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Sleeping with an Elephant: Devolution and the United Kingdom Internal Market Act 2020

"Living next to you is in some ways like sleeping with an elephant. No matter how friendly and even-tempered is the beast, if I can call it that, one is affected by every twitch and grunt".[1]

Introduction

The constitutional fall-out from the process of withdrawing from the European Union has been dramatic and wide-ranging. Few areas have been untouched, few principles have remained unchallenged. The focus of this article is the impact of withdrawal on devolution and the territorial constitution, through an examination of the market access principles that are at the core of the United Kingdom Internal Market Act 2020 (UKIMA). This Act introduces a new body of rules to govern the general system of internal trade relations between the constituent territories of the UK, as from the expiry of the Brexit transition period on 1 January 2021. UKIMA represents a novel meeting of two hitherto distinct worlds: on the one hand, the theory and practice of cross-border trade management and internal markets, and on the other hand, the UK system of devolution. Analysis of UKIMA calls for an integrated understanding of each of these worlds, so that we can better explore their newfound interfaces and interactions.

In the first part of the article, we introduce the world of internal markets, and the internationally familiar governance toolbox that has been developed to assist in their operation and management. Nation-states, multinational organisations, federal, decentralised, and other forms of multilevel governance regime commonly adopt some of these tools in the management of their common economic space. The degree of regulatory uniformity within that space, and the associated impact on the scope for legislative autonomy for the constituent units, reflects different legal and political

[1] Pierre Trudeau, on the relationship between Canada and the US, Address to the National Press Club, Washington DC, March 1969.

choices, contexts and histories. Whilst we draw on comparative examples from other federal and multilevel governance systems, the experience of the European Union is centred. This reflects the EU's distinctiveness, not least through the systematic conceptualisation it has brought to internal market management, serving as a point of inspiration and reference not only for other international economic orders, but also for existing states to address internal trade issues.

In the second part of the article, we set out the distinctive legal and political context of the UK's territorial constitution. The two decades' experience of the devolution of legislative competence to institutions established in Edinburgh, Cardiff and Belfast occurred within the parameters of EU membership. Operating within these parameters minimised the scope for regulatory divergence within the UK to distort the domestic market. Beyond excluding some market-focused policy areas from devolved competence in the devolution statutes,[2] scant attention was given to the arrangements for managing a UK internal market. Yet such arrangements became unavoidable with Brexit, as departure from the European Single Market removed the framework of common rules that had previously governed much of the UK's internal as well as external trade. We chart the development of the UK Government's response, of which UKIMA is the most high-profile element.

Against those twin backgrounds, in the third part of the article we summarise the core principles of the legislation, explaining the choice of tools selected for the management of the fledgling UK internal market: the market access principles for goods and services, the mutual recognition of qualifications, and the mechanisms for monitoring and enforcement. Two other key elements of the Act – Part 6 (whereby the UK government can directly fund a wide variety of projects across the UK, regardless of devolved powers); and Part 7 (which resolves a dispute regarding competence over subsidy control by expressly reserving it to the central UK authorities) – are beyond the scope of this article. Though no less controversial for their impact on devolved competence, we contend that they are not central to the design and management of

[2] Northern Ireland Act 1998, Schedule 3; Scotland Act 1998, Schedule 5; Government of Wales Act 2006, Schedule 7A.

internal markets, though they do betray the centralizing motivations that underpin UKIMA.

In the final part, we explore the legal and political implications of the market access principles for devolution and territorial governance. We argue that whilst the legislation draws on familiar tools of internal market management, it does so in a way that is ill-adapted to the distinctive features of the UK, wherein one territory, England, is so much larger in market terms than the rest. The Act has restrictive – and potentially damaging – consequences for the regulatory capacity of the devolved legislatures that live next door to this English elephant, both by limiting the reach of devolved law, and by increasing pressure to conform to regulatory norms set by the UK government for England. UKIMA, as one amongst a series of continued provocations to devolved power, most of which have been introduced in the face of considerable opposition from the devolved institutions, presents significant challenges for the continuation of an increasingly fragile union.

Our focus is on the legislative innovation and broader constitutional implications of UKIMA for trade relations and devolution within Great Britain. We do not explore the specific position now occupied by and in relation to Northern Ireland, in accordance with the regime provided for under the Protocol on Ireland/Northern Ireland contained in the EU-UK Withdrawal Agreement of 2020.[3]

The world of internal markets

The "problem" of trade management

Any governance system which incorporates two or more territories, each with their own regulatory competence, needs to confront the scope and structure of internal, cross-border economic cooperation. The response will depend on a variety of constitutional,

[3] [2019] O.J. C 384 I. On which, see further, e.g. M. C. Murphy "Northern Ireland and Brexit: where sovereignty and stability collide?" (2021) 29 *Journal of Contemporary European Studies* 405; NIA Research and Information Service, *Internal Market Act 2020 and the Protocol on Ireland/Northern Ireland,* Paper No. 28/21 (16 April 2021).

economic and political considerations, each specific to that particular case. There will be differences both in how far regulatory divergence is regarded as a "problem" standing in the way of the "success" of an integrated market, and in the combination of legal instruments selected to achieve the agreed level of market integration. As Anderson observes, "there is always a judgement about the relative priority – and even legitimacy – to be assigned to the objective of an integrated internal market versus other objectives".[4] What that judgment is, and how it is made, will necessarily engage constitutional considerations, including the relative powers of the different constituent units, whether those rights are constitutionally protected and entrenched, the structures for intergovernmental relations, the mechanisms for enforcement, including the role of the courts, and their deference, or otherwise, to the constitutional status quo.

The assumed benefits of market integration, including stronger economic growth and competitiveness, are such that the balance between regulatory divergence and economic unity is an issue that all multilevel governance systems – whether decentralised or federal states, or international treaty systems – will face.[5] But not all will share the same level of ambition for economic integration, with different takes on how robustly both barriers to trade and distortions of competition are defined and addressed. A very limited internal market might be built on a thin concept of what constitutes a barrier to trade, limiting itself to addressing tariffs, border controls or overt protectionism against imported goods and services. Beyond those basic promises of market access, a more expanded notion would include other forms of market exclusion or segmentation, addressing regulatory obstacles that arise from the mere existence of variations in how different territories regulate the production and sale of particular goods or the provision of particular services.

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[4] G. Anderson (ed.), *Internal Markets and Multi-level Governance: The Experience of the European Union, Canada, Switzerland and the United States* (Ontario: Oxford University Press, 2012) p. 1.

[5] From a vast literature, consider, e.g. S. Deakin and F. Wilkinson, "Rights vs. Efficiency? The Economic Case for Transnational Labour Standards" (1994) 23 *Industrial Law Journal* 289; A. Ogus, "Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law" (1999) 48 *I.C.L.Q.* 405; D. Esty and D. Geradin (eds.), *Regulatory Competition and Economic Integration: Comparative Perspectives* (Oxford: Oxford University Press, 2001).

On distortions of competition, the question is how far should different compliance costs, resulting from different regulatory regimes across different territories, be regarded as a "problem"? Higher standards are often associated with higher costs and (in some eyes) reduced competitiveness – though high standards can also act as a guarantee of quality that (even with increased costs) offers a competitive advantage. For some, differential compliance costs are an artificial distortion of merits-based competition between private undertakings that should be eliminated. For others, such costs enable businesses to select the optimal jurisdiction for their regulatory needs – in turn stimulating competitive pressure upon legislatures to "improve" their regulatory outputs – a form of healthy rivalry between jurisdictions, spurring them to attract investment through innovation. For many, that sort of competition between legislatures is precisely the problem, permitting private undertakings to engage in "social dumping" by picking the territory that has the most permissive standards, thereby forcing rival policymakers to try to win back lost business by engaging in their own deregulatory processes and encouraging a cycle which will lead to lower standards for all through the dreaded "race to the bottom".[6] Conversely, there is also evidence of a "race to the top",[7] where the highest-standard jurisdiction becomes the regulatory norm, whether de facto or de jure. The conditions for this to emerge include market size, regulatory capacity, stringency of regulations, and the mobility of regulatory targets (contrasting, say, relatively less mobile employees or consumers with highly mobile capital).[8]

A familiar trade law toolkit

Trade law offers a toolkit of principles and instruments that can be employed in order to manage cross border trade in goods and services, and thereby translate the political

[6] Coined first in relation to corporate law deregulation in the US: see W.L. Cary, "Federalism and Corporate Law: Reflections Upon Delaware" (1974) 83 *Yale Law Journal* 663; and further D. Drezner, "Globalization and Policy Convergence" (2001) 3 *International Studies Review* 53.

[7] Starting with Vogel's thesis on the "California effect": see D. Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge, MA: Harvard University Press, 1995); D. Vogel and R.A. Kagan (eds), *Dynamics of Regulatory Change: How Globalization Affects National Regulatory Policies* (Berkeley, Los Angeles and London: University of California Press, 2004).

[8] A. Bradford, *The Brussels Effect: How the European Union Rules the World* (New York: Oxford University Press, 2020).

choices made within any given system into a more concrete regulatory reality. Whilst instruments of *negative harmonisation* manage the market through enabling local regulatory choices to be struck down where they offend the agreed scope of market access, instruments of *positive harmonisation* rely more on the centralised coordination or harmonisation of regulatory standards. Occupying a space between and across these lies the concept of mutual recognition, which permits any good or service lawfully produced in one participating territory to have access to other participating territories, without the need to comply with further checks or other requirements in the host state.

Negative harmonisation provides for the removal of hindrances to trade through judicial enforcement. At the very least, it will seek to capture discriminatory measures, as non-discrimination is generally seen as a baseline requirement for cross-border trade: it eliminates blatant inequalities. Discrimination may be direct – where a state applies a criterion that on its face treats home and imported goods differently, placing imports at a disadvantage (for example, requiring imports to be labelled as such); or it might be indirect, applying a prima facie neutral criterion that in practice creates a disadvantage (for example, requiring certain qualifications, or local residency for service providers). There will, though, be limits to the reach of negative harmonisation. Typically, provision will be made for some "discriminatory" measures to be maintained for public interest reasons. These reasons may be explicitly set out in legislation (as with the EU's Treaty-based justifications for hindrances to free movement)[9], or in court-created rules (for example, the EU's "mandatory requirements",[10] and the US "undue burdens" balancing test, which can justify discriminatory state regulation otherwise caught under the "dormant" commerce clause).[11] But however effective a non-discrimination

[9] E.g. Art. 36 Treaty on the Functioning of the European Union, on free movement of goods. Comparable provisions apply across the remaining "four freedoms" of movement guarantees for services and establishment, capital and people.

[10] Case C-120/78, *Rewe-Zentral* v. *Bundesmonopolverwaltung für Branntwein* ("*Cassis de Dijon")*, ECLI:EU:C:1979:42.

[11] C. J. Weiler Jr, "The United States of America" in G. Anderson (ed.), *Internal Markets and Multi-level Governance: The Experience of the European Union, Canada, Switzerland and the United States* (Ontario: Oxford University Press, 2012); J.M. McGoldrick Jr., "The Dormant Commerce Clause: The Endgame—From *Southern Pacific* to *Tennessee Wine & Spirits*—1945 to 2019" (2020) 40 *Pace Law Review* 44.

principle might be, however widely defined the group of potential litigants that may be recognised as having standing, and however strongly interpreted by the court system, such an approach will inevitably fail to tackle the problem of barriers to trade which arise from the mere existence of different rules across different territories: for instance, a rule banning the sale of GMO products may be non-discriminatory, but it may yet partition the market along territorial lines.

Positive harmonisation provides one route to address market partitioning – through the adoption of centralised, harmonised regulatory standards. However, this depends on there being a central body that is capable of legislating for the composite territory. If such legislation sets a common regulatory standard which must be complied with by all the territorial jurisdictions sharing the same internal market, this will solve the problem of barriers to trade that arise from mere differences between national or regional laws. In addition, uniform regulation will eliminate distortions of competition that would otherwise arise from regulatory variation across territories: the same rules should result in the same compliance costs for producers located in different territories. However, centralised regulation may be viewed as an intrusive instrument of market management. Strongly decentralised systems, such as those of Canada and Switzerland, have little tradition of such regulation, relying instead on other instruments, such as intergovernmental agreements, or mutual recognition, and accepting the more limited forms of market integration that may result.[12]

The European Union stands out amongst multitier systems, even compared to nation states, for its framework for facilitating centralised regulation. The EU has the law-making competence to create uniform regulation across various policy fields. Nonetheless, concerns may arise about the limited degree of regional autonomy and

[12] W. Dymond and M. Moreau, "Canada" and T. Cottier and M. Oesch, "Switzerland" in G. Anderson (ed.), *Internal Markets and Multi-level Governance: The Experience of the European Union, Canada, Switzerland and the United States* (Ontario: Oxford University Press, 2012); E.M. Besler and S. Mazidi, *Internal Market Approaches – Comparative Research (Switzerland)*, Report to the Scottish Parliament Finance and Constitution Committee (31 August 2019) available at https://archive2021.parliament.scot/S5_Finance/General%20Documents/20191021_FINAL_Switzerland_Research.pdf.

respect for local preferences that this approach allows. In the EU context, these concerns are partly addressed through building in controls over the EU legislature's exercise of competence, including a commitment to respect the principle of subsidiarity, even if many commentators express doubts about the effectiveness of its legal (and especially judicial) enforceability.[13] That said, Union-level harmonisation is often relatively limited in scope, defining only those common standards needed to protect essential public interest requirements. Additionally, the EU legislative process is designed to ensure a balanced representation of interests. This includes the voice of the Commission, as well as the elected representatives of EU citizens in the European Parliament, together with the representatives of the Member State governments. The latter act together in the Council, where decision-making is influenced, though not entirely determined, by population size (especially in situations where unanimity is required to adopt Union-level legislation).

The final tool is *mutual recognition*.[14] Mutual recognition solves the problem of barriers to trade in a straightforward way: differences in national law are left in place, but cannot be used as an excuse to hinder the free sale of goods or the provision of services. However, mutual recognition also preserves any distortion of competition arising from differential compliance costs, facilitating regulatory competition and maintaining the risk of social dumping. Moreover, despite the apparent space for local regulatory autonomy to be maintained, mutual recognition will place significant limits on the ability of any legislative or governing body to set and enforce its own distinctive policy choices across its territory: rules might apply to local producers and suppliers, but cannot be enforced in the case of importation. For example, whilst one territory

[13] See, amongst many others, A. Estella, *The EU Principle of Subsidiarity and Its Critique* (Oxford: Oxford University Press, 2002); R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009); S. Pazos-Vidal, *Subsidiarity and EU Multi-level Governance: Actors, Networks and Agendas* (Abingdon: Routledge, 2019).

[14] Again from a vast literature, see further, e.g. K. Armstrong, "Mutual Recognition" in C. Barnard and J. Scott (eds), *The Legal Foundations of the Single Market: Unpacking the Premises* (Oxford: Hart, 2002); F. Kostoris Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process* (Basingstoke: Palgrave Macmillan, 2005); C. Janssens, *The Principle of Mutual Recognition in European Union Law* (Oxford: Oxford University Press, 2013); S. Weatherill, "The Principle of Mutual Recognition, It Doesn't Work Because it Doesn't Exist" (2018) 43 E.L.Rev. 224.

might ban the production of GMOs within its borders, it cannot stop the importation of GMOs which have been lawfully produced in another participating territory within the internal market. Whilst mutual recognition is undoubtedly an effective tool for promoting cross-border trade, it is also a much more controversial principle, which means that states have to live with the practical consequences that result from the regulatory choices made in other participating jurisdictions, which may entail different or lower regulatory standards. When the Spanish Market Unity Act (2013) introduced a "region of origin" rule as a form of compulsory mutual recognition to combat perceived market fragmentation resulting from regulatory divergence between the autonomous communities, this aspect of the legislation was struck down by the Spanish Constitutional Court. The Court ruled that it breached the regional autonomy provisions of the Spanish Constitution, including the principle of the territoriality of regional competences.[15]

For those reasons, a trade system that relies on extensive commitments to mutual recognition will typically incorporate multiple safeguards in its application. These might include offering a range of justifications that enable the host territory to enforce its higher regulatory standards against incoming goods and services, for the sake of protecting important public interest goals. This approach is adopted by the EU, as laid down by the Court of Justice in the 1979 case *Cassis de Dijon,*[16] perhaps the most famous judicial decision ever delivered in the field of cross border trade and internal market management. According to *Cassis de Dijon*, each Member State is free to regulate its own market as it sees fit, but subject to a presumption of mutual recognition – so that goods lawfully made, or services lawfully provided, in one Member State will be available in every other Member State. This presumption is not absolute, though. It can be rebutted on a wide range of public interest grounds – an open list which extends far beyond the derogations (such as public health and security) explicitly laid down in the relevant Treaty provisions, so as to include (for example) environmental, labour and consumer protection – indeed, virtually any social or welfare objective (unless this

[15] L.A. Jiménez, "Mutual Recognition in the Spanish Multilevel Administrative State" (2021) 12 *Review of European Administrative Law* 159.

[16] Case C-120/78, *Rewe-Zentral* v. *Bundesmonopolverwaltung für Branntwein* ("*Cassis de Dijon")*, ECLI:EU:C:1979:42.

amounts to covert protectionism). Successful rebuttal will result in the host state being able to insist that imported goods and services meet its particular regulatory standards. Switzerland, which has modelled its own Internal Market Act on the *Cassis de Dijon* rule, adopts a market access principle based on mutual recognition as well as non-discrimination, making the former subject to a broadly drawn concept of public interest considerations that can be raised by the target jurisdiction.[17]

Experiences in market management have provided several important general lessons. First, every "internal market" is a product of its own unique circumstances and conditions – which will affect the many choices to be made and the complex balances to be struck: what works for the US will not necessarily succeed in Europe (and vice versa).[18] Secondly, even within any given internal market, the precise choices made may vary from sector to sector, and the balance struck or compromises reached will face pressure to change and evolve over time. Internal markets are not end-states or final destinations; they are ongoing frameworks and processes for managing economic relations between their constituent territories. Thirdly, the wide variety of ways in which it is possible to conceive of the relevant problems, design workable solutions and operationalise such approaches into institutional and legal practice means that internal markets should not be reduced to overly simplistic models, which equate "policy diversity" with an imperfectly functioning internal market, or that see all barriers to trade as inherent evils that need to be extinguished. On the contrary, internal markets can and do offer a wide range of regulatory responses to similar regulatory challenges – all of which are equally "valid", but reflect different understandings of the relevant problem and the possible solutions. Fourthly, what all internal markets generally do have in common is the need for mutual trust between their constituent territories. Indeed, mutual trust is surely essential to the smooth functioning and long-term survival

[17] T. Cottier and M. Oesch, "Switzerland" in G. Anderson (ed.), *Internal Markets and Multi-level Governance: The Experience of the European Union, Canada, Switzerland and the United States* (Ontario: Oxford University Press, 2012).

[18] Consider, e.g. F. Duina, *The Social Construction of Free Trade: The European Union, NAFTA and Mercosur* (Princeton and Oxford: Princeton University Press, 2006); A. Hinarejos, "Free Movement, Federalism and Institutional Choice: A Canada-EU Comparison" (2012) 71 C.L.J. 537; M. Egan, *Single Markets: Integration in Europe and the United States* (Oxford: Oxford University Press, 2015).

of any internal market. For example, a system that offers its participants an effective voice, through relatively independent and impartial institutions and processes, will surely prove more satisfactory and durable than one which treats certain territories as inherently more important or privileged than others, or that is imposed without the consent of one or more of the participating territories.[19]

Devolution and market regulation in the UK

Devolution and the UK internal market before Brexit

Legislative devolution in the United Kingdom has several distinctive features that impact on the system of market regulation. The 1998 statutes introduced devolution only in the UK's three smaller territories, leaving the largest, England, to be governed by the UK parliament and government. Each system of devolution has distinctive characteristics and powers, reflecting the historical and political context in which it emerged. However, all three devolution statutes conform to a dualist model of power allocation, with little tradition of shared competence between the UK and devolved institutions, and few requirements for co-decision.[20] Most explicit tools of market regulation are "reserved" to the UK parliament. With some variations across each statute,[21] these encompass broad swathes of trade and industry policy, including

[19] Consider, e.g. P. Cramér, "Reflections on the Roles of Mutual Trust in EU Law" in M. Dougan and S. Currie (eds.), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Oxford: Hart, 2009); M. Möstl, "Preconditions and limits in mutual recognition" (2010) 47 C.M.L.Rev. 405.

[20] J. Hunt, "Subsidiarity, Competence and the UK Territorial Constitution" in O. Doyle, A. McHarg and J. Murkens (eds.) *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (Cambridge: Cambridge University Press, 2021).

[21] Considerable asymmetry remains across the devolution arrangements for Scotland and Wales (as well as Northern Ireland). Whilst Wales' model has in recent years moved from a conferred model of powers to a reserved model, more in line with that of Scotland (and Northern Ireland), reserved areas are more extensive for Wales than other parts of the Union. Note that Northern Ireland's distinctive, and more extensive settlement, includes both areas that are reserved as well as excepted – the former are envisaged as potentially being subject to future devolution. See further J. Hunt, "Subsidiarity, Competence and the UK Territorial Constitution" in O. Doyle, A. McHarg and J. Murkens (eds.) *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (Cambridge: Cambridge University

competition, consumer protection, import and export controls, the regulation of financial and energy markets, key areas of transport regulation, and the protection of product standards, except food, agricultural and horticultural products. As Lord Hope noted in *Imperial Tobacco*, a common theme of the reservations is that they "are designed to ensure that there is a single market within the United Kingdom for the free movement of goods and services".[22]

Devolution nonetheless gave key policy levers to the devolved institutions to set regulatory standards and introduce market interventions in a broad range of fields, including housing, agriculture, food production, the environment, healthcare and education. Explicit mechanisms to ensure that devolved decisions did not impede trade within the UK were, though, limited and haphazard. For example, the Northern Ireland Act 1998 has a unique (and never invoked) provision entitling the (UK) Secretary of State to prevent an Assembly Bill being presented for Royal Assent where the minister considers that it "would have an adverse effect on the operation of the single market in goods and services within the United Kingdom".[23] The Scotland Act 1998 also has a unique provision preventing the Scottish Parliament from modifying Articles 4 and 6 of the Acts of Union 1707 so far as they relate to freedom of trade.[24] There are no equivalent provisions in the Welsh devolution legislation.

In contrast to federal constitutions that divide sovereignty between constituent units, the UK's devolution statutes recognise the continued sovereignty of the UK parliament and its ability to make any laws for Scotland, Wales and Northern Ireland. This gives the UK institutions the potential to regulate in devolved areas. However, Westminster parliamentary sovereignty has been modified by a constitutional convention, known as the Sewel, or Legislative Consent, Convention, that the UK parliament will not "normally" exercise that power without the consent of the relevant devolved

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Press, 2021); B. Dickson, "Devolution in Northern Ireland", A. McHarg, "Devolution in Scotland" and R. Rawlings, "The Welsh Way/Yr Fordd Gymraig", all in J. Jowell and C. O'Cinneide (eds.) *The Changing Constitution* (Oxford: Oxford University Press, 9th edn 2019).

[22] *Imperial Tobacco* v. *Scottish Ministers* [2012] UKSC 61; 2013 SC (UKSC) 153, at [29].

[23] Section 14(5)(b).

[24] Schedule 4, Part 1, para 2(a).

legislature(s). Between 1999 and the end of 2020, over 350 legislative consent motions had been the subject of votes in one or more of the devolved legislatures, in relation to over 200 Acts of Parliament.[25] The Sewel Convention has been an important tool both to manage the interface between devolved and reserved powers and to underpin the authority of the devolved institutions in the context of continued Westminster parliamentary sovereignty.[26]

The need for all legislative authorities within the UK to work within the scope of EU law and implement EU directives also limited the extent to which devolved policy levers could generate market distortions across the UK's domestic market. Nevertheless, the discretion afforded by EU law permitted some divergences. For example, the Court of Justice of the European Union (CJEU) confirmed the lawfulness under EU law of differential implementation by legislatures within a state, recognising that "each Member State is free to allocate powers internally and to implement [EU law] by means of measures adopted by regional or local authorities".[27] This resulted in differences (for example) in environmental and agricultural standards, and food and energy efficiency standards. These were regarded as sufficiently marginal to be accepted as a consequence of devolution.[28] Indeed, regulatory divergence has long been a feature of the UK market: for example, building regulations – identified in the UK Internal Market White Paper as an illustration of potential barriers to trade[29] – were distinct in Scotland from those in England and Wales long before devolution (reflecting differences in climate and housing stock). In fact, the claim in the White Paper that "[t]he UK Internal Market has for centuries been at the heart of our economic and social

[25] Institute for Government, *Sewel Convention*, available at https://www.instituteforgovernment.org.uk/explainers/sewel-convention (accessed 31 August 2021).

[26] A. McHarg, "Constitutional Change and Territorial Consent: The *Miller* Case and the Sewel Convention" in M. Elliott, J. Williams and A. L. Young (eds.) *The UK Constitution After: Brexit and Beyond* (Oxford: Hart Publishing, 2018).

[27] Case C-428/07, *R (Horvath)* v. *Secretary of State for Environment, Food and Rural Affairs,* ECLI: EU:C:2009:458 at [50].

[28] J. Hunt, "Devolution and Differentiation: Regional Variation in EU Law" (2010) 30 *Legal Studies* 421-441.

[29] Department for Business, Energy and Industrial Strategy*, UK Internal Market* (CP 278, 2020) at 85.

prosperity as a country",[30] dating back to the 1707 Acts of Union, has an unconvincing historical foundation.[31] There is no reference in the Acts of Union to a common UK market,[32] and despite the existence for most of the period of union of a single legislature for the whole of the UK, different laws bearing on trade in the UK's separate jurisdictions have long persisted.[33] The Inner House in *Imperial Tobacco*[34] noted the limited protections for internal trade actually contained in the union legislation.

After devolution, some distortions were accepted within the domestic market despite being prohibited under the rules of the EU's internal market. In perhaps the highest profile example, distinctive systems of university tuition fees in each of the UK's territories meant that students from other EU/EEA states were treated in the same way, and charged at the same rate, as "home" (i.e. Scottish, Welsh, English or Northern Irish) students, but those coming from other parts of the UK could face different, and in some cases considerably higher, fees.

The Brexit challenge

Nonetheless, it was widely recognised that the UK's departure from the EU internal market opened up the prospect of increased regulatory differences across the constituent territories of the UK, with the potential to impact upon internal trade in

[30] Department for Business, Energy and Industrial Strategy*, UK Internal Market* (CP 278, 2020) at [1].

[31] The White Paper's "strangulated paragraphs" on history are critiqued by D. Wincott, C. R. G. Murray and G. Davies, "The Anglo-British imaginary and the rebuilding of the UK's territorial constitution after Brexit: unitary state or union state?" (2021) *Territory, Politics, Governance*, DOI: 10.1080/21622671.2021.1921613.

[32] M. Keating, "Response: The Internal Market White Paper" (17 June 2020) available at https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/response-internal-market-white-paper.

[33] E.g. Finlay shows that, following the 1707 union, English goods were still treated in law for certain purposes as foreign goods in Scotland, escaping the guarantee of free trade under the Acts of Union: see J. Finlay, "Jurisdictional Complexity in Post-Union Scotland" in S.P. Donlan and D. Heirbaut (eds.), *The Law's Many Bodies: Studies in Legal Hybridity and Jurisdictional Complexity c.1600-1900* (Berlin; Duncker and Humblot, 2015) p. 236.

[34] [2012] CSIH 9; 2012 SC 297.

goods and services. In her January 2017 speech "A Plan for Britain", setting out the negotiating objectives for exiting the EU, the then Prime Minister, Theresa May, stressed that as powers returned from Brussels to the UK, the "guiding principle" governing their allocation was to ensure that "no new barriers to living and doing business within our own Union are created".[35] The UK government's approach to this challenge went through a number of iterations prior to the enactment of UKIMA, and some of the proposed solutions proved highly controversial.

The initial approach[36] was to effectively centralise authority over all "retained EU law" by constraining the ability of the devolved legislatures to modify or replace such laws even where they concerned fields that otherwise fell within devolved competence. This would have effectively ensured harmonised legal rules until such time as the constraint was eased; that is, if and when harmonisation was deemed unnecessary by the UK government. That constraint was relaxed in the face of considerable pressure from the devolved institutions. Instead, the European Union (Withdrawal) Act 2018 empowered the UK Government to "freeze" the ability of devolved institutions to modify "retained EU law", albeit compelling UK ministers to seek (though not necessarily secure) the consent of the devolved legislatures before exercising that power. But these freezing powers ("section 12 regulations") have never been used.

Instead, the UK and devolved administrations worked collaboratively toward exploring whether and how to replace EU regulations with domestic common legislative and non-legislative frameworks to "enable the functioning of the UK internal market, while acknowledging policy divergence".[37] Over 150 fields of EU activity were initially

[35] See https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech.

[36] European Union (Withdrawal) Bill, clause 11. The Bill was introduced on 13 July 2017.

[37] Joint Ministerial Committee (EU Negotiations) communiqué: 16 October 2017, retrieved from: https://www.gov.uk/government/publications/joint-ministerial-committee-communique-16-october-2017. See also: S. Douglas-Scott, "The Constitutional Implications of the EU (Withdrawal) Act 2018: A Critical Appraisal", *Queen Mary University of London, School of Law Legal Studies Research Paper,* No. 299/2019; T. Mullen, "Brexit and the territorial governance of the United Kingdom" (2019) 14

identified as intersecting with devolved competence. In most of these areas, the administrations concluded that no framework would be required, and by summer 2021, there were 32 active common frameworks at various stages of completion.[38] These use both legislative and non-legislative approaches to secure harmonisation across matters including food compositional standards, procurement, and genetically modified organisms. Common frameworks were described by the (then) UK Government's Constitution Minister as "voluntary agreements" between the UK and devolved administrations that "allow all parts of the UK to maintain consistent, easily-understood rules and regulations for citizens, consumers, businesses and trading partners".[39]

The frameworks programme represents a rare example of intensive intergovernmental cooperation in a system characterised by weakly institutionalised intergovernmental relations (IGR). Although there were always interdependencies and spillovers between devolved and reserved powers, the dualist model of power allocation created few incentives for joint working.[40] Changes in the devolution statutes, alongside party political incongruence in the composition of the UK's various governments, had already generated pressure for reforms to IGR.[41] The Brexit process intensified these demands, not least in recognition of the potential impact that increased policy divergence might have for domestic trade once the UK had departed from the EU regulatory arena. The weak and ad hoc processes that had hitherto characterised the

Contemporary Social Science 276; N. McEwen, "Negotiating Brexit: Power Dynamics in British Intergovernmental Relations" (2021) 55 *Regional Studies* 1538.

[38] Cabinet Office, *Government Response to the House of Lords Common Frameworks Scrutiny Committee report:* '*Common Frameworks: building a cooperative Union*' (May 2021) available at: https://committees.parliament.uk/publications/6175/documents/68906/default/.

[39] Letter from Chloe Smith MP to Baroness Andrews on the Government's response to the Lords' Common Frameworks Scrutiny Committee's report (29 June 2021) available at: https://committees.parliament.uk/work/734/postbrexit-common-frameworks/publications/.

[40] N. McEwen, "Still Better Together? Purpose and Power in Intergovernmental Councils in the UK" (2017) 27/5 *Regional and Federal Studies* 667.

[41] The Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (27 November 2014) available at: https://depositedpapers.parliament.uk/depositedpaper/2275280/files

system of IGR in the UK were deemed not "fit for purpose".[42] A long-running review has produced interim proposals that suggest potentially far-reaching reforms could be forthcoming, including portfolio-level engagement in ministerial groups that relate to the domestic market, such as trade, business and industry, transport and environment, food and rural affairs, and an inter-ministerial standing committee for strategic cross-cutting issues.[43] But the marginalisation of the devolved administrations in the process of negotiating Brexit has contributed to a significant deterioration of trust between the UK and devolved governments that may impede both the prospects of agreement and the dynamics of intergovernmental working.[44]

This lack of trust has been cemented by the Johnson administration's centralising and unilateral approach to the introduction of UKIMA, founded on an understanding of the United Kingdom more as a "unitary" than a multi-layered, territorially complex state.[45] The legislation was motivated by the same issue that underpinned the frameworks programme: how to ensure that EU exit avoids creating new barriers for business and professionals operating across more than one of the territories that make up the UK's domestic market. But in place of a co-operative, co-owned process that embedded respect for devolution, as was the case with common frameworks, UKIMA was driven by the UK Government alone in the face of deep-seated opposition from all three devolved administrations. It was also introduced very late in the Brexit process. A White Paper was published in July 2020, allowing only four weeks for consultation;[46] the Bill itself was introduced into Parliament on 9 September 2020 and received Royal

[42] House of Commons Public Administration and Constitutional Affairs Committee, *Devolution and Exiting the EU: Reconciling Differences and Building Strong Relationships?* (HC1485, 2018 at 38); N. McEwen, M. Kenny, J. Sheldon and C. Brown Swan, "Intergovernmental Relations in the UK: Time for a Radical Overhaul?" (2020) 19 *Pol. Q.* 632.

[43] Cabinet Office, *Progress update on the review of intergovernmental relations* (24 March 2021) available at: https://www.gov.uk/government/publications/progress-update-on-the-review-of-intergovernmental-relations.

[44] See the references in note 37 (above).

[45] D. Wincott, C.R.G. Murray and G. Davies, "The Anglo-British imaginary and the rebuilding of the UK's territorial constitution after Brexit: unitary state or union state?" (2021) *Territory, Politics, Governance*, DOI: 10.1080/21622671.2021.1921613.

[46] Department for Business, Energy and Industrial Strategy*, UK Internal Market* (CP 278, 2020).

Assent just over three months later. Moreover, the Act was enacted despite all three devolved legislatures withholding their consent, after it had been sought according to the Sewel Convention. This was not the first time since the Brexit referendum that the Convention had been set aside, but it was especially notable given that the primary purpose of the legislation was to constrain the capacity of the devolved institutions to use their regulatory autonomy to generate potential barriers to trade and mobility within the UK.

The analysis in the next section considers the legislation in detail, exploring how it draws upon the toolkit of principles and instruments used to underpin internal trade. Although UKIMA relies principally on mutual recognition and non-discrimination, rather than harmonisation or recentralisation, the unique circumstances of the UK suggest that it will have significant centralising effects.

Core provisions of UKIMA 2020

The legislation places a market access commitment at the heart of the UK Internal Market (UKIM), founded on two strong principles: mutual recognition and non-discrimination. These are provided for separately in relation to goods and services, and carry the potential to constrain a wide range of policy levers that could otherwise affect domestic trade. The legislation provides only limited exemptions from the market access principles and empowers the Secretary of State to make extensive alterations to these exemptions. The effect of the market access commitment is reinforced by the ability of businesses and individuals to argue before the courts that incompatible devolved legislation should be disapplied in practice.

Market access principles for trade in goods

Under Part 1 of the Act, mutual recognition will apply to certain types of rules; non-discrimination is applicable by default to another category of rules.[47]

[47] Section 1(1)-(2). Though neither market access principle shall prevent traders from complying with all relevant local rules: see s. 14.

The Act lays down certain basic limits to the scope of both market access principles. For example, they only apply in respect of statutory requirements imposed by legislation;[48] and they only apply to sales made in the course of a business – though they do not apply to sales, even if made in the course of a business, where these are only for the purpose of performing a public function.[49] Moreover, both mutual recognition and non-discrimination are intended to be largely prospective in effect: subject to certain conditions, they will not apply to existing rules. However, the Act will kick in should existing provisions be amended in a substantive way. What amounts to a "substantive" amendment is not expressly defined. The principles will apply to all new regulatory requirements introduced by the competent authorities.[50]

For new or substantively amended rules, the main market access principle is mutual recognition.[51] The latter will apply to all rules governing (what in EU law terms would be known as) product requirements, non-compliance with which would otherwise result in a prohibition on sale of the relevant goods. These include: regulatory standards affecting the physical integrity of the goods themselves, such as their ingredients, composition, packaging and labelling; and mandatory conditions relating to production covering issues such as site of manufacture, record-keeping, inspection and approval.[52] Here, the Act offers only very limited opportunities for a host territory to insist upon applying its own standards to imports from elsewhere in the UK; mutual recognition can be denied only to deal with highly specific problems, i.e. combatting the spread of pests, diseases or unsafe foodstuffs, and even then, only under strictly controlled

[48] See, in particular, ss. 3(8), 6(10) and 16(14); also s. 58.

[49] See s. 15. Note also the basic definitions contained in s. 16, e.g. as to the meaning of 'goods'; as well as the provisions of s. 10(1) and Schedule 1, para. 11 on the exclusion of taxation powers from the scope of Part 1.

[50] See s. 4 (mutual recognition, noting s. 4(2)(b) in particular); and s. 9 (non-discrimination).

[51] See s. 2.

[52] See s. 3.

conditions.[53] There is no wider system of justifications or derogations, even for general threats to public health, let alone issues such as environmental, consumer or employment protection.

For example, the Scottish and Welsh Governments have proposed the introduction of a prohibition on the marketing of single use plastic packaging.[54] That rule would fall within the scope of Part 1, as a new requirement imposed upon the sale of goods made in the course of a business. The rule would be categorised as a regulatory standard affecting the physical packaging of goods and, as such, become immediately subject to the requirement of mutual recognition. The rule would be ineligible for public interest exclusion, since the Act does not recognise environmental concerns as a valid ground of justification. The Scottish and Welsh requirements would therefore be rendered inapplicable to non-compliant goods imported (say) from England – though they would remain fully applicable in respect of domestically-produced goods.[55] The UK Government has announced that it will consult on potential prohibitions of single use plastics in England in autumn 2021. Should any resulting regulations diverge from, and be less extensive than, the proposed restrictions in Scotland and Wales, businesses in the devolved territories may be placed at a competitive disadvantage and, at the same time, the policy objective motivating the devolved regulations would be undermined.

Besides the core principle of mutual recognition for product requirements, the Act also contains a principle of non-discrimination, covering both direct and indirect discrimination against goods with a "relevant connection" to another part of the UK,

[53] See s. 10(1) and Schedule 1, especially paras. 1 and 2. Note also the particular provisions limiting mutual recognition in respect of chemicals, fertilisers and pesticides as contained in Schedule 1, paras. 6-10.

[54] Scottish Government, *Programme for Government 2021-2022* (September 2021) available at https://www.gov.scot/programme-for-government/; Welsh Government, *Programme For Government* (July 2021) available at: https://gov.wales/sites/default/files/publications/2021-06/programme-for-government-2021-to-2026.pdf.

[55] In that regard, consider the UK Government's official guidance available at: https://www.gov.uk/government/publications/uk-internal-market-bill-2020-policy-statements/goods-market-access-approach-to-restrictions-and-bans--2.

i.e. based on those goods (or any of their components) being produced there, or being produced by a business based there, or originating/transiting through there.[56] Non-discrimination will apply to a second and distinct body of new or substantively amended rules: those governing (what in EU law terms would be known as) selling arrangements – such as advertising regulations, shop opening restrictions or licensing requirements, as well as mandatory conditions relating to circumstances of sale covering issues like conditions of storage or transportation.[57] If there is putative direct discrimination against other UK goods, it can only be defended on very specific grounds, i.e. combatting the spread of pests or diseases (though again, only under strictly controlled conditions), or to the extent that it can reasonably be justified as a response to a "public health emergency" posing an "extraordinary threat" to human health.[58] If there is prima facie indirect discrimination against other UK goods, then it can be justified according to a lower threshold, i.e. where the measures can reasonably be considered a necessary means of achieving a legitimate aim – currently defined as the protection either of the life or health of humans, animals or plants, or of public safety and security.[59]

For example, imagine that the Welsh Senedd were to introduce a prohibition on the advertising of alcoholic beverages. That rule would fall within the scope of Part 1, as a new requirement imposed upon the sale of goods made in the course of a business. The rule would be categorised as a regulatory standard affecting the advertising of goods (though without affecting the physical integrity of the goods as such) and would therefore become subject to the principle of non-discrimination. Since the prohibition applies to all alcoholic beverages, there is no direct discrimination in favour of domestic production. But the rule might still give rise to indirect discrimination, if there is evidence that it places imported beverages at a greater disadvantage (for example, because new products are more reliant on advertising to penetrate established local markets) and causes a significant adverse effect on competition in the relevant UK

[56] See ss. 5, 7 and 8. Note also s. 10(1) and Schedule 1, para. 12 for a specific exclusion from the definition of indirect discrimination against goods.

[57] See s. 6.

[58] See s. 10(1) and Schedule 1, especially paras. 1 and 5.

[59] See s. 8(1) and (6); taking into account also the factors indicated in s. 8(12).

market. If such effects arise, and the Welsh prohibition cannot reasonably be considered a necessary means of protecting human health, the rule could then be rendered inapplicable as regards the advertising of English alcoholic drinks – though it would remain fully applicable in respect of domestically-produced goods.

The final version of UKIMA contains certain provisions, added after publication of the original proposals, to clarify precisely which rules should be subject to full mutual recognition, as opposed to which rules should instead be governed only by non-discrimination. When the Bill was first published, it was unclear how (for example) rules on the minimum pricing of goods such as alcohol should be classified: were they closer to product requirements, governed by mutual recognition; or to selling arrangements, subject to non-discrimination? This issue has particular resonance in Scotland, where efforts to combat excessive alcohol consumption have already been the subject of scrutiny under EU internal market law,[60] and the draft UKIM legislation caused particular alarm among the public health community.[61] Largely in response to such concerns, the final version of UKIMA therefore creates a specific category called "manner of sale requirements" – rules regulating the circumstances or manner in which goods are sold (such as place or time of sale, sale by whom or to whom, or the price and other terms of sale). Such manner of sale requirements will generally be governed by the principle of non-discrimination – unless they appear to be designed artificially to avoid full application of the principle of mutual recognition, for example, by being so unusually restrictive as to render sale of the goods practically impossible.[62]

Although UKIMA shares with EU free movement law the basic practice of assigning different trade rules to different categories, each governed by different tests (product requirements have mutual recognition, selling arrangements have non-discrimination etc), it is nevertheless worth noting that, in certain important respects, the new UK

[60] Case C-333/14, *Scottish Whisky Association*, ECLI:EU:C:2015:845; *Scotch Whisky Association v Lord Advocate* [2017] UKSC 76; 2018 SC (UKSC) 94.

[61] Alcohol Focus Scotland, *Response to the Scottish Parliament's Finance and Constitution Committee Call for views from on the UK Government's Internal Market bill* (2020) available at: https://www.alcohol-focus-scotland.org.uk/media/440038/afs-response-uk-internal-market-bill-fcc-.pdf.

[62] See s. 3(4)-(6).

regime appears less far-reaching in scope than its EU model. For example, EU law also has a general or default test for trade rules that do not clearly fall into one of its pre-defined categories yet are nevertheless capable of having an appreciable effect on market access between Member States. By contrast, UKIMA has pre-set categories, but no general or default test based on residual impacts upon market access for imported goods. To illustrate, take restrictions on the post-sale use of a product – say, a rule that motorbike trailers cannot be used on public highways. That rule is neither a product requirement (so no mutual recognition) nor a selling arrangement (so no non-discrimination). But under EU law, it would still be treated as a barrier to trade that needs to be justified by the host state – because banning a product's use for one of its basic or essential purposes has an appreciable effect on potential consumer demand for that product and therefore hinders its access to the relevant market.[63] In line with this precedent, a Welsh ban on the use (but not sale) of electric shock collars for pets was recognised as engaging the free movement of goods provisions, but was still found to be a justifiable restriction on free movement as it pursued a legitimate aim.[64] By contrast, under UKIMA, restrictions on the post-sale use of a product appear to fall entirely outside the scope of the market access principles and indeed of the legislation itself – regardless of any potential impact on market access between the constituent territories of the UK.[65]

Provisions on services and professional qualifications/regulations

Part 2 of the Act sets out rules governing internal trade in services.[66] The approach is again based on identifying certain pre-set categories of rules, each subject to their own

[63] See, in particular, Case C-110/05, *Commission* v. *Italy*, ECLI:EU:C:2009:66 (together with its subsequent line of caselaw).

[64] *R (Petsafe)* v. *The Welsh Ministers* [2010] EHWC 2908; [2011] EuLR 270.

[65] In that regard, consider the UK Government's official guidance, available at: https://www.gov.uk/government/publications/uk-internal-market-bill-2020-policy-statements/goods-market-access-approach-to-restrictions-and-bans--2.

[66] Note that the rules on services apply only by default, where the rules on mutual recognition for goods under Part 1, or on professional qualifications/regulations under Part 3, do not apply: see s. 17(5).

principles of scrutiny and potential incompatibility with the UKIM.[67] "Authorisation requirements" (whereby businesses must have a regulator's permission before providing a particular service) are governed by mutual recognition.[68] "Regulatory requirements" (non-compliance with which would prevent a business from providing a particular service) are governed by non-discrimination.[69] Again, the Act provides only limited scope for derogation or justification. Mutual recognition/putative direct discrimination can only be refused/excused to the extent that the disputed requirement can reasonably be justified as a response to a public health emergency posing an extraordinary threat to human health.[70] Prima facie indirect discrimination must reasonably be considered a necessary means of achieving a legitimate aim – currently defined as either protecting the life or health of humans, animals or plants, or protecting public safety or security, or the efficient administration of justice.[71] In addition, Schedule 2 contains a lengthy list of sectors (such as audiovisual, gambling, healthcare and private security services) which (together with any authorisation/regulatory requirements connected to taxation) are not subject to the principles of mutual recognition and/or non-discrimination.[72] Almost as soon as the legislation came into force, the UK Government opened a public consultation, *inter alia*, into whether the existing list of exclusions under Schedule 2 should be amended.[73]

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[67] See particularly s. 17 for more precise definitions and various exclusions – including the principle that the trade disciplines of Part 2 should not apply to existing and substantively unamended authorisation/regulatory requirements, though subject to the important qualification in s. 17(6). Note also the further definitions contained in s. 23.

[68] See s. 19. Note that the Act's provisions on mutual recognition as regards authorisation requirements go beyond the pre-existing regime governing internal UK service provision as contained in the Provision of Services Regulations 2009 (available at: https://www.legislation.gov.uk/ukdsi/2009/9780111486276/contents).

[69] See ss. 20 (direct discrimination) and 21 (indirect discrimination). Note that the Act's provisions on non-discrimination as regards regulatory requirements also go significantly further than the previous regime contained in the Provision of Services Regulations 2009 (the latter being addressed primarily to discrimination against EEA, rather than other UK, service providers).

[70] See ss. 19(4), 20(3) and 23(1).

[71] See ss. 21(2) and (7); taking into account also the factors indicated in s. 21(13).

[72] See s. 18 and Schedule 2, Parts 1-4.

[73] See Department for Business, Energy and Industrial Strategy, *UK Internal Market: The continuity of exclusions from the principles of mutual recognition and non-discrimination for services* (February

Part 3 of the Act sets out various rules concerning professional qualifications and other regulations. The basic principle is that, where provisions in one part of the UK limit the ability to practise a profession to individuals with certain qualifications or experience, a UK resident who is qualified to undertake the full range of corresponding activity in another part of the UK is to be treated for those purposes as if that person had the necessary qualifications or experience.[74] However, that basic principle does not apply where the competent authorities offer a process of individualised assessment, undertaken in compliance with various conditions laid down by the Act, offering qualified UK residents the ability to practise the relevant profession in that part of the UK.[75] Moreover, the principle of mutual recognition for professional qualifications does not apply to existing and substantively unamended provisions;[76] and in any case does not apply to provisions that limit the ability to practise a legal profession or any profession of school teaching.[77] That said, Part 3 does extend the principle of non-discrimination to various professional regulations other than rules governing access to the relevant activity (for example, requirements relating to insurance or continuing professional development, or restrictions on undertaking particular activities during the course of practising the relevant profession) that apply differently according to an individual's qualifications or experience (or according to where the latter were obtained).[78]

Although some of UKIMA's principles governing services and professional qualifications go much further than the regime derived from EU law, in other respects, those principles are again less far-reaching than the corresponding principles applicable

2021) available at: https://www.gov.uk/government/consultations/uk-internal-market-the-continuity-of-exclusions-from-the-principles-of-mutual-recognition-and-non-discrimination-for-services.

[74] See ss. 24 and 25, particularly for more precise definitions and exclusions – including the requirement that qualifications/experience may be relied on only if they were obtained/obtained mainly in the UK. Note also the further definitions contained in s. 29.

[75] See s. 26.

[76] See s. 27(1)-(2), but subject to the important qualification in s. 27(3).

[77] See s. 27(5)-(7).

[78] See s. 28.

within the Single Market. For example, under EU law, all restrictions on cross-border service provision imposed by the host state (whether classified as authorisation or regulatory requirements) would be assessed in accordance with the same framework, based on a presumption of home state control/mutual recognition analogous to that established for goods by *Cassis de Dijon*.[79] Moreover, the UK regime is explicitly limited to restrictions imposed by legislation,[80] whereas EU law is capable of scrutinising a wider category of behaviours, including market access restrictions for service providers that may be created through the exercise of collective power by private sector actors.[81]

Provisions on monitoring and enforcement

The UK Government seems to envisage that the new regime will be applied, on the ground, primarily through the work of existing regulators and other public authorities – where appropriate, acting under more detailed guidance issued by UK government ministers. This may be a reasonable starting point, but proactive voluntary compliance alone is unlikely to ensure that UK trade operates smoothly and in accordance with the Act.

To support compliance with the new regime, the Act contains detailed provisions on the future role of the Competition and Markets Authority (including a new Office for the Internal Market (OIM)) in monitoring and reporting on the operation of the UKIM, as well as providing advice on its implementation and development.[82] The OIM must prepare and publish annual reports on the operation and effectiveness of the UKIM, as well as five yearly reports on the effectiveness of the Act and its interaction with common frameworks, and may undertake reviews of any aspect of the UKIM or the operation of the Act at its discretion.[83] It may also provide reports at the request of the UK and/or one or more of the devolved governments on regulatory provisions that the

[79] In accordance with the caselaw initiated by Case C-275/92, *Schindler,* ECLI:EU:C:1994:119.

[80] See ss. 17(3), 17(4) and 23(1); also s. 58.

[81] E.g. Case C-341/05, *Laval un Partneri,* ECLI:EU:C:2007:809.

[82] See Part 4 and Schedule 3.

[83] Section 33.

relevant authority proposes to make,[84] or on provisions that have already been enacted either by the requesting authority/ies or in another part of the UK.[85] The scale of the information-gathering task given to the OIM is clearly immense, and the *Draft Guidance on the Operation of the CMA's UK Internal Market Functions* makes clear that it will have to prioritise what monitoring work to undertake;[86] though it is worth noting that UKIMA does not go as far (say) as mimicking the EU's long-established model of mandatory prior notification of draft standards – allowing the competent authorities to assess and, if necessary, negotiate over potential barriers to trade before they reach the statute books.[87]

In any case, the OIM's role is ultimately an advisory rather than a decision-making one. The UK Government appears to envisage that enforcement will be carried out by existing regulators and trading standards authorities. The Act does not set out a process of dispute resolution, nor is there a dedicated intergovernmental process to identify and resolve any problems encountered in its implementation.[88] But we anticipate an important role for the courts when things do (allegedly) go wrong. Although the Act states that the market access principles for goods have no direct legal effect except as provided for under the legislation,[89] the relevant provisions on mutual recognition and non-discrimination under Part 1 make clear that any offending trade restrictions are to be treated as inapplicable to/unenforceable against protected traders.[90] Similar legal

[84] Section 34.

[85] Section 35.

[86] Office of the Internal Market, *Guidance on the Operation of the CMA's UK Internal Market Functions* (May 2021), Chapter 4 (available at: https://www.gov.uk/government/consultations/draft-guidance-on-the-operation-of-the-cmas-uk-internal-market-functions).

[87] E.g. under what is now Directive 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] O.J. L241/1.

[88] Department for Business, Energy and Industrial Strategy, *Goods market access: enforcement* (17 November 20200 available at: https://www.gov.uk/government/publications/uk-internal-market-bill-2020-policy-statements/goods-market-access-enforcement.

[89] Section 1(3).

[90] E.g. s. 2(3) on mutual recognition; s. 5(3) on non-discrimination.

effects are also explicitly ascribed to the relevant principles governing internal trade in services.[91]

Again, UKIMA here owes an important intellectual debt to its EU counterpart. After all, the concept of disapplication is a familiar tool of EU law, the details of which have been developed through a vast jurisprudence of the CJEU spanning several decades of incremental development.[92] The core idea is simple. Domestic measures which are identified as being incompatible with free movement rules are not rendered null or void; they are merely to be treated as inapplicable in practice, and only to the extent of their verified incompatibility with the Member State's directly effective Treaty obligations. Otherwise, the relevant domestic measures remain entirely valid and indeed fully applicable in all other situations/for all other purposes.[93]

Beyond that basic intellectual borrowing, however, UKIMA is notably silent on the fuller implications of what "disapplication" should mean in practice, when it comes to the treatment and effects of trade rules identified as being incompatible with the Act's market access principles. Experience of EU law suggests that the courts are likely to be asked a series of questions about the more detailed effects of "disapplication". For example, will the possibility of judicial enforcement be available only to affected traders, or should a much wider range of potential beneficiaries (rival undertakings, potential customers, interest and pressure groups) also be entitled to invoke the Act's provisions?[94] How far will courts feel able or indeed obliged to use supplementary legal

[91] See, e.g. s. 17(2) on services in general; s. 19(1) on mutual recognition as regards authorisation requirements; s. 20(1) on directly discriminatory regulatory requirements; s. 21(1) on indirectly discriminatory regulatory requirements.

[92] See further, e.g. M. Dougan, "Primacy and the Remedy of Disapplication" (2019) 56 C.M.L.Rev. 1459.

[93] Consider, e.g. Case C-226/97, *Lemmens*, ECLI:EU:C:1998:296; Case C-264/96, *ICI*, ECLI:EU:C:1998:370; Cases C-10/97 to C-22/97, *IN.CO.GE.'90*, ECLI:EU:C:1998:498; Case C-314/08, *Filipiak*, ECLI:EU:C:2009:719; Case C-310/10, *Agafiţei*, ECLI:EU:C:2011:467; Case C-378/17, *Minister for Justice and Equality*, ECLI:EU:C:2018:979.

[94] An issue of considerable controversy as a matter of EU law: see further, e.g. M Dougan, "Who Exactly Benefits from the Treaties? The Murky Interaction Between Union and National Competence Over the Capacity to Enforce EU Law" (2009-2010) 12 C.Y.E.L.S. 73.

principles or creative interpretative tools, so as to temper the full force of the UKIM rules – say, when faced with concerns about the allegedly unfair impact of disapplication on legal certainty or legitimate expectations – particularly given the limited system of derogations and justifications, as well as the lack of any systematic process for ex ante notification and assessment of draft standards?[95]

But on top of these familiar issues, the Act also contains certain idiosyncratic features that might well raise particular questions about the potential for judicial enforcement and the proper role of the courts in policing the UKIM.

In that regard, it is useful to recall one of the key ideas underpinning the enforcement of EU free movement law (and that marks it out as very different from EU competition law and other systems of detailed sectoral regulation and active market management). The EU's primary free movement rules are intentionally capable of largely self-standing application by lawyers, working at a desk with little more than basic legal reasoning skills to help them: does this rule fall into this basic category; if so, does it fall foul of this basic prohibition; if so, does it serve a valid social or public interest objective; if so, does it comply with the principle of proportionality and respect fundamental rights? A good lawyer can work out the likely answer, or at least the range of likely answers, in a matter of minutes – often without any reference to external considerations or calling upon other disciplinary expertise or data (say) to define markets, or market shares, or to ask for trade statistics about volume or value. That reliance on common sense assumptions, hypothetical scenarios and purely abstract reasoning makes the rules not only relatively clear, but also relatively cheap and easy to apply and enforce. Of course, free movement disputes do sometimes involve more difficult policy questions and call upon more detailed empirical data or evidence. Yet that tends to happen primarily at the justification stage – when a host state calls upon appropriate scientific analyses or quantitative studies to support its claim that disputed regulatory choices are genuinely necessary and proportionate to their public policy

[95] Consider, e.g. Case C-409/06, *Winner Wetten*, ECLI:EU:C:2010:503; Case C-379/15, *Association France Nature Environnement*, ECLI:EU:C:2016:603; Case C-411/17, *Inter-Environnement Wallonnie*, ECLI:EU:C:2019:622.

purpose.[96] But to call upon such analysis or evidence is not an inherent and necessary part of the free movement rules per se.

By contrast, UKIMA muddies the waters between the relatively mechanical demands of trade law, and a more data-driven subject like competition law, by incorporating certain "market analysis" requirements into the very fabric of its basic market access principles. That is most obvious with the definition of indirect discrimination.[97] Unlike the EU system, which relies largely on common sense or commonly-held assumptions and presumptions, UKIMA defines indirect discrimination in a more detailed and idiosyncratic manner – calling for the sort of detailed and data-based market analysis that would be more familiar to a competition lawyer than a free movement lawyer. In particular, the Act requires us to calculate whether any disadvantage imposed upon (for example) imported goods also produces an "adverse market effect", by causing a significant adverse effect on competition in the relevant market for comparable (i.e. like or interchangeable) goods in the UK.

Such an approach risks making life much more complicated than it needs to be. More importantly, that complication could act both as a disincentive for individual litigants to enforce the market access principles before the courts, and as an unnecessary burden for public officials charged with overseeing application and enforcement of the legislation – costs and burdens that might well be completely out of all proportion to the actual economic value of the relevant trade dispute. These additional disincentives come on top of the more obvious enforcement limitations of the new legislation – not least its failure to provide any replacement for the lost possibilities of the *Francovich* action, that would entitle aggrieved traders to seek compensation for any losses they have suffered as a result of unlawful trade barriers enacted by a host territory.[98]

[96] See further, e.g. N. Nic Shuibhne and M. Maci, "Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law" (2013) 50 C.M.L.Rev. 965.

[97] See, in particular, s. 8 (goods) and s. 21 (services).

[98] Cases C-6/90 & C-9/90, *Francovich*, ECLI:EU:C:1991:428; especially after Cases C-46/93 & C-48/93, *Brasserie du Pêcheur* and *Factortame III*, ECLI:EU:C:1996:79.

But the Act's potential enforcement problems do not arise only from its unnecessary, potentially burdensome or even disproportionate competition-style analytical demands. Even when it comes to the more traditional type of policy evaluation that we are familiar with from EU free movement rules, UKIMA manages to frame such tasks in terms that could potentially place the UK courts in a very difficult position, arguably more so than would be inherent in any system based on the judicial enforcement of complex trade rules. Not only are the courts (inevitably) required to second guess difficult policy choices about the balance of public and private interests, even in situations (say) of health emergencies involving incomplete, unclear or contested scientific evidence; they may also have to decide whether a public body – including a democratically-elected legislature – has acted in good faith or with disguised and improper motives when performing its regulatory functions. The latter assessment risks exposing the courts to accusations of politicised adjudication.

Core problems in the nature and design of UKIMA

Although the White Paper went to almost comical pains to avoid admitting as much,[99] it is clear that UKIMA owes a significant intellectual debt to the experience of the European Single Market – including the latter's concepts of mutual recognition and non-discrimination; categories such as product requirements and selling arrangements; and the concept of disapplication as a remedy for non-compliance with core trade principles. Yet the UKIMA regime is also fundamentally different from the EU legal heritage, from which it draws inspiration not only on a highly furtive but also deeply selective basis. The core problem with UKIMA derives from two main factors: first, the relatively one-sided balance between promoting trade and respecting regulatory autonomy struck by the legislation *even on paper*; and, second, the manner in which that balance is likely to operate *in practice*, given the unusual territorial characteristics and constitutional arrangements of the UK itself.

[99] The EU is barely mentioned, despite the UK having been a full member of that particular world-leading system of cross-border market building / management for nearly 50 years. Instead, the White Paper purports to draw almost entirely upon the experience of other "single state" systems, e.g. Australia, New Zealand, Spain and Switzerland.

UKIMA on paper and in practice

On paper, i.e. taken simply on its own terms, the Act is based upon a strong (if not radical) market dynamic: strict guarantees of market access, capable of overriding/bypassing local regulatory choices, subject to only very limited opportunities for exclusion or justification. Indeed, UKIMA is effectively *Cassis de Dijon* on steroids: market integration is not just a presumption, but an almost absolute rule; there is barely any system of derogations allowing host territories to defend their regulatory standards in the public interest.

Even in the best of circumstances, UKIMA's market access principles would be capable of generating significant deregulatory pressures – making it much more difficult for one territory to choose, justify and enforce stricter levels of public regulation in any situation in which another territory follows laxer standards. The Act also risks creating a powerful disincentive to engage in legal reform or innovation, in response to changing economic challenges or social preferences – since not only new regulatory initiatives, but also plans to amend existing rules in any substantive way, would immediately become subject to the market access principles.

Yet the inherent design problems are only likely to grow when put into practice. Although the Act's strong market access principles, plus their inherent deregulatory pressures and disincentives to reform or innovate, affect all law-making bodies across the UK, the constitutional and geographical peculiarities of the UK mean they will not operate in a neutral manner across its four constituent territories. This emerges from the one fundamental and indeed overriding fact that makes the challenges facing the UK internal market completely unique when compared to systems of market regulation in the EU, or the US, Canada or Australia. We can conveniently refer to that fundamental fact as "the English Problem". The UKIM is made up of a relatively small number of territories, where just one of those territories alone accounts for over 84% of the total population and 84% regional economic activity (Gross Value Added). [100] The

[100] Office for National Statistics, *Population estimates for the UK, England and Wales, Scotland and Northern Ireland: mid-2020* (2021) available at:

comparatively small scale of the Scottish and Welsh economies within the wider UK economy is compounded by their close connections to English supply chains and markets and, in the case of Scotland at least, a large trade deficit with England.[101] This may increase pressure to conform to regulations set for the English market, to avoid local businesses facing a competitive disadvantage.

The "English Problem" is further compounded by the asymmetrical constitutional effect of UKIMA as between the UK and devolved levels. Although the Act does not expressly limit devolved competence – devolved legislation or executive acts that are incompatible with the market access principles remain valid, but are simply liable to be disapplied – in practice, it constrains the ability of the devolved institutions to make effective regulatory choices for their territories in ways that do not apply to the choices made by the UK government and parliament for the English market.

In the first place, the fact that UKIMA was made a protected statute that the devolved institutions are unable to modify[102] means that they are unable to set aside or override the market access principles where these are considered to have a harmful effect on devolved regulation. By contrast, the operation of Westminster parliamentary sovereignty means that this is an option which remains open to the UK parliament when legislating for England.

Secondly, the Act changes the *geographical* basis of devolved regulation. The assumption is no longer that devolved regulation applies to *all of the relevant activity* within the relevant devolved territory. Instead, it applies to producers or suppliers *based*

https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2020#main-points; and *Regional economic activity by gross value added (balanced), UK: 1998 to 2017* (2018) available at: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2020#main-points .

[101] A. Greig, M. Spowage and G. Roy, *UK Interregional Trade Estimation: Estimates of trade between Northern Ireland, Scotland, Wales and England* (ESCoE Discussion Paper 2020-09). Their findings, suggesting that Wales had a large trade surplus with England, were qualified by the lack of reliable data.

[102] UKIMA, s. 54; Northern Ireland Act 1998, s. 7(1)(f); Scotland Act 1998, Schedule 4, para. 1(2)(h); Government of Wales Act 2006, Schedule 7B, para. 5(1).

in the devolved territory. While those producers and suppliers will (should they choose to do so, and subject to market forces) be able to carry their domestic regulatory standards with them when they export goods or services to other parts of the UK, local regulators will not be able to insist on the application of local regulations to *imported* goods or services. In other words, devolved competence becomes a power to regulate local producers and suppliers on their local market, and *not* the whole of that local market. How exactly this will affect devolved regulatory choices in practice is difficult to predict, and the uncertainty is made all the greater by the lack of clarity over enforcement discussed in the previous section. Whereas under the devolution statutes, procedures are in place to ensure that devolved law officers are notified of potential challenges to devolved legislation or other decisions, and so are in a position to defend the regulatory choices they embody, there are no equivalent provisions in UKIMA. Indeed, given the burdens that litigating over the application of the market access principles may impose on devolved regulatory authorities, there may well be a risk of challenges to devolved legislation being conceded by default.

This indirect and uncertain effect on devolved competence is one basis on which the Welsh Counsel General is currently seeking to challenge the validity of UKIMA. As a constitutional statute, he argues, the Government of Wales Act 2006 (and by extension the other devolution statutes) can only be amended directly and explicitly, not indirectly and by implication.[103] Accordingly, he claims, UKIMA should be read as placing no constraints ondevolved legislation. However, given the sovereignty of the Westminster Parliament, this challenge faces formidable obstacles; not least the fact that UKIMA may itself be regarded as a constitutional statute,[104] and because it is difficult to see what other reading might be given to the Act that would leave devolved regulatory autonomy intact.

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[103] *Application for Judicial Review by the Counsel General for Wales against the Secretary of State for Business, Innovation and Industrial Strategy* (January 2021) available at: https://gov.wales/written-statement-legal-challenge-uk-internal-market-act-2020. The Welsh Government is also challenging the various ministerial powers to amend the scope of the market access principles on the basis that these offend against the principle of legality.

[104] In such cases, according to the Northern Ireland High Court in *Re Allister*, "[a]s a starting point, based on fundamental principles, the most recent constitutional statute is to be preferred to the older one" [2021] NIQB 64 at [95].

Assuming that UKIMA survives this challenge, it will begin to produce its full effects within the particular economic and constitutional context of the UK. Whatever the competences of the devolved institutions on paper, the ability of English goods and services freely to access markets in Scotland or Wales could (in practice) make it much more difficult for the devolved institutions to adopt or enforce different or higher regulatory standards of their own. Such standards could effectively disadvantage domestic producers and suppliers, while the potential scale of English imports would, in many circumstances, simply negate any prospect of Scotland or Wales delivering on their desired public interest objectives.

Taming England's relative size and power would challenge *any* internal market system. Yet the UKIM "toolkit" lacks effective safeguards for the devolved institutions that could enable them to adopt different social choices without the risk, not so much that the UK government might directly and formally overrule them by imposing centrally harmonised standards, but that the free market access of English goods or services into Scotland and Wales might simply render autonomous devolved choices redundant in practice. Without such safeguards, there is a serious risk that the UKIM will not merely reflect but positively reinforce and indeed magnify the empirical and constitutional facts of English dominance within the UK. Indeed, a strong system of mutual recognition, without any other corrective to protect devolved competences, arguably renders the need for centralised harmonisation effectively redundant, and at the same time reduces the incentive for the UK government to engage in negotiation, consensus or co-decision with the devolved administrations. It also means that choices made for England would be able to produce their full effects within Scotland and Wales on a scale that could overwhelm the latter's own preferences. In effect, UKIMA will subject the exercise of various devolved competences to the operation of market forces – yet in a market which is inherently skewed in favour of one dominant territory.

Furthermore, unlike the EU system, there is no clear and conscious attempt by the UK government and Westminster parliament to define the relationship between the general principles that will govern cross-border commerce by default and the role to be performed by centralised harmonisation or other forms of politically negotiated solutions to potential trade problems. Indeed, the relationship between market access

principles under the Act (on the one hand) and a project like "common frameworks" (on the other hand) remains ambiguous. As a result of sustained pressure in the House of Lords, the power held by the Secretary of State to amend the list of express exemptions from the market access principles for goods as laid down in Schedule 1 might now be exercised, *inter alia*, to give effect to a "common framework agreement" between the UK government and one or more devolved administration(s).[105] But there is no consensus on what "common framework agreements" entail – do they include agreements to diverge, for example, or only agreements to harmonise regulation? And while the consent of the devolved administrations must be *sought* before exercising the amendment power, it is expressly provided that such consent can be dispensed with.[106] It is, moreover, just a power, not a duty; in principle, therefore, agreed common frameworks remain vulnerable to being undermined by the application of the market access principles.

Thus, while the amendment power is a potentially useful one, it does not really tell us very much about the overall range and more precise nature of the trade management solutions that might end up being employed in common frameworks or how they should relate to the default market access principles laid down in the Act. Just as importantly, the centralising vision, design and anticipated effect that underlies the Act points towards an implicit answer to the question about harmonisation *versus* mutual recognition: who needs "common frameworks" at all if market forces will do the job themselves, based on the considerable extra-territorial effects of whatever standards England choses to adopt?

The potential impacts of UKIMA are compounded by a series of other factors. First, and unlike the EU system, there are no guarantees that the UKIM will operate according to certain minimum common standards in fields such as the environment, consumers and employment protection. Indeed, it is clear from UKIMA that any good marketed in England *even in the total absence* of any relevant public interest regulation, is still entitled to benefit from the principle of mutual recognition when it comes to sale or supply in Scotland or Wales. Secondly, and again unlike the EU system, there is no

[105] Section 10. There is a corresponding power in respect of Part 2 on services: see s. 18.

[106] Section 10(9)-(11).

attempt to combine the new UKIM principles with reforms to the UK's overall governance structures, to create more independent and impartial fora for decision-making and dispute resolution between the constituent territories. The interim proposals from the ongoing review of intergovernmental relations suggested there could soon be a role for impartial analysis in a reformed process of dispute resolution.[107] But such reforms would not detract from the significant powers that UKIMA confers upon the central executive to change the "rules of the game" laid down in the Act itself and, as noted, even without the consent of the devolved authorities.[108] Thirdly, the fact that UKIMA does nevertheless mimic the EU system by conferring direct legal enforceability upon its own core market access principles only serves to render the Act's potential impacts and problems even more potent in practice, as the courts are likely to be called upon to disapply devolved rules that fall foul of the Act's turbocharged system of mutual recognition and non-discrimination.

Replacement or improvement?

Those combined reasons – the trade bias which is apparent on the very face of the legislation, plus the total failure of the Act even to recognise, let alone accommodate, the unique territorial and constitutional context of the UK itself – largely explain the ferocity of opposition to UKIMA in Scotland and Wales. On paper, devolution might continue to look the same. Indeed, it might even look more extensive, given the repatriation of powers previously exercised at EU level to the devolved authorities under the EU (Withdrawal) Act 2018. But in practice, the operation of UKIMA has real

[107] Cabinet Office, *Progress update on the review of intergovernmental relations* (24 March 2021) available at: https://www.gov.uk/government/publications/progress-update-on-the-review-of-intergovernmental-relations.

[108] E.g. s. 6(5)-(9) on the definition of rules subject to non-discrimination for goods; s. 8(7)-(11) on the legitimate aims capable of justifying indirect discrimination against goods; s. 10 on exclusions from the market access principles for goods as laid down in Schedule 1; s. 18 on exclusions from the rules on services as laid down in Schedule 2; s. 21(8)-(12) on the legitimate aims capable of justifying indirect discrimination against services. Note ss. 13 and 22 on the review of delegated amendment powers as provided for under Parts 1 and 2 (respectively); and ss. 56-57 on the general scope of executive powers under the Act.

potential to limit the capacity of the devolved institutions to pursue different economic or social choices from those made in London.

Arguably, the underlying problems affecting UKIMA lie in its core starting assumptions: that the ability of businesses to trade freely across the UK should take precedence over the ability of devolved institutions to set their own regulatory standards. As has been explained, the Act does not prevent the devolved authorities from setting distinctive standards in accordance with the powers conferred on them by their respective devolution settlements, nor does it constrain the ability of the UK authorities to set rules for England. But appreciating the clear costs of the Act to devolution has to be seen alongside the empirical fact that, without proper constraints and processes, a strong UKIM system will magnify England's existing economic and constitutional dominance yet further.

For those reasons, it is tempting to regard UKIMA as so flawed that it should be scrapped at the earliest opportunity and the entire design of internal UK trade reimagined from first principles. For example, one might propose that the unique characteristics of the UK are best reflected in avoiding any system of direct legal enforceability at the behest of individual traders, in favour of an effective system of pre-legislative dialogue between the competent authorities from across the UK. This would allow potential internal trade problems to be identified and resolved even before they arise, while insisting that any potential barriers which are eventually enacted into law must then be accepted as a fact of economic and regulatory life by all relevant traders. That would place the emphasis back on finding a satisfactory approach to the development and implementation of "common frameworks". In some sectors, the best option might well be full-scale harmonisation. In others, it might be possible to reach agreement on a system of mutual recognition, but subject to more appropriate/extensive opportunities for derogation and justification. And in some fields, it might be best simply to allow internal trade barriers to arise and expect businesses to adapt to them – because that is what the responsible political actors agree would strike the best balance between the competing public interests at stake.

But even for such a system of pre-legislative dialogue and political management to work smoothly and effectively, there would need to be major changes to the way the

UK currently operates. For example, one would ideally want the cooperative political resolution of trade issues to be settled against the background of an agreed definition over the minimum "flanking policies" required to prevent principles such as mutual recognition from morphing into a tool for unfair trade practices and harmful social dumping. Similarly, one would ideally want a system of pre-legislative dialogue to take place within a political and constitutional culture that values devolution and respects the prerogatives of the democratic institutions of Scotland and Wales. Systematically undermining the Sewel Convention and the respect for devolved authority it embodies, and allowing the UK institutions to overrule their devolved colleagues at will, does not build the sort of mutual trust that is needed for the long-term stability and credibility of the UKIM, and potentially of the union itself.

In the absence of such radical redesign options, the basic scheme of UKIMA could nevertheless be improved in smaller but still significant ways. For example, a broader system of derogations and justifications could allow an individual administration to refuse mutual recognition or defend trade discrimination where its local regulations are justified for the protection of a much wider range of public interest objectives, as happens in the EU Single Market. After all, even if one cannot change the empirical and constitutional fact of English dominance, and even if the central UK authorities are unwilling simply to substitute a system of pre-legislative dialogue for the legally-binding market access principles now contained in the Act, we could still take *Cassis de Dijon* off its steroids and live (at least for a while) with a more fairly balanced system of internal trade rules.[109]

There seems little chance of the UK courts delivering a *Cassis*-style ruling, effectively redesigning core parts of the Act by creating an additional unwritten body of justifications/derogations. But the initial phases of interpreting and applying UKIMA will still surely raise some interesting questions for courts and regulators. For example: how far might the legislation contain enough "wriggle room" to address some of its apparently inherent problems? How far might decision-makers prove able, in practice,

[109] As the anonymous reviewer points out: a broader system of justifications could also promote greater dialogue between administrations with a view to reaching agreed / coordinated solutions to the UK's future internal trade challenges.

to take into account the distorting effects of the legislation itself upon the system of trade/competition/regulation across the UK? And at the very least, will we build up a strong evidence base that might lead the current or a future UK government to rethink some of the choices currently enshrined in the Act?

Concluding Remarks

Does the UK need a principled framework for managing trade relations between its constituent territories? Yes. Does UKIMA create a balanced and sustainable system, capable of commanding an appropriate degree of political legitimacy? No.

Of course, much of this is very new. It will need to be interpreted more extensively, and to be tested and applied in practice. It might well be that some problems that appear glaring on paper turn out to be much less serious in reality. It might well be that some things that looked easy in theory end up being a nightmare once real life human beings get their hands on them.

However, UKIMA does not feel like an ideal starting point for this new experiment in internal market management. The UK as such may be a latecomer to the global club of internal market-making. But the British did spend 45 years as leading members of one of the most advanced and sophisticated internal markets in the world. Yet many of the core features that make the EU system acceptable and indeed attractive to its participants have simply been expunged from the UK Government's plans for the design and operation of the British version.

As it stands under the 2020 Act, the UKIM is characterised by a default rule of market access based on a decidedly distorted reading of *Cassis de Dijon.* There are no clear principles to govern the alternative strategies of centralised harmonisation or collective regulatory coordination. There are no enforceable minimum standards in crucial flanking fields such as labour and environmental standards. There are no changes to a highly problematic governance framework, of the sort that would promote more independent and impartial institutions and processes. Above all, there is not even a flicker of recognition of the unique circumstances of the UK, in which one territory,

out of just four, occupies a position of not merely relative but absolute and indeed overwhelming dominance over the others.

All of this makes one suspect that the problems of UKIMA are not just a reflection of subtle differences in government preferences about the challenges of cross-border trade and the solutions for market management, but instead reveal a much deeper and stronger antipathy by the current Conservative administration towards a more fundamental set of constitutional arrangements and relationships: devolution itself. In that regard, it is important to reiterate that UKIMA was adopted without the consent of the Scottish Parliament or the Welsh Senedd, and that the Welsh Government continues to resist the legislation in the courts. Far from agreeing to this potentially far-reaching amendment of the devolution settlements, the governments in both Edinburgh and Cardiff – despite their contrasting perspectives on the value of the Union – accused the UK Government of a unilateral and shameless power-grab that undermines democracy and risks weakening still further its own composite yet fragile union.[110]

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Jo Hunt, Cardiff University
Nicola McEwen, University of Edinburgh
Aileen McHarg, Durham University

[110] Consider, e.g. Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill* (28 September 2020) available at: https://www.parliament.scot/S5_Finance/General%20Documents/SPLCM-S05-47.pdf.