

The UK Internal Market

Key issues for the food and drink sector

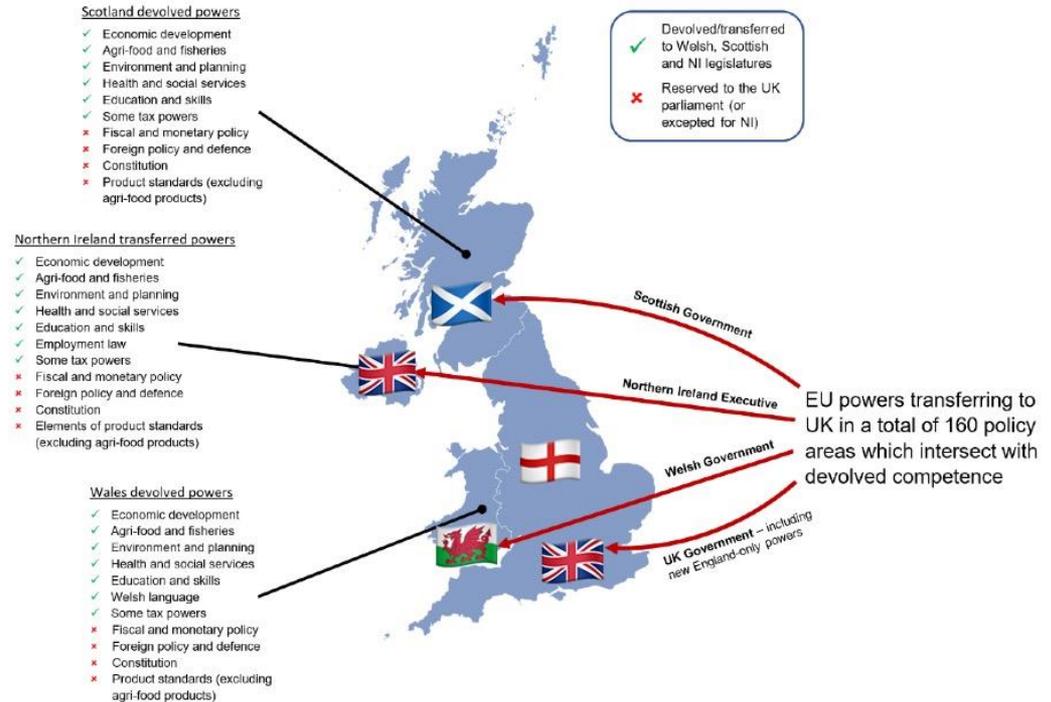
David Thomson, Director of Strategy and Devolved Nations, FDF

The UK Internal Market – Key Issues for the food and drink sector

- The fragmented regulation within the UK nations
- The legal ground rules
- The deposit return schemes and health promotion regulations as illustrative case studies

Devolution and difference

- There have always been different laws in Scotland, and since 1921 in Northern Ireland
- Devolution has existed since 1999 in Scotland and Wales
- Laws created within the EU Internal Market framework, but with national and devolved variation
- But clear that devolution has driven further difference



https://upload.wikimedia.org/wikipedia/commons/thumb/2/2e/U.K._Internal_Market_%28devolved_powers%29.jpg/800px-U.K._Internal_Market_%28devolved_powers%29.jpg?20201109001802

The Brexit effect



Brexit removed the EU framework for regulation to protect the EU Internal Market



UK Government decided that a new mechanism was required to protect the UK Internal Market – an Internal Market Act



Caused huge controversy in Scotland and Wales as seen to restrict already permitted devolved powers – a reverse devolution power grab



Northern Ireland's situation makes it a special case

Single use plastics

- Plastic spoons
- Scotland and Wales
- An exemption allowed



Deposit return system

- Inclusion of glass bottles
- Scotland
- Allowed to proceed but only within restrictive parameters



A future of uncertainty?



Deposit Return
System and glass
in Wales?



Restrictions on
promotions for
HFSS food in
Scotland and
Wales?



Precision breeding
and impact on
legislation in
Scotland?



What more?

What the FDF is doing



 Asking the right questions of politicians in Westminster and Devolved Nations

 Discussing implications with civil servants in all parts of the UK

 Analysing proposals for regulations in Devolved Nations for Internal Market Act implications

 Engaging in London, Edinburgh and Cardiff with the Office of the Internal Market (part of the Competition and Markets Authority)

 Supporting this and other webinars

 Providing a briefing sheet to members on this legislation and its developing impact

The UK Internal Market: Key issues for the food and drink sector

Natasha Durkin, Senior Associate
Kevin Clancy, Partner



SHEPHERD+ WEDDERBURN

Key legal pillars underpinning UK internal market

Scotland Act 1998

- Internal market reservations etc.

UK Internal Market Act 2020

- Market access principles etc.
-

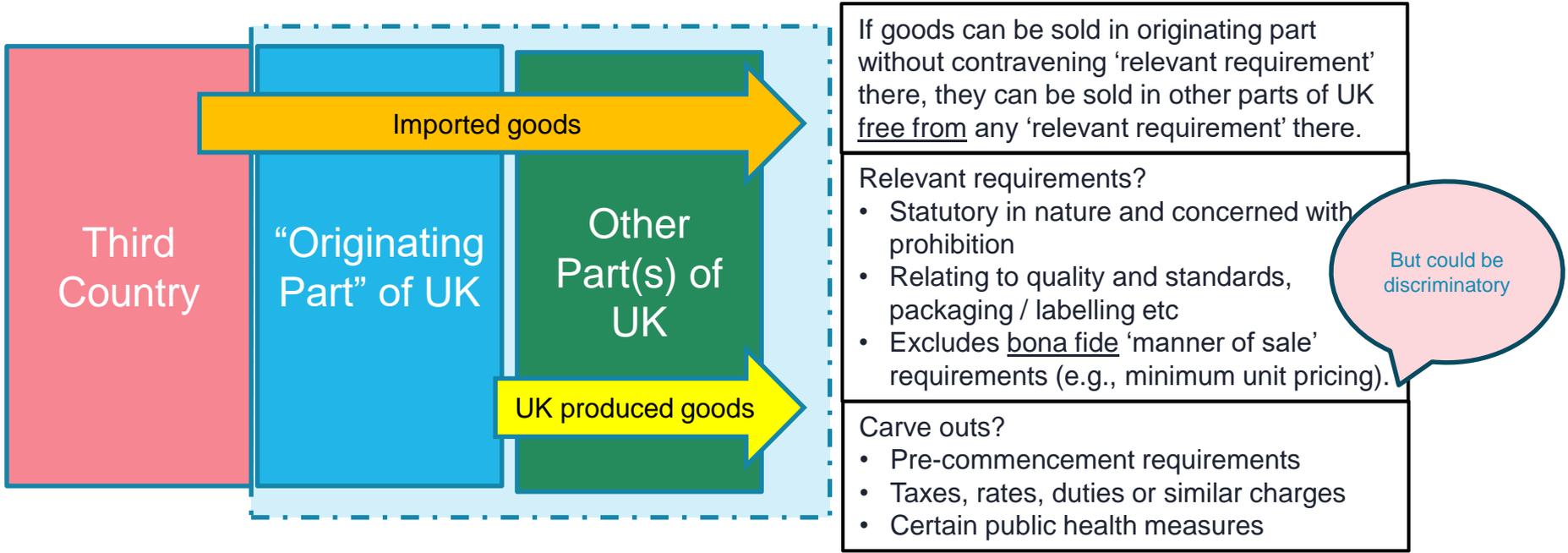
Scotland Act 1998 (SA) – Key Points

- Reservations under the SA limit legislative competence of Scottish Parliament in relation to regulation of UK internal market (s.29 and sch.5), such as:
 - anti-competitive conduct (considered in Greene King litigation)
 - consumer protection (but note exception in relation to food safety)
 - Acts of Scottish Parliament that “relate to” reserved matters are unlawful (determined by the purpose of the provision (s.29(3) SA), which is more than a loose/consequential connection).
 - Section 35 veto - Secretary of State can block the passage of Scottish Parliament Bills:-
 - where there are reasonable grounds to believe the measure would have an adverse effect on the operation of the law as it applies to reserved matters (SA, s.35)
 - First (and only) use of the veto so far – the Gender Recognition Reform (Scotland) Bill
 - Scottish Government have appealed.
 - Scope / appetite for wider use in internal market context?
-

Internal Market Act 2020 (IMA) – Key Points

- The IMA is a “protected provision” under the SA; it cannot be changed by an Act of the Scottish Parliament.
 - Introduces two “market access principles” (MAPs): (1) the “mutual recognition” principle and (2) the “non-discrimination” principle in relation to both goods and services.
 - The imposition of relevant requirements (such as laws or regulations) in one part of the UK (e.g., Scotland) which contravene the MAPs vis-a-vis incoming goods / services cannot be enforced against them (e.g., goods from Wales). While the Welsh goods would contravene a law/rule if supplied in Scotland, no fine or other penalty could be imposed against those goods by Scottish Authorities in Scotland.
 - But can divergence be a good thing - act as a ‘policy laboratory’?
 - Scope under the Act to disapply the principles where a “common framework” has been adopted (e.g., in relation to single use plastics).
 - First use of the IMA exclusion process was the Scottish single-use plastics exclusion.
-

Mutual recognition principle (MRP) for goods



Non-discrimination principle (NDP) for goods

Goods with a “relevant connection” with originating part of UK – produced in/come from/pass through that part of the UK

“Direct discrimination” = treating incoming goods differently and adversely compared to local goods because of their relevant connection with the originating part of the UK.

“Indirect discrimination” = applying uniform requirements to incoming and local goods which put incoming goods at a relative disadvantage without adequate justification.

NB relating to protection of life/health of humans, animals or plants, public safety or security (query, environment?)

Destination part of UK may not apply relevant requirements which discriminate directly or indirectly against goods with ‘relevant connection’ with originating part of UK.

Relevant requirements?

- Statutory in nature applying to goods
- Not otherwise covered by MRP
- Broadly, ‘manner of sale’ and related types of sales / seller regulation

Carve outs?

- Pre-commencement requirements
- Taxes, rates, duties or similar charges
- Public health emergency

Office for the Internal Market (OFIM)

- OFIM has been authorised by the CMA under the IMA to assist the 4 UK governments in an advisory capacity through monitoring, advising and reporting.
 - First annual report (2022-2023) issued –
 - Intra-UK trade represents c. 45-65% of the external sales/purchases of Scotland, Wales and N. Ireland
 - Widespread lack of awareness among business of the potential for regulatory differences within UK
 - Most relevant developments for IMA and the MAPs – single-use plastic, DRS, high fat/salt food/drink and genetic technology.
 - Sources of regulatory divergence – UK Withdrawal from the EU (Continuity) (Scotland) Act 2021 – s.1 power to Scottish Ministers to align Scots law with EU law.
-

Common frameworks (CF)

- Exclusions to the MAPs can be made through a CF agreement – defined as a ‘consensus between a Minister and devolved government on how devolved matters previously governed by EU law are to be regulated’. 154 areas of EU law intersect with devolved competence. There are only 32 CF in place to date.
 - A CF agreement excluding the MAPS is formalised by a Statutory Instrument of the UK Parliament (e.g., the United Kingdom Internal Market Act 2020 (Exclusions from Market Access Principles: Single-Use Plastics) Regulations 2022).
 - UK Government ministers have a discretionary power to disapply the MAPs – they do not have to do so even if there is consent from the devolved governments.
 - House of Lords Scrutiny Committee report in 2022 on CF - “*seriously concerned that...[CF] are at risk of becoming a missed opportunity*” and that IMA had “*damaged intergovernmental relations*”.
 - CF process lacks transparency – single-use plastics exclusion Scottish Parliament was first informed – and asked to consent to the exclusion – after the agreement between the Scottish and UK Government had been reached.
-

Case study: single-use plastics

- The Scottish ban of certain single-use plastics came into force June 2022, a Welsh ban (not identical) was passed in December 2022. The forthcoming English ban (plates, bowls, cutlery etc) will come into force October 2023. 3 items included in the Welsh measure (carrier bags, oxo-degradable plastic and polystyrene lids) are not included in the Scottish or English measures.
 - The Scottish ban covers both supply and manufacture – not the case in Wales/England.
 - The application of MAPs (from the IMA) meant that the Scottish ban did not affect items banned in Scotland (e.g., plastic cotton buds) that were produced or first imported into England or Wales. Therefore, an English/Welsh supplier could supply Scottish banned products to Scotland with no penalty.
 - Scottish Government secured an exclusion to disapply the MAPs under the Resources and Waste Common Framework. The exclusion was formalised in Regulations in 2022.
 - Little comment/disquiet overall from business – aligned with consumer pressure, availability of replacement items, and general view that investing in environmentally friendly products is a sound business decision (see OFIM annual report).
-

Case study: deposit return schemes

- What is a deposit return scheme?
 - What is the current position in Scotland?
 - Why was the Internal Market Act relevant?
 - What does this mean for the future: England, Scotland & Wales
-

Case study: deposit return schemes

- Scope to trigger MRP and / or NDP depending on design of relevant scheme.
 - NDP:
 - Appears applicable to the obligation to pay / collect the deposit (as a requirement relating to the terms upon which products may be marketed).
 - Query whether would be any / sufficient evidence of disparate impact on incoming versus local goods.
 - MRP:
 - May be applicable to producer obligations if seen as pre-conditions for operating in the market (requiring registration and submission of data).
 - Relevant producer obligations could not be applied to 'out of state' producers, with consequent impact on operability of scheme.
-

Case study: DRS judicial review

- Judicial review by Abdul Majid & Sons Limited
 - Concerned the determination of the Reasonable Handling Fee
 - Challenge to the legality of the retailer handling fees that would not be calculated by reference to an individual retailer's actual costs
 - No relevant statutory power
 - Practical considerations
 - Any issue with the drafting of the DRS Regulations was one for the Scottish Government to solve and not the retailers
-

Case study: food and drink high in fat, salt and sugar (HFSS)

- **Scottish Government:** Remains committed to restrict HFSS promotions despite not introducing the Public Health (Restriction of Promotions) Bill.
 - Scottish Government via a more 'direct and efficient' route by consulting on regulations 'this autumn'.
 - The regulations will restrict the promotion of HFSS in prominent in-store locations and will target multibuys and unlimited refills.
 - **England:** Promotion of HFSS products will be restricted by location and volume price (delayed until 2025) such as "buy-one-get-one-free" or "3 for 2" offers on HFSS products.
 - **Wales:** To be introduced in 2024, will include volume-based promotions, such as multi-buys and restrictions on where HFSS products can be displayed, such as at the end of aisles. Temporary price promotions and meal deals also intended to be included.
-

Case study: food and drink high in fat, salt and sugar (HFSS)

- Some initial thoughts on the application of MAPs:-
 - Unlikely to trigger application of the NDP at least as regards direct discrimination, since unlikely to be explicitly targeting of 'out of state' products
 - Query whether any scope to trigger application of NDP as regards indirect discrimination?
 - Would require (a) evidence of disparate impact on incoming goods versus domestic production and (b) lack of sufficient justification in, e.g., public health terms. Certainly, room for argument!
 - One example might be restrictions which apply to goods with ingredients that are typically / only included in 'out of state' products, but not in domestic products? Arguably could amount to direct discrimination.
-

Internal market: implementation and challenge

- Implementation of statutes via administrative rules and decisions of law makers
 - Scope for judicial review under principles of administrative law:
 - Illegality (including ECHR)
 - Irrationality / lack of reasons
 - Procedural impropriety
 - Importance of engagement with law makers and preserving legal challenge options
 - A recent conundrum:-
 - Genetic Technology (Precision Breeding) Act 2023 applies in England only
 - Scottish Government has been opposed to genome editing and the Act
 - The EU Commission (July 2023) proposes loosening the existing rules (ban) for the EU
 - Query Scottish Government response and position given policy of alignment with EU Law
-



SHEPHERD+ WEDDERBURN



Kevin Clancy

T: 0131 473 5798

E: kevin.clancy@shepwedd.com



Natasha Durkin

T: 0131 473 5776

E: natasha.durkin@shepwedd.com

shepwedd.com

Edinburgh

9 Haymarket Square
Edinburgh
EH3 8FY
T +44(0)131 228 9900

Glasgow

1 West Regent Street
Glasgow
G2 1RW
T +44(0)141 566 9900

London

Octagon Point
6th Floor, 5 Cheapside
London EC2V 6AA
T +44(0)20 7429 4900

Aberdeen

37 Albyn Place
Aberdeen
AB10 1YN
T: 01224 621166

Dublin

27/28 Herbert Place
Dublin
D02 DC97
E info@shepwedd.com