From the EU Single Market to the UK Internal Market: Practice Doesn't Always Make Perfect ...

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It would be so pleasant, to honour my good colleague and friend, Leonard, by writing a little discourse on the pleasures of playing together Mozart's great Divertimento in E♭ K563, the challenges of those awkward double stops in that arrangement of Bach's magnificent Goldberg Variations, or our regular bemusement in working out whether a hemidemisemiquaver is a thirty-second or a sixty-fourth note. But sadly, I suspect such a discourse might not weave very fluidly into the texture of this learned collection. So I will instead pay tribute to Leonard with a paper that hopefully combines some of his long-standing academic as well as personal interests: in the fundamentals of European Union law, in the diversity of national constitutional experiences, and in the sad fate of the UK as it drifts down into the lonely depths of Brexit.

To be more precise: this contribution examines the United Kingdom Internal Market Act 2020 (UKIMA 2020). In some respects, this important legislative initiative has already received its fair share of international attention – thanks largely to the Johnson Government's aborted plans consciously and deliberately to breach its own

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legally binding obligations, under the EU-UK Withdrawal Agreement, designed to avoid a hard border across the island of Ireland.[1] However, the primary focus of the UKIMA 2020 in fact lies elsewhere: introducing a new body of rules to govern the general system of internal trade relations between the constituent territories of the UK as from expiry of the Brexit transition period on 1 January 2021. On the one hand, some form of internal trade framework is certainly needed: the devolution settlements introduced across the UK in the late 1990s mean that – once the unifying framework of EU trade law is removed – the British market is capable of fragmenting through the creation of internal trade barriers and distortions of competition. On the other hand, the robust market access principles contained in the UKIMA have potentially fundamental repercussions, certainly for the constitutional context of devolution, and most likely for its practical operation as well.

In Section 1, we recall some of the key questions and challenges that face the architects of any internal market. In Section 2, we highlight the main lessons that the UK should really have learned about internal market building after 45 years as a leading member of the Union. Section 3 then identifies the particular empirical and constitutional characteristics of the UK that one would expect should influence the design and operation of its own fledging internal market. In Section 4, we summarise the key provisions of the UKIMA 2020 before proceeding, in Section 5, to query how far the UK's core characteristics are indeed well reflected in the final terms of the legislation. Our conclusion can be brief, since the answer is: not very well.

1. Some Key Questions and Challenges for Any Internal Market

Any project of market integration between two or more territories, each with their own regulatory jurisdiction and the capacity to enact

[1] See further, e.g. Editorial Comments, 'Sour Lessons from the Union's First Encounters with the UK as a 'Free and Sovereign Country'', 58(1) *CMLRev* (2021) p. 1-12.

different rules, will be shaped by certain fundamental decisions about the scope and structure of their cross-border economic cooperation.

To begin with, the parties need to decide on their level or depth of ambition. After all, different theories of cross-border trade offer very different views about how far regulatory differences should even be regarded as a problem.[2] Will barriers to trade be defined only narrowly (no tariffs, border controls or overt protectionism); or more expansively – covering also regulatory obstacles arising from the mere existence of variations in how different territories regulate the sale of goods or provision of services? Will variable regulatory compliance costs be considered an artificial distortion of competition that needs to be eliminated; or a stimulant to healthy rivalry between jurisdictions, spurring them to attract investment through innovation; or rather an invitation to social dumping and the trigger for a regulatory race to the bottom?

Those questions are far from simply logical or self-executing, but rather laden with underpinning assumptions and subjective preferences. For their part, lawyers offer policymakers a 'toolkit' of trade principles that can be employed in order to translate the necessary policy choices into a more concrete regulatory reality. In particular, the legal architects of any internal market can call upon several key techniques of market management: towards one extreme, the centralised harmonisation of regulatory standards; towards the other extreme, a mere prohibition of discrimination (direct and indirect); but perhaps most significant of all, the principle of mutual recognition.[3]

[2] From a vast literature, consider, e.g. S. Deakin and F. Wilkinson, 'Rights vs. Efficiency? The Economic Case for Transnational Labour Standards', 23(4) *ILJ* (1994) p. 289-310; A. Ogus, 'Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law,' 48(2) *ICLQ* (1999) p. 405-418; D. Esty & D. Geradin (eds), *Regulatory Competition and Economic Integration: Comparative Perspectives* (Oxford University Press 2001).

[3] 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* (Hart Publishing 2002); F. Kostoris Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave Macmillan 2005).

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 and provision of services. However, mutual recognition obviously preserves any distortions of competition that might arise from differential compliance costs – thereby facilitating regulatory competition and, in many eyes, increasing the risk of social dumping. Moreover, mutual recognition places significant limits on the ability of any given territory to set and enforce its own distinctive social policy choices in a truly effective and systematic manner – even for and within its own jurisdiction. For those reasons, a trade system that relies on extensive commitments to mutual recognition is also likely to incorporate safeguards, for example, allowing a host territory still to enforce its higher regulatory standards against incoming goods and services, for the sake of protecting important public interest goals.

In reality, of course, no internal market is going to be built simply upon one single definition, say, of a barrier to trade; or by using just one method of market management, like harmonisation. Instead, we have to experiment with how tools such as harmonisation, non-discrimination and mutual recognition can be combined together, adapted and qualified, so as to construct a workable system that manages to reconcile the potentially competing interests at stake. And also ask a series of other important questions. For example: which 'flanking policies' will be required to ensure that greater economic integration is based on competition which is both free and fair: rules on competition and state subsidies, minimum social and environmental standards etc? Or again: which institutions, structures and processes are needed to operationalise the entire system in practice: who makes key decisions about when and how to harmonise; who determines when the public interest in high standards of regulatory protection outweighs the public interest in greater competition and consumer choice; who has the ultimate power to settle disputes about the basic 'rules of the game'? Indeed, the answers to such questions about flanking policies and governance frameworks will invariably have a decisive bearing, back upon the very scope and depth of trade ambition that underpins their internal market.

In exploring those challenges and hammering out workable solutions, trade lawyers have learned 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.[4] Secondly, even within any given internal market: the precise choices we make will inevitably vary from sector to sector; and the balance struck or compromises reached will 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, what all internal markets do generally have in common is the need for mutual trust between their constituent territories. A system, for example, 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 instead treats certain territories as more inherently important or privileged than others.[5]

2. Lessons from the EU Experience of Building and Maintaining the Single Market

All of those policy challenges, legal solutions and common lessons are well illustrated by considering the Union's own long experience of market integration. In the EU context, we tend to distinguish between two basic situations: what happens in the absence of any centralised harmonisation, when market regulation is left to each Member State in the exercise of its sovereign competence; and then what

[4] Consider, e.g. M. Egan, *Single Markets: Integration in Europe and the United States* (Oxford University Press 2014). There is also an extensive literature comparing the EU experience with other regional systems of economic integration, e.g. Mercosur and ASEAN.

[5] 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* (Hart Publishing 2009); M. Möstl, 'Preconditions and limits in mutual recognition', 47(2) *CMLRev* (2010) p. 405-436.

happens after the Union has decided to adopt common standards, to be applied across the Member States.

In the absence of central harmonisation, Union law operates on the basis of the approach first laid down by the CJEU in the *Cassis de Dijon* case – perhaps the most famous judicial decision ever delivered in the field of cross-border trade and internal market management.[6] 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 and services lawfully provided in one Member State can be lawfully sold and provided in every other Member State as well. However, that presumption of mutual recognition is not absolute: it can be rebutted by the host state on a wide range of public interest grounds – not just public health or security, but also, for example, environmental, labour or consumer protection – any one of which might justify the host state insisting that imported goods or services still need to meet its particular regulatory standards.

But there is, of course, also a power of central harmonisation at the Union level – capable of displacing or superseding the default rules on free movement provided for under *Cassis de Dijon*. However, in many sectors, Union-level harmonisation tends to be relatively ad hoc in nature – intervening to tackle specific problems or challenges, with no ambition to create a more comprehensive regulatory code. Moreover, Union-level harmonisation is often relatively limited in scope – defining only those common standards needed to protect the essential public interest requirements at stake in any given field, but otherwise leaving all remaining (non-essential) regulatory choices to the individual Member States. Nevertheless, the very fact that such limited harmonisation has been achieved, is still capable of justifying a much stronger obligation of mutual recognition: the grounds for limiting cross-border trade now tend to be more narrowly and

[6] C-120/78, *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42.

strictly defined, for example, to deal with unforeseen events or public safety emergencies.[7]

In addition, the Union places great emphasis on the effective pursuit of various 'flanking policies' (as they would be seen from a trade perspective) – designed to ensure that the competitive forces generated within the internal market are both properly free and suitably fair: the rules on competition law and state aid, as well as minimum standards of social and environmental protection. By those combined means, the Union removes many barriers to trade (but not all); eliminates certain distortions of competition (but not every one of them); and controls the conditions for regulatory competition between states (though without excluding it entirely). And as we said before: the precise balance struck naturally varies across sectors and changes across time.[8]

Just as importantly: the Union's particular approach to internal market building has not evolved in the abstract; it is shaped by the co-evolution of a unique institutional structure – one that seeks to facilitate and service the operation of its internal market.[9] We have a central Union legislature, designed to ensure a balanced representation of interests – which, in the case of the Member States acting together in the Council, is influenced but not entirely determined by

[7] Particularly under the 'new approach to harmonisation' inaugurated by the Commission's *White Paper on Completing the Internal Market*, COM (1985) 310 Final. See further, e.g. C.D. Ehlermann, 'The Internal Market Following the Single European Act', 24(3) *CMLRev* (1987) p. 361-409; J. Pelkmans, 'The New Approach to Technical Harmonisation and Standardisation', 25(3) *JCMS* (1987) p. 249-269.

[8] See further, e.g. A. McGee & S. Weatherill, 'The Evolution of the Single Market: Harmonisation or Liberalisation', 53(5) *MLR* (1990) p. 578-596; N. Reich, 'Competition Between Legal Orders: A New Paradigm of EC Law?', 29(5) *CMLRev* (1992) p. 861-896; R. Van den Bergh, 'The Subsidiarity Principle in European Community Law: Some Insights From Law and Economics', 1(4) *MJ* (1994) p. 337-366; J. Smits, 'A European Private Law as a Mixed Legal System: Towards a Ius Commune through the Free Movement of Legal Rules', 5(4) *MJ* (1998) p. 328-340.

[9] And of course, it is this constitutional and institutional dimension to European law that has provided the focus of Leonard's research and to which he has made such important contributions, e.g. L.F.M. Besselink, *A Composite European Constitution* (Europa Law Publishing 2007).

population size. Moreover, thanks to the principle of conferral, the Union's powers of central harmonisation are exhaustively listed and their exercise has to be justified on objective grounds; while in any case, Union legislation must comply with various principles designed to protect the interests of its constituent territories (such as subsidiarity).[10]

Furthermore, the Single Market is dependent upon complex administrative structures – generally centred around the European Commission, but largely comprising networks of national civil servants – which together monitor and enforce the system: exchanging information, coordinating responses, allocating jurisdiction, deciding on market authorisations, penalising infractions etc. And there are equally complex judicial structures – dependent on the central authority of the Court of Justice, but again based primarily on the work of the national courts across each Member State – that interpret and apply the Single Market rules. Indeed: perhaps the most striking institutional aspect of the Union system is the enormous importance placed on the need for genuinely independent and impartial systems of administrative and judicial supervision, dispute settlement and enforcement – crucial for generating and sustaining the sense of mutual trust upon which the operation and durability of the entire edifice depends. Conversely, this careful system of checks and balances means that the Member States feel relatively comfortable about the idea that the main Single Market rules enjoy direct legal enforceability before the courts at the behest of natural and legal persons.[11]

3. Framing the UK Debate About the Post-Brexit 'Internal Market'

Of course: just because something works well for the EU, does not mean that it will work for anyone or anywhere else. In this section,

[10] See further, e.g. N. Nic Shuibhne (ed.), *Regulating the Internal Market* (Edward Elgar Publishing 2006).

[11] I.e. through principles such as direct effect, disapplication and the award of *Francovich* damages.

we will consider some of the key contextual factors that are directly relevant to the UK debate about its own fledgling internal market.[12]

The regulation of internal UK trade was not considered a significant issue or problem until the decision to leave the European Union. After all, when the UK first joined the European Economic Communities in 1973, there was no system of devolution allowing Scotland or Wales to engage in their own distinctive legislative activities. And when devolution did occur in the late 1990s, the application of common EU rules helped to structure not only the UK's trade relations with other Member States but also the internal operation of the UK market itself.[13] Whatever problems did arise, concerning differential regulatory treatment across England, Scotland and Wales, were regarded as sufficiently marginal and/or exceptional as to be considered perfectly tolerable.[14]

However, withdrawal from the EU has made it important to decide how far regulatory differences across the constituent territories of the UK will impact upon internal trade in goods and services. True: the precise scale of this problem remains unclear – not least given the novelty, complexity and uncertainty of the situation now facing the UK. But there is good reason to believe that the issue of intra-UK regulatory divergence, and the consequent need for internal market management, will indeed become a significant practical matter. After all, the UK Government has itself repeatedly promised that Brexit will lead to a significant expansion in devolved competences.[15]

[12] Note that we will concentrate on the position of England, Scotland and Wales – the situation of Northern Ireland being distinguished and considerably complicated, in particular, by the Protocol on Ireland / Northern Ireland contained in the EU-UK Withdrawal Agreement [2019] OJ C 384 I.

[13] Devolution was introduced under the Labour Government led by Tony Blair, in particular, through the Scotland Act 1998 and the Government of Wales Act 1998.

[14] One of the most high profile examples being the charging of differential university tuition fees to Scottish residents and EU students (on the one hand) as compared to other UK residents and international students (on the other hand).

[15] E.g. HMG, *The United Kingdom's exit from and new partnership with the European Union* (Cm 9417 of 2 February 2017); HMG, *White Paper on the UK Internal Market* (CP 278 of 16 July 2020).

So what primary factors does the UK need to take into account, when thinking about the design of its own internal market? In that regard, there is one fundamental and indeed overriding fact that the UKIM has to confront – and which makes the challenges facing the British completely unique when compared, say, to the EU or the US, Canada or Australia. We can conveniently refer to that fundamental fact as 'the English Problem': this is an internal market made up of a relatively small number of territories, where just one of those territories alone accounts for over 4/5 of the total population and economy.[16] Within the UK economy: the productive capacities of Scotland and Wales, as regards the manufacture of goods and supply of services, are extremely limited as compared to those of England; indeed, for the supply of many different types of goods, Scotland and Wales are largely or even entirely dependent upon England to supply their own markets, businesses and consumers.

Moreover, thanks to the traditional constitutional principle of (Westminster) parliamentary sovereignty, the UK is an internal market where that same empirically dominant territory also exercises overwhelming control over the central institutions of the state as a whole. England as such has no separate or distinct institutions for itself, while English political representatives enjoy the ability to use the UK state's shared institutions to overrule or override the competences and choices of its smaller neighbours.[17] That is particularly true in light of the judgment of the UK Supreme Court in *Miller*: the so-called 'Sewell Convention', which requires the consent of the devolved administrations to any UK-wide legislation capable of impinging upon devolved matters, is merely a political practice that is not to be treated as legally enforceable via the courts.[18]

Against that background, it is obvious that principles which might work well in an internal market such as that of the Union, will simply not operate in the same manner in the peculiar context of the UK.

[16] England makes up almost 85% of the total UK population; Scotland around 8%; Wales slightly less than 5%; Northern Ireland just under 3%.

[17] Notwithstanding minor reforms such as 'English votes for English laws' procedures in the House of Commons.

[18] *Miller* [2017] UKSC 5.

For example, imagine that the UK were to introduce a strong system of mutual recognition: whatever the competences of the devolved institutions on paper, the ability of English goods and services freely to access the markets in Scotland or Wales would, 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 will 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.

For those reasons, any UKIM 'toolkit' should ideally incorporate proper and effective safeguards for the devolved institutions – enabling them to adopt different social choices without the risk, not so much that London might directly and formally overrule them at will, say, by imposing centrally harmonised standards; as that the free market access of English goods or services into Scotland and Wales might simply render autonomous devolved choices redundant in practice. Otherwise, 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, might in some situations render the need for centralised harmonisation effectively redundant and therefore reduce the incentive for the central government to engage in negotiation or seek consensus with the devolved administrations.

Among the many challenges that the outcome of the 2016 referendum has posed for devolution,[19] is the question of how Brexit will impact upon the scope and exercise of devolved competences.[20] As that wide-ranging question became wrapped up with initial deliberations about the more specific design of the UKIM, the authorities

[19] See further, e.g. J. Hunt, 'Devolution' in M. Dougan (ed.), *The UK After Brexit: Legal and Policy Challenges* (Intersentia 2017); A. Young, 'The Constitutional Implications of Brexit', 23(4) *European Public Law* (2017) p. 757-786.

[20] Not least under the system of 'retained EU law' provided for under the European Union (Withdrawal) Act 2018.

in London, Edinburgh, Cardiff and Belfast were engaged in discussions about the development of 'common frameworks' that might serve both to stabilise the UK's immediate post-Brexit regulatory environment, while also helping to manage future internal trade relations.[21] Those discussions have not always progressed smoothly, but they have certainly progressed. To cut across those sectoral negotiations, by introducing a horizontal principle to manage internal trade, such as a strong obligation of mutual recognition, could undermine the entire philosophy of the 'common frameworks' approach. After all: why should London bother to try to negotiate, or even impose, harmonised rules for the whole of the UK, when it can just adopt rules to suit England and then let market forces take over – projecting the effects of English rules into the territories of Scotland and Wales; in fact, pressurising Edinburgh and Cardiff simply to follow the English rules themselves as well?

4. Core Provisions of the UKIMA 2020

Yet that is precisely the sort of internal market model that the UK Government proposed under its UKIM Bill of September 2020,[22] and which the Westminster Parliament ultimately endorsed in enacting the final UKIMA 2020.[23] The UKIM will indeed be based on strong principles of free market access, with only limited opportunities for the devolved institutions to enforce their own divergent laws against English imports, reinforced by the ability of businesses and individuals to go to the courts and have devolved legislation disapplied in practice. To illustrate those propositions, we will now summarise the core provisions of the UKIMA 2020 – focusing on the rules concerning trade in goods, rather than those that address trade in services or the mutual recognition of professional qualifications –

[21] See further the official documentation and regular reports available via gov.uk/government/collections/uk-common-frameworks.

[22] Available at publications.parliament.uk/pa/bills/cbill/58-01/0177/20177.pdf.

[23] Available at legislation.gov.uk/ukpga/2020/27/pdfs/ukpga_20200027_en.pdf.

though many of the same issues arise also in relation to those provisions.[24]

In the field of goods, the UKIMA 2020 creates a system of internal UK trade based on two 'market access principles': mutual recognition (applicable to certain types of rules) and non-discrimination (applicable by default to another category of rules).[25]

The Act lays down certain basic limits to the scope of those market access principles: for example, 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, but only for the purpose of performing a public function.[26]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 would kick in, if and when any existing provisions are amended in a substantive way; and will in any case apply to all new regulatory requirements introduced by the competent authorities.[27]

For new or substantively amended rules, the main market access principle is mutual recognition.[28] The latter will apply to all rules governing (what in EU law terms would be known as) product requirements: regulatory standards affecting issues such as ingredients, composition, packaging and labelling.[29] Here, the Act offers only very limited opportunities, say, for Scotland to insist upon applying its own standards to English imports: mutual recognition can be denied only to deal with highly specific problems, such as the spread of

[24] See Part 2 and Schedule 2 on services and Part 3 on professional qualifications / regulation. Note that the Act also contains additional provisions, e.g. on trade between Northern Ireland and Great Britain in accordance with the Protocol on Ireland / Northern Ireland (see sections 10(7) and 11, Part 5 and section 55).

[25] Section 1(1)-(2). Though this does not prevent traders from complying with all relevant local rules: section 14.

[26] Section 15 – with the concept of 'public function' presumably having a similar meaning as it does, in English law, to delimit the scope of domestic administrative law or the application of the Human Rights Act 1998. Also Schedule 1, e.g. para 11 on the exclusion of taxation powers.

[27] Section 4 on mutual recognition; section 9 on non-discrimination.

[28] Section 2.

[29] Section 3.

pests, diseases or unsafe foodstuffs; and even then, only under strictly controlled conditions.[30] 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.

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.[31] Non-discrimination will apply to a second and distinct body of new or substantively amended rules, i.e. those governing (what in EU law terms would be known as) selling arrangements – such as advertising regulations, shop opening restrictions or licensing requirements.[32] If there is direct discrimination against other UK goods, it can only be justified on very specific grounds, such as dealing with a 'public health emergency' posing an 'extraordinary threat' to human health.[33] If there is indirect discrimination against other UK goods, then it can be justified if the measures can reasonably be considered a necessary means to protect either life and health, or public safety and security.[34]

The final version of the UKIMA 2020 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. In particular: when the UKIM 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?[35] The final UKIMA 2020

[30] Schedule 1, especially paras 1 and 2.

[31] Sections 5, 7 and 8. Though see Schedule 1, para 12 for a specific exclusion from the definition of indirect discrimination under the Act.

[32] Section 6.

[33] Schedule 1, especially paras 1 and 5.

[34] Section 8(1) and (6).

[35] This issue has particular resonance in Scotland, since it is bound up with public health efforts to combat excessive alcohol consumption. Readers will recall the ruling, under EU free movement law, in C-333/14, *Scottish Whisky Association*, ECLI:EU:C:2015:845.

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 artificially designed simply to avoid classification as a product requirement and thus full application of the principle of mutual recognition.[36]

Having created this set of market access guarantees for goods, the UK Government seems to envisage that the new rules will be enforced and applied on the ground, primarily through the work of existing regulators and other public authorities, acting under more detailed guidance from ministers in London.[37] The UKIMA 2020 also contains detailed provisions on the future role of the Competition and Markets Authority (including a new Office for the Internal Market) in monitoring and reporting on the operation of the UKIM, as well as providing advice on its implementation and development.[38] However, there will also be an important role for the courts. In particular: although the Act states that the market access principles for goods have no direct legal effect except as provided for under the legislation,[39] the relevant provisions on mutual recognition and non-discrimination make clear that any offending trade restrictions are in fact to be treated as inapplicable to or unenforceable against protected traders.[40]

5. Critical Comments on the Nature and Design of the UKIM

In some respects, the UKIMA 2020 draws extensively upon the intellectual heritage of Union law. And yet the UKIM is also

[36] Section 3(4)-(6).

[37] Section 12.

[38] Part 4 and Schedule 3.

[39] Section 1(3).

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

fundamentally different from the Single Market – both on paper and, one can safely assume, in practice.[41]

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 or bypassing local regulatory choices, subject to only very limited opportunities for exclusion or justification. Indeed: the UKIMA 2020 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, the UKIM rules are 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 where another territory follows more lax 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 brand new regulatory initiatives, but also plans to amend existing rules in any substantive way, would immediately become subject to the UKIM's market access principles.

Yet the inherent design problems are only likely to grow still further when put into practice. After all: in the particular context of the UK, the Act's strong market access principles, plus their inherent deregulatory pressures and disincentives to reform or innovate, simply will not operate in a neutral manner across the constituent territories. Taming England's relative size and power would challenge *any* internal market system. Instead, the Act's regime would positively magnify England's inherent advantages yet further and risk rendering the exercise of many devolved powers redundant in practice. English choices would be able to produce their full effects within Scotland

[41] There are other more technical points on which the UKIM rules differ from those already familiar under EU free movement law: e.g. the rather idiosyncratic definition of indirect discrimination used in section 8 UKIMA 2020; e.g. the exclusion from scrutiny under the Act of rules regulating or restricting the post-sale use of goods (which under EU law would be analysed in accordance with the caselaw following C-110/05, *Commission v Italy*, ECLI:EU:C:2009:66).

and Wales, on a scale that could simply overwhelm the latter's own preferences. In effect: the UKIMA 2020 will subject the exercise of various devolved competences to the operation of market forces – yet in a market which is inherently, if not altogether dysfunctionally, 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, has been left deliberately ambiguous. The UKIMA 2020 simply confers upon the central executive a power to amend the list of express exemptions from the market access principles for goods as laid down in Schedule 1; and states that that power might be exercised, *inter alia*, to give effect to a common framework agreement between the UK government and one or more devolved administrations about how matters previously governed by EU law should be regulated after expiry of the post-Brexit transition period.[42] But arguably, the Act is so extreme in its vision and design that it 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 overwhelming extra-territorial effects of whatever standards England choses to adopt?

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 the UKIMA 2020 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. And again unlike the EU system: there is no attempt to combine the

[42] Section 10.

new UKIM principles with reforms to the UK's overall governance structures, for example, so as to create more independent and impartial fora for decision-making and dispute resolution between the constituent territories. Far from it: the UKIMA 2020 confers significant powers upon the central executive to change the rules of the game laid down in the Act itself and even without the consent of the devolved authorities.[43] At the same time, the conferral of direct legal enforceability upon the core market access principles contained in the Act would only serve to render its potential impacts and problems even more potent in practice, as the courts would be called upon to disapply devolved rules that fall foul of the Act's turbocharged system of mutual recognition and non-discrimination.[44]

So on paper, devolution might continue to look the same. Indeed, it might even look more extensive. But in practice, the operation of the UKIM has real potential to limit the capacity of the devolved institutions to pursue different economic or social choices from those made in London.

It is arguable that the underlying problems affecting the UKIMA 2020 lie in its core starting assumptions: that regulatory differences capable of creating any barrier to trade are inherently objectionable and must be suppressed in practice; and that those barriers to trade will emanate primarily from the actions of the Scottish or Welsh authorities, never from choices made in London. But in reality, the main challenge facing the UKIM does *not* lie in the ability of Scotland or Wales to do certain things differently from England in accordance with their legitimate powers under their own devolution settlements. The real problem is the sheer empirical fact that, without

[43] E.g. section 6(5)-(9) on the definition of rules subject to non-discrimination; section 8(7)-(11) on the legitimate aims capable of justifying indirect discrimination; section 10(2)-(11) on exclusions from the market access principles as laid down in Schedule 1. Note section 13 on review of those delegated amendment powers; and sections 56-57 on the general scope of executive powers under the Act.

[44] Note also the controversial powers contained in Part 6 (whereby the UK Government can directly fund a wide variety of projects across the UK and regardless of devolved powers); Part 7 (categorisation of subsidy control as a competence reserved to the central UK authorities); and section 54 (protection of the UKIMA 2020 against modification by the devolved institutions).

proper constraints and processes, a strong UKIM system will magnify England's existing economic and constitutional dominance yet further – and do so to the clear cost of devolution itself.

For those reasons, it is tempting to regard the UKIMA 2020 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 – allowing potential internal trade problems to be identified and resolved even before they arise; while insisting that any potential barriers which are eventually enacted in 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 solution might well be full-scale harmonisation. In other sectors, it might be possible to reach agreement on a system of mutual recognition, but subject to more appropriate or 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 Sewell Convention, and

allowing the UK's central 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.

Even if such radical redesign options are hoping for too much, the basic scheme of the UKIMA 2020 could nevertheless be improved in smaller but still significant ways. For example: the Act could be amended so as to provide a much broader system of derogations and justifications, allowing an individual territory 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.

6. Concluding Remarks

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. Which makes it all the more surprising that so many of the core features that make the EU system so 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 strategy 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. Most of all: there is not even a flicker of recognition for 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 which makes one suspect that the problems of the UKIMA 2020 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 highlight that the UKIMA 2020 was itself adopted without the consent of the Scottish Parliament or the Welsh Senedd. Far from it: the governments in both Edinburgh and Cardiff accused London of a unilateral and shameless power-grab that undermines UK democracy and risks weakening still further its own composite yet fragile union.[45]

There is no parallel universe in which Brexit is as entertaining as K563 or the Goldbergs. But Brexit still manages to provide us with the occasional hint of, albeit unintended, irony: the ferocious effort that hard core British Europhobes have invested in undermining the European Union might yet end up unravelling their own 'United Kingdom' instead.

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