

Trade and Public Health: a lack of coherence and consistency

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Abstract

1. This paper examines the lessons to be learned from the experience of attempts by civil society to influence the content of the Internal Market Bill as it passed through Parliament to receive royal assent on 17th December 2020.
2. The implications are explored of the lack of consistency between what the Government says are its objectives to improve public health, and the highly restricted framing of the protection of public health as a legitimate aim in the Internal Market Act (IMA).
3. The paper concludes by looking at how civil society can engage public opinion to stiffen the Government's resolve to take action to improve population health.

Introduction

4. For government to regulate to protect public health requires first and foremost political will, backed by trade deals which allow exceptions for public health.
5. The experience of the unsuccessful challenge to Australian laws requiring plain packaging demonstrates that in principle the WTO is not a block to government regulations to reduce the harm from health damaging commodities.
6. To quote Andrew Mitchell in his paper for PETRA on plain packaging, the lesson from Australia's successful defence of its plain packaging laws is that "*TIAAs [Trade and Investment laws] arguably present greater threats to tobacco control than WTO Agreements*"¹ and the same is true for other areas of public health too.
7. We have a government which is inconsistent, not to say incoherent in its approach. On the one hand the Prime Minister and Secretary of State for Health talk of radical reform of public health and prevention.^{2 3} On the other the Government's principles set out in its policy paper on trade,⁴ and the Internal Market Act 2020,⁵ provide only very limited exceptions for public health.

¹ Mitchell AD. Australia's plain packaging disputes and the UK's trade negotiations. 2021

² DHSC Policy paper. [Transforming the public health system: reforming the public health system for the challenges of our times](#). Published 29 March 2021

³ DHSC. [Advancing our health: prevention in the 2020s – consultation document](#). July 2019.

⁴ Department for International Trade. [Policy paper. UK-Japan free trade agreement: the UK's strategic approach](#). Updated 4 January 2021. Accessed 5th April 2021.

⁵[United Kingdom Internal Market Act 2020 \(c. 27\)](#)

8. This paper focuses on the IMA, and its implications for international trade agreements being negotiated by the UK Government. To date the trade Agreements the UK has negotiated, with the possible exception of the UK-Japan Comprehensive Economic Partnership Agreement and the recently announced trade deal with Australia, appear to do little more than roll over EU Agreements the UK was previously party to. However, this will not be the case in the longer-term and we need to be vigilant in our defence of public health as a legitimate exception in new trade agreements.
9. The government says it wants to be ambitious about improving public health, the question is whether the trade deals it is concluding risk undermining its ability to do so. Whether this is because of the speed of negotiations or because there is an in principle opposition to public health exceptions is not important, the outcome would be the same.

UK government ambitions to improve public health

10. The current government has stated its strong ambitions to improve population health, by making England Smokefree by 2030,³ extend healthy life expectancy by five years by 2035, while reducing inequalities and levelling up society.⁶
11. In March 2021 the Government announced that following its decision to abolish Public Health England a new Office of Health Promotion (OHP) would be established within DHSC, and committed to making health *“a core priority for the whole of government”*.⁷ On the day of the launch the Prime Minister said that the OHP, *“will be crucial in tackling the causes, not just the symptoms, of poor health and improving prevention of illnesses and disease”*, and the Secretary of State for Health said that, *“we will bring health promotion into the heart of Government, working to the Chief Medical Office [sic], so we can level up the health of our nation”*.⁸
12. These are grand ambitions, but the proof of the pudding will be in the eating. However, as of June 2021 with implementation due in October, there is no pudding yet, not even a recipe, all that is known is some, but not all, of the ingredients which were set out in the press release.⁸ The OHP will *“recruit an expert lead who will report jointly into the Health Secretary and the Chief Medical Officer, Chris Whitty”*. The remit of the OHP will be to *“systematically tackle the top preventable risk factors causing death and ill health in the UK, by designing, implementing and tracking delivery policy across government.”* And the Government will *“establish a new cross-government ministerial board on prevention, to drive forward and co-ordinate government action on the wider determinants of health.”*
13. This sounds promising but the Coalition Government tried something very similar in 2011 and went further, setting up a Cabinet sub-committee on Public Health. A cautionary tale as it was wound up barely two years later, with no evidence that it had had any real impact.⁹

⁶ [The Conservative and Unionist Party Manifesto 2019](#).

⁷ DHSC Policy paper. [Transforming the public health system: reforming the public health system for the challenges of our times](#). 29 March 2021.

⁸ DHSC Press Release. [New Office for Health Promotion to drive improvement of nation’s health](#). 29 March 2021.

⁹ Buck D. [The passing of the Public Health Sub-Committee: mourning a missed opportunity](#). King’s Fund 12th November 2012.

14. It is positive that the Government has recognised that shaping the market through regulation is an important tool in the policy toolbox, both in the Green Paper on prevention in 2019¹⁰ and the obesity strategy in 2020.¹¹ And the policy note launching the OHP stated that. *“in certain circumstances, the government has a responsibility to go further to protect the public’s health... where individuals are at risk of harm or ill-health as a result of a power imbalance, such as... industries based on addiction like smoking.”*⁷
15. However, the default tendency of government is to fall back on stressing individual behaviour change rather than tackling the upstream determinants of health through regulation. And in the broader context, successive governments over the last decade have run active campaigns to cut net regulation, defining regulation as ‘red tape’, burdensome to business which must be challenged and cut back at every opportunity.¹²
16. It is in this broader context that the UK government is busy developing trade and investment policies which could undermine public health.^{14 15} This is a still evolving landscape and so this is an initial assessment as of June 2021. However, the Internal Market Act, negotiated in parliament in haste and with nugatory exceptions for public health, does not augur well for the future.

Internal Market Act

17. The Internal Market Bill, now Act, was designed to enshrine two market access principles into law, relating to government regulation of goods and services, mutual recognition and non-discrimination. The Bill contained two highly controversial elements. First, provisions specifically relating to trade between Northern Ireland (NI) and Great Britain (GB) that were incompatible with the EU-UK Withdrawal Agreement and thus, as the government acknowledged, illegal under international law.¹⁶
18. Secondly, provisions in the Bill limited the powers of all of the devolved nations to act independently, which included action to improve public health. To quote the Scottish First Minister, Nicola Sturgeon: *“Under this bill [i.e. as originally published], the Scottish parliament would not have been able to pass its world-leading legislation on minimum unit pricing of alcohol – a fact which will deeply concern the broad coalition of Scottish civic society which backed this vital public health measure.”*¹⁷ The UK Government described the Internal Market Bill as providing a “power surge” for the devolved

¹⁰ DHSC. [Advancing our health: prevention in the 2020s – consultation document](#). July 2019.

¹¹ DHSC. [Tackling obesity: government strategy](#). July 2020

¹² Prime Minister's Office, 10 Downing Street. [Red Tape Challenge](#). 7 April 2011.

¹³ Prime Minister's Office, 10 Downing Street and The Rt Hon Boris Johnson MP [Prime Minister welcomes independent report on re-imagining regulation in the UK](#). Press release 15 June 2021.

¹⁴The Rt Hon Michael Gove MP, The Rt Hon Alister Jack MP, and The Rt Hon Alok Sharma MP. [Bill introduced to protect jobs and trade across the whole of the United Kingdom](#). Office of the Secretary of State for Scotland, Cabinet Office, Department for Business, Energy & Industrial Strategy, 9th September 2020.

¹⁵ [The UK’s trade agreements](#). Last updated 28th December. Published by GOV.UK Accessed 14th June 2021. s

¹⁶ [HMG LEGAL POSITION: UKIM BILL AND NORTHERN IRELAND PROTOCOL](#) 9 Sept 2020

¹⁷ In 2017, after many years of litigation in which it was alleged that the Alcohol (Minimum Pricing) (Scotland) Act 2012 constituted an unlawful barrier to trade within the EU, the UK Supreme Court finally found that statute to be lawful <https://www.supremecourt.uk/cases/docs/uksc-2017-0025-judgment.pdf>. Accessed 14th June 2021

administrations, the governments of Scotland and Wales disagreed, viewing as a “power grab” which threatened to “cripple devolution”.¹⁸

19. The passing of the IMA has crystallised the dispute between the Westminster Government and the devolved administrations over what would happen to returning EU powers which were within devolved competence. Initially in 2017 the British Government made some bold commitments that a system of “Common Frameworks” would be developed to: “enable the functioning of the UK internal market, while acknowledging policy divergence.” It also stated that the “Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures and will therefore” ... “maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules”.¹⁹
20. The process of the development and passing into law of the Internal Market Act was rapid, particularly given the contentious nature of the legislation. The white paper published on 16th July 2020²⁰ was consulted on for only four weeks, before the Bill had its first reading in the House of Commons on 9th September, only 8 weeks after the White Paper was published.
21. Despite widespread criticism and an active civil society campaign²¹ against the Bill, it passed through the House of Commons largely unchanged, before moving to the House of Lords in October. At this point ASH sought a legal opinion on the Bill and its impact on public health, which concluded that, “as currently worded, the Bill provides for large-scale deregulation at the expense of the devolved administrations and their citizens. The very limited and piecemeal nature of the public health exceptions is a matter of particularly grave concern, since the protection of human life and health is undoubtedly the most important matter of all.”²²
22. The Alcohol Health Alliance (AHA) was already engaged as part of a broader coalition working to support amendments to the Bill.²¹ ASH worked to support the AHA in producing briefings for parliamentarians which focused on the public health issues for which we secured widespread support from a range of civil society organisations.^{23 24}
23. The aim was to secure amendments to the Bill in the House of Lords and initially we had some success. However, public health was very much a subsidiary issue with the undermining of the rule of law front and centre of the debate. Amendments to include wider exceptions for public health were passed by the House of Lords at Report Stage and in the early stages of ‘ping pong’. However, the deal that was agreed in the end did

¹⁸ Brooks L. Morris S. [Plan for post-Brexit UK internal market bill 'is an abomination'](#) Guardian 9th September 2020.

¹⁹ Joint Ministerial Committee (EU Negotiations) (16 October 2017). [Joint Ministerial Committee \(EU Negotiations\) communiqué \(Report\)](#). The National Archives. Accessed 26 April 2021.

²⁰ Department for Business, Energy and Industrial Strategy, [UK Internal Market, white paper](#), July 2020,

²¹ [UK Internal Market Bill – Joint Briefing From The Wales Civil Society Forum On Brexit And The Brexit Civil Society Alliance](#). Brexit Civil Society Alliance 21st September 2020.

²² Oliver P. Opinion for Action on Smoking and Health in the matter of the Internal Market Bill. 8th October 2020 on the bill draft dated 30th September which incorporated amendments made in Committee stage of the House of Commons.

²³ ASH and the Alcohol Health Alliance UK. [The Internal Market Bill and Public Health Report Stage Briefing](#) ASH London 18th November 2020.

²⁴ ASH and the Alcohol Health Alliance UK. [The Internal Market Bill Day 2 Report Stage Briefing](#). ASH London 23rd November 2020.

not include the amendments we had sought, which would have embedded public health exceptions in the heart of the Bill.

24. In December, after multiple defeats in the House of Lords, the UK Government allowed the Lords to remove those provisions of the Bill that were in breach of international law. The Government also made changes which they said would allow a certain amount of divergence from the internal market rules for the devolved administrations, where these were agreed through the Common Frameworks.
25. This sounds good in principle but in practice what the legislation says is that the Secretary of State may by regulation amend Schedule 1 to give effect to a Common Framework (section 10). It remains to be seen whether this protection is sufficient, given that the power rests with the UK Government and the lack of clarity about the Intergovernmental relations (IGR) processes under the Common Frameworks. In return for the concession on Common Frameworks the Government insisted all other amendments on market access be dropped.
26. The House of Lords is unelected and while it can scrutinise legislation and hold government to account it can only delay rather than veto legislation which starts in the Commons. In a situation where, as now, the party in government has a large majority in the House of Commons the Lords has very limited powers to secure changes to government legislation.²⁵ We were told that the majority judgement in the Lords was that the risk of losing that concession was too great, even though it was considered that the arguments on the market access principles were felt to have been won.
27. The Bill as enacted allows the devolved administrations to regulate goods and service providers under their jurisdiction, but after an assessment of their compatibility with the market access principles contained in the Act, such regulations may not be enforceable on goods or service providers from other parts of the UK or international goods imported into other parts of the UK. This is likely to undermine the devolved administrations' ability to successfully implement certain kinds of policies that fall within the scope of the Act. The implications are significant, particularly if the Government negotiates US-style trade agreements where the health-related justifications are not as strong as they are in EU agreements.
28. The UK government has said that challenge to the policy experiment that was Minimum Unit Pricing (MUP) of alcohol is not threatened²⁶ in the Bill as passed as pricing was moved out of scope of the mutual recognition principle to non-discrimination.²⁷ However, there are concerns that the wording of the proportionality test for indirect discrimination in the IMA, which is different from that applied in EU law, could open MUP up to legal challenge.²⁸ And, in any event, any further novel policy initiatives are definitely open to legal challenge.
29. Indeed, there are numerous examples of novel environmental and/or public health policies which could be undermined going forward unless they are agreed on a UK-wide basis, such as prohibition of categories of single use plastics (under consideration in

²⁵ UK Parliament. [The Parliament Acts](#) GOV.UK. Accessed 14th June 2020.

²⁶ Department for Business, Energy & Industrial Strategy. [Policy paper. Goods market access: approach to restrictions and bans](#). 17th November 2020. Accessed 14th June 2021.

²⁷ [United Kingdom Internal Market Act 2020](#). Section 6. Accessed 14th June 2021.

²⁸ [Brexit Bill 'likely' to mean court challenge for Scots minimum alcohol price | The Scotsman](#)

Wales); to require warning labels on individual cigarettes (under consideration in Scotland); or to require alcohol products to display calories (under consideration in England).

30. It is notable that the Act received royal assent without either the Scottish Parliament or the Senedd Cymru giving legislative consent, because of their concerns about the implications of the legislation for the devolution statutes.^{29 30} Since none of the devolved administrations agreed, this was a breach of the Sewel Convention. However, because the convention is not legally binding, the UK parliament can pass bills without devolved consent, even when the UK government accepts that the legislation in question falls within the scope of the Sewel convention.
31. The Scottish Government's legislative consent memorandum used the hypothetical example of a law, that is within its competence, to limit the sugar content of food to tackle obesity. On the effect of the Bill, they stated that: "The Scottish Parliament could technically still legislate in this way, but it would only bind producers based in Scotland, undermining the intended effect of the policy, as well as potentially disadvantaging Scottish producers. The Bill would therefore, in effect, prevent the Scottish Parliament from exercising its devolved competence in this area, for which is it democratically elected, and accountable."³¹
32. As the Institute for Government has pointed out, in many ways the passing of the IM Act into law was the easy part. Even more difficult will be making the Act work in practice.³² Although the Act does open up an avenue for continuing to explore derogations via the Common Frameworks process, this will require the support of the UK Government, which is not a foregone conclusion.
33. Clarification is needed around how the market access principles will be enforced and to agree protocols around the use of powers to amend the framework. It remains to be seen how dispute resolution both for the IMA and for the Common Frameworks, which have their own dispute resolution process, will play out now the legislation has been pushed through against the wishes of the Scottish and Welsh devolved legislatures and governments.³³
34. To quote Lord Fox speaking for the Liberal Democrats who remained unconvinced, "*If I have one reservation, it is about the mechanics of how this market will work and how the office for the internal market [OIM] will sit alongside the CMA going forward. Clearly, that story may well run but, as the Minister set out, the OIM will have a pivotal role in monitoring how this market runs and in informing the process. How that is configured, who is in it and what its process are will, in the end, be the measure of how successful, smooth and, frankly, unfettered this internal market ends up being.*"³⁴

²⁹ Armstrong KA. [Governing With or Without Consent – The United Kingdom Internal Market Act 2020](#). UK Const. L. Blog. 18th Dec. 2020.

³⁰ Sargeant J. Stojanovic A. [The United Kingdom Internal Market Act 2020](#). Institute for Government. February 2021.

³¹ Legislative Consent Memorandum. Internal Market Bill. para 46. Accessed 14th June 2021.

³² Sargeant J. Stojanovic A. [The United Kingdom Internal Market Act 2020](#). Institute for Government. February 2021.

³³ House of Lords Common Frameworks Scrutiny Committee. [Common frameworks: building a cooperative Union](#). 1st Report of Session 2019–21. HL 259.

³⁴ [United Kingdom Internal Market Bill. Volume 808: debated on Tuesday 15 December 2020](#). Accessed 14th June 2021.

35. There is considerable uncertainty around how these new frames of reference including the UK IMA, Common Frameworks, and the trade agreements, already made, as well as those to come, will influence internal policy thinking in the future, but it is unlikely to be positive. Rather than opportunities for ‘taking back control’ to strengthen public health measures for non-communicable disease prevention, the IMA weakens the powers of the devolved administrations. This could, in fact is likely, to have a serious ‘chilling’ effect on devolved policy moving forward, by framing and limiting internal thinking about what policy options are feasible.
36. The lesson to be learned is that it is very unlikely that in trade negotiations, public health will be a priority for the UK government. While to date, that has not been a serious issue, as trade agreements have rolled over the protections for public health that exist in the EU, this will not be the case, for example, when it comes to a trade agreement with the US.
37. A trade deal with the US is a concern for the longer-term, but more immediately the UK has agreed core principles of a trade deal with Australia, with the detailed agreement expected imminently.³⁵ Furthermore the UK has applied to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)³⁶ which has been criticised for its treatment of public health, evidence and the precautionary principle. The TPP does, however, allow for reservations, whereby a country unilaterally reserves the right to regulate in a specified area. Civil society needs to engage without delay in a campaign to ensure that public health is a reservation for the UK, if and when we do accede to the CPTPP.

Civil society has a key role to play in securing and demonstrating public support

38. Demonstrating public support for interventions is key to securing the political will to act. In 2004, a special adviser to the Secretary of State for Health during a discussion about the need for comprehensive legislation to prohibit smoking in public places, said it’s not about the evidence, we all know secondhand smoke is harmful, “*show me the votes*”.
39. In tobacco control there is a long track record of carrying out opinion polls surveying a representative sample of the adult population. This helps us understand what the public thinks and how to frame campaigns to address their concerns. For example, at the start of the campaign for Smokefree laws the debate was framed as the rights of smokers about where they could smoke versus the rights of non-smokers to breathe clean air. When it came to pubs and clubs opinion was evenly balanced. ASH and the Smokefree Action Coalition worked with trade unions to foreground the rights of workers to a Smokefree workplace, and the lack of choice for workers in the hospitality trade.
40. This change in framing had a major effect on public opinion. Polls showing that public support for smokefree pubs and bars had risen from a half to two thirds between May 2004 and December 2005 were crucial to the success of the campaign for

³⁵ Australian Department of Foreign Affairs and Trade (DFAT). [Australia-United Kingdom Free Trade Agreement](#). 17 June 2021

³⁶ House of Commons Library research briefing. [The Comprehensive and Progressive Agreement for Trans-Pacific Partnership \(CPTPP\)](#) 11 June, 2021. Accessed 14th June 2021.

comprehensive Smokefree laws in England.³⁷ Despite a majority of 66 (not dissimilar to the current government's majority of 89) the Labour Government allowed a free vote on amendments to its bill and the legislation was won with a majority of 200.

41. Since 2007 ASH has carried out an annual survey of public opinion with a large sample (over 12,000 this year in GB). This enables us to drill down into attitudes and behaviour of the general population, as well as smokers in particular, and break it down by a range of demographic characteristics. Surveying opinion annually enables us to demonstrate how support has grown over time for various measures and continues to grow after implementation.³⁸
42. Coupled with extensive evidence to back up the impact of the measures, the opinion data have helped persuade governments of all political complexion to proceed with a range of upstream tobacco control measures. These include above inflation tax increases, a ban on point of sale displays in shops and the standardised 'plain' packaging of tobacco products.³⁹
43. Indeed, public support for government action to tackle smoking in England has grown over the last decade, despite the many measures that have been introduced during this period. Since 2010, the numbers saying the Government is doing 'too much' to limit smoking have fallen from 21 to just 5 per cent, while those saying 'not enough' have risen from 32 to 45 per cent. Added to the 35 per cent who think the Government is getting it about right, a total of 80 per cent want to maintain the current strategy or go further.
44. The most recent survey shows the vast majority, however they voted in the 2019 election, support the Government's ambition to be Smokefree by 2030. And there is no evidence of hostility to what opponents call the 'nanny state'. In 2021 all the measures tested were supported by big majorities, including banning all smoking in cars (support 67 per cent, oppose 15 per cent), increasing tax on cigarettes (66 to 15 per cent) and raising the age of sale from 18 to 21 (63 to 15 per cent). Indeed, even among smokers, supporters outweigh opponents by a clear margin on all policies except increasing tobacco taxation and banning smoking in cars.^{40 41}
45. Public support for government action to regulate business for the benefit of public health, is not unique to smoking, nor is it unique to England. This year for the first time ASH has added questions in our annual survey of adults 18+ in Great Britain relating to alcohol,

³⁷ Arnott D, Dockrell M, Sandford A, Willmore I. Comprehensive smoke-free legislation in England: how advocacy won the day. *Tob Control*. 2007 Dec;16(6):423-8. doi: 10.1136/tc.2007.020255. PMID: 18048621; PMCID: PMC2807200.

³⁸ ASH research report. [Smokefree: The First Ten Years. Tackling the smoking epidemic in England: the views of the public](#). 1st July 2019. Accessed 14th June 2021.

³⁹ Royal College of Physicians. [Smoking and health 2021: a coming of age for tobacco control?](#) London: RCP, 2021.

⁴⁰ Kellner P. [Voters, including many smokers, want tough action to make tobacco history](#). Peter Kellner. The Politics Counter. 9th June 2021. Accessed 14th June 2021.

⁴¹ ASH Smokefree England survey. Total sample size was 10,211 adults. Fieldwork was undertaken by YouGov between 18th February - 18th March 2021. The survey was carried out online. The figures have been weighted and are representative of all adults in England (aged 18+).

obesity and gambling.⁴² Net support for more Government action is much greater than opposition across all these risk factors for health and wellbeing. A large majority either support government action or think it should go further: 79 per cent for smoking, 82 per cent for obesity, 76 per cent for alcohol and 75 per cent for gambling. The proportion who think Government is doing too much is low across all risk factors, at 5 per cent for tobacco, obesity and alcohol, and 3 per cent for gambling.

Figure 1: Is government action: to limit smoking; reduce obesity; reduce harm from alcohol and gambling....

	smoking	Obesity	alcohol	Gambling
Too much	5%	5%	5%	3%
Not enough	45%	59%	42%	53%
About right	34%	23%	34%	22%
DK	15%	14%	19%	22%

46. There is also a high level of public support from protection of health policy from the influence of all four industries.

Figure 2: Government health policy should be protected from the influence of the...

	tobacco industry	food and drink industry	alcohol industry	gambling industry
Support	73%	71%	71%	76%
Oppose	3%	6%	5%	4%

Conclusion

47. The UK is at a critical juncture with trade agreements threatening to undermine public health, and unilateral action by the devolved nations on environmental and/or public health policies rendered ineffective by the terms of the Internal Market Act, unless they are supported by the UK Government (see paragraph 29). Public pressure will be needed to ensure the Government delivers on its commitment to act across government to tackle the wider determinants of health, this will only be secured if we communicate the implications of government policy and the value of government intervention more effectively to civil society and the public,

48. There are lessons to be learned from tobacco control about how this can be done. Measuring and understanding public opinion on tobacco policy interventions has enabled us to frame interventions in ways that highlights the evidence that resonates best with the public. Disseminating the results, and engaging the support of a large number of civil society organisations in the Smokefree Action Coalition, helped stiffen successive governments' resolve to intervene to tackle the upstream determinants of health in this policy area, most notably with respect to the ban on smoking in public places. The approach used in tobacco control should be extended to other areas of public health, such as obesity, and alcohol.

⁴² ASH Smokefree GB survey. Total sample size was 12,247 adults. Fieldwork was undertaken online by YouGov between 18th February - 18th March 2021. The figures have been weighted and are representative of all adults in GB (aged 18+).