barrier to an economic operator based outside of NI.

The crucial point is that produce emanating from any UK nation should not be discriminated against on the basis of geographic origin provided key baseline standards are met (i.e. are congruent with the regulatory standards that NI businesses will need to apply as a result of the implementation of the NI Protocol). In other words, provided key baseline standards are met by products emanating from elsewhere in the UK, they should be mutually recognised by all parts of the UK.

We all want to be able to purchase high-quality food when needed no matter what is going on in the world, and safeguarding food security here in NI is crucial to achieve that which is why we must support local food production and choose locally produced food. If COVID-19 has taught us anything it's that when times are hard, we rely on our neighbours more than ever and that includes our local food producers

**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?**

We note at paragraph 153 that third party determinations will not directly overturn the actions of elected representative, the UFU also believes it would be wrong for third party determinations to overturn the decisions of elected parliaments.

At paragraph 154 of the consultation it is explained that the UK Government position is that the evolution and overall shape of the UK internal market will be overseen by the UK Parliament, with key decisions put to the UK Parliament for approval rather than resting exclusively with the UK Government. Whilst we welcome this provision, we are of the view that the UK internal market belongs to all four of the home nations and we would like to see there being a role for the devolved legislatures in this process.

There are no obvious candidate bodies which could take on the independent functions of monitoring the Internal Market and business and consumer engagement as these functions are entirely new to the UK setting.

We would do not consider the Competition and Markets Authority to be a natural fit with this work, and the proximity of CMA to BEIS would always leave it open to accusations of political influence.

We share the Government's view that such a body needs to be free from political influence, and we are therefore open to the idea of founding a new body, however we note that getting such a body up and running in readiness for the end of the transition period would present a real challenge. We would urge the UK Government to work closely with the devolved institutions on the development of such a body and ensure that that there are representatives on any new body from each of the home nations.

We welcome the fact that the independent advice of the proposed body will be made available to legislatures as well as administrations as we believe that this should contribute to more effective scrutiny and policy development.

At paragraph 161 the consultation speaks of reviewing internal market architecture at intervals, and we would welcome more information as to the government's thinking on the frequency of such reviews.

It is proposed at paragraph 162 that that monitoring functions could include the option for making recommendations about minimum standards, we would also be interested to know more about this, such as what would be the status of such recommendations (would they be advisory or binding, and upon whom?) and would they supplant the standards which we hope and anticipate will be agreed via common frameworks in the not too distant future?

In paragraph 167 there is reference made to the expert committee or body being accountable directly to the UK Parliament, we would argue that because the internal market is a matter for each of the home nations that there should be a corresponding element of accountability to the devolved Parliaments as well.

#### **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**

The most obvious way to ensure that these functions are carried out independently of government is by ensuring that the body is at arm's length from government, with panel membership drawn from each of the home nations.

Whilst having linkages with both UK parliament and devolved assemblies, its make-up would enable it to have operational independence. This committee should also have the ability to commission the provision of independent research and additional technical expertise on issues which emerge to be important to the functioning of the UKIM as well as overseeing the monitoring of how the various functions of the UKIM (including Mutual Recognition and Non-Discrimination) are applied in practice. This latter function would be undertaken in conjunction with the Governmental body (e.g. Defra, DAERA etc.) with responsibility for the area concerned.

Finally, it is worth highlighting that mechanisms used for the governance of the UKIM will need some means to liaise with the Joint UK-EU Committee on the NI Protocol as Article 6 of the Protocol is on the 'Protection of the UK internal market.