

FSB Response to the UK Internal Market Consultation

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to UK Internal Market Consultation.

The Federation of Small Businesses (FSB) is the UK's leading business organisation. Established over 40 years ago to help our members succeed in business, we are a non-profit making and non-party political organisation that's led by our members, for our members. Our mission is to help smaller businesses achieve their ambitions. As experts in business, we offer our members a wide range of vital business services, including legal advice, financial expertise, access to finance, support, and a powerful voice in government. FSB is the UK's leading business campaigner, focused on delivering change which supports smaller businesses to grow and succeed. Our lobbying arm starts with the work of our team in Westminster, which focuses on UK and English policy issues. Further to this, our expert teams in Glasgow, Cardiff and Belfast work with governments, elected members and decision-makers in Scotland, Wales and Northern Ireland.

Consultation Response

Operation of UK Internal Market Principles

FSB welcomes the introduction of mutual recognition and non-discrimination as underpinning principles for the UK Internal Market across goods and services. Both principles are critical to the proper functioning of the UK Internal Market for small and micro businesses. However, all four administrations must ensure that the transposition of these powers is done neatly and cohesively. The principles should complement one another, though need not apply jointly in all cases. The changes must be made to work equally for businesses operating across all four localities, they must also be clearly communicated to businesses across all jurisdictions in a manner which distinguishes between the requirements for each jurisdiction where these exist.

Northern Ireland Protocol

It is important that the legislative amendments do not present the UK Internal Market as a 'three-plus-one' system which excludes Northern Ireland by virtue of the significance of the Northern Ireland Protocol ('The Protocol'). The Protocol stipulates that Northern Ireland will continue to follow EU rules for goods as well as on Sanitary and Phytosanitary (SPS) measures. Northern Ireland, unlike other parts of the UK, will also continue to apply the rules of the EU's Union Customs Code. This presents an additional challenge in terms of managing the UK's Internal Market.

The UK Government has committed to ensure that Northern Irish businesses retain unfettered access to the wider UK market, however the movement of goods into Northern Ireland from Great Britain will be more problematic, with greater checks and controls required than is currently the case. These include the possible introduction of import declarations, safety and security declarations and other relevant certifications. Further, Government is undecided as to whether Northern Irish businesses will need to provide an exit summary declaration. It is important that businesses are assured of progress in these areas, some of which have the potential to diminish the success of the UK Internal Market.

In recognition of these issues, the UK Government recently announced a Trader Support Service to assist Northern Ireland businesses with customs formalities when bringing goods in from Great Britain. The policy governing the UK Internal Market should serve to protect Northern Ireland's role within UK wide supply chains, as is currently the case. This should

guard against direct discrimination, but must also monitor and highlight where policy is causing indirect discrimination, creating a commercial disincentive to the detriment of Northern Irish businesses. An independent monitoring authority should be sufficiently powerful to recommend action to remedy any disadvantages that may arise.

Intergovernmental working

With the principles of non-discrimination and mutual recognition clearly articulated, it is vital that all four UK administrations work together to develop proposals for the UK Internal Market's regulation that provide confidence and stability to smaller businesses. As such, the current process of developing common frameworks should be the starting point for the operation of the UK Internal Market, with the measures set out in the consultation to be used to provide stability to that framework over the longer-term.

Application of UK Internal Market Principles

Mutual Recognition

FSB welcomes the introduction of mutual recognition as a general standard but would emphasise the need for some flexibility across all jurisdictions. Smaller businesses across the UK recognise the benefits of mutual recognition, it allows smaller business to access markets which would otherwise be impenetrable. However, it is important that its expansion does not lead to the distortion of market standards, lower market standards or anti-competitive behaviours which may result in smaller businesses being undercut. For instance, the principle of mutual recognition should not allow products which have been produced to different standards to be sold as if they were of identical quality. FSB also takes the view that the long-term stability of minimum standards helps to foster a conducive business environment and to establish a level playing field.

Smaller businesses recognise that the expansion of mutual recognition will result in reduced administrative burden and welcome the principle for that reason, however businesses have suggested that the legislation should include exceptions to the rule of mutual recognition where its application might result in the application of lower market standards. As with the Swiss model, all countries within the UK Internal Market should be able to derogate from the mutual recognition principle under agreed exceptions such as public health should such a response meet the proportionality test. This is separate to and more nuanced than the existing exclusions discussed in the white paper.

Non-discrimination

Small businesses across all UK jurisdictions are supportive of the need for legislative protection against direct discrimination as they often feel disadvantaged by rules which favour larger, more established businesses. It is equally important that the new framework prohibits indirect discrimination, be that by legislation or by other standards, to allow for a level playing field between smaller and larger businesses. If non-discrimination is enshrined in legislation, businesses will be able to pursue legal action through the courts where a violation occurs. To minimise the burden upon the courts, the independent oversight body should have jurisdiction to arbitrate matters regarding both direct and indirect discrimination.

Smaller businesses seek some degree of flexibility in the application of both principles. As documented in the white paper, there may be instances where non-discrimination should be applied and mutual recognition disapplied. Mutual recognition encourages administrations to accept regulatory standards which may be inconsistent with their own, such as food safety or planning regulations, in such cases the doctrine should not apply but authorities must act in accordance with the principle of non-discrimination.

Non-discrimination is intended to supplement mutual recognition and thus should be subject to greater flexibility. The principle should be applied on a case by case basis with enough latitude to allow for country specific diversions.

With regard to public procurement, smaller businesses accept that the principle of indirect discrimination will be waived in some instances to the end of fostering regional/ local growth, but such occurrences must be case specific. Scottish governments at local and national level have expressed a desire to build more resilient supply chains, hence businesses that are operating in the region are keen that internal market principles do not present policy barriers which undermine this aim. It is also important that these regulatory principles supplement existing legislation.

Effect on Competition

Government must consider the implications of the internal market principles on competition across the UK. The Internal Market model has been successful in removing market barriers across several jurisdictions but it has also been found to unveil and exacerbate economic disparities between countries and market participants. Central and devolved governments should jointly appoint a regulator to oversee this. In other internal market jurisdictions, the existence of this disproportionality has helped shape the infrastructure around State Aid.

Although smaller businesses accept the benefit of State Aid policies for the entire business community, it is important that smaller businesses are not forgotten by cause of a focus on larger businesses. Small businesses grant that the UK Internal Market should be subject to a single State Aid regime, therefore all four administrations should actively support its smaller businesses as these changes come into place to minimise any disparities.

Three-tier Enforcement and Oversight System

As explored in the Annex of the White Paper, Spain's Internal Market System has yielded some benefits, with particular regard to its emphasis on dispute resolution. This case study accentuates the necessity of a robust and independent arbitrary body which can oversee and resolve disputes brought by governments, businesses and consumers alike. FSB supports a three-tier model of enforcement and oversight bodies for the UK Internal Market. The first is the Four Nations Independent Body as outlined in the White Paper. This body must adopt an equitable approach to decision making for all four administrations. The investigations and enforcement powers must be conferred upon a new or existing regulatory body such as the Competition and Markets Authority. Finally, there is need for a wider engagement forum for businesses and representative bodies to feed into the aforementioned bodies.

The reliance on the courts to resolve disputes in the Spanish system has proved unsuccessful, but does illuminate the need for a body with adequate enforcement powers to hold entities to account in the event of a violation. In order to achieve this, the independent body must not be accountable to any government within the UK Internal Market. It must also embrace business expertise obtained through the engagement forum and must allow disputing parties to adduce expert evidence in dispute resolution proceedings. As with most arbitral bodies, parties must be permitted to bring cases before higher courts where the dispute is sufficiently serious or where a legal precedent is necessary. However, it is critical that all three bodies have adequate powers to deal with matters at their various levels, particularly as SMEs have tended to benefit from the flexibility of Alternative Dispute Resolution.

Next Steps

In order to ensure the delivery of the principles of non-discrimination and mutual recognition, all four UK governments must work closely together to build consensus on the framework for the internal market. Furthermore, the UK and devolved governments must continue to consult with the small business community regarding the implementation of these changes. FSB is open to discussing the impact of these proposals in more detail.

Thank you for considering our response to this consultation. If you would like to discuss any of the points further, please contact me via my colleague Damilola Ojuri, Senior Policy Advisor, on 0207 592 8127 or at Damilola.Ojuri@fsb.org.uk.

Yours sincerely,

Martin McTague

A handwritten signature in black ink, appearing to read 'M. McTague', written in a cursive style.

National Vice Chair, Policy and Advocacy

Federation of Small Businesses