

THE UK INTERNAL MARKET: A GLOBAL OUTLIER?

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When the UK government published the Internal Market Bill in September 2020, the proposal immediately sparked considerable and, in this age of political polarisation, unusually unanimous outrage. The first wave of criticisms focused on the fact that the Bill violated international law by deviating from provisions of the Withdrawal Agreement, which had been concluded with the European Union (EU) a mere few months earlier. Lawyers, politicians, and civil servants worried publicly about how this breach would make the UK look on the global stage, arguing that the country's reputation as a reliable international partner might suffer irreparable damage.¹ A second criticism, from outside Westminster, regarded another type of worry. Representatives of Scotland, Wales, and Northern Ireland raised concerns over the Bill's implications for devolution. One of the more strongly-worded reactions came from Jeremy Miles, at the time Counsel General of Wales, who deplored that the UK government planned 'to sacrifice the future of the union by stealing powers from the devolved administrations'.² Nicola Sturgeon, then First Minister of Scotland and Leader of the Scottish National Party, went as far as calling the proposal an 'abomination'.³ The eventual UK Internal Market Act (UKIMA), which received Royal Assent on 17 December 2020, no longer contained the contentious clauses considered to have been in breach of the Withdrawal Agreement. They had been removed as a token of good faith in the final phase of the negotiations of the EU-UK Trade and Cooperation Agreement. By contrast, the substance of the legislation remained, with few limited exceptions, unaltered.

UKIMA is the most visible manifestation of a new market structure that has been gradually emerging over the past few years: the UK internal market. It is new not just in the trivial sense of containing a set of rules on trade and free movement which differ from those that applied before the UK left the EU. It represents a qualitative shift in the ways and extent to which economic integration in Britain is pursued. The policies in this area have been presented as guided by the idea of continuity, as a form of preserving an UK internal market that has existed for centuries, ever since the signing of the Acts of Union.⁴ This is misleading at best. Despite

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¹ For a small selection, see 'Britain Threatens to Flout International Law' (The Economist, 9 September 2020); Cameron-Chileshe, 'Theresa May Refuses to Back "Reckless" Internal Market Bill' (Financial Times, 22 September 2020); Elgot, Syal, and Boycot, 'UK's Top Legal Civil Servant Quits over Brexit Deal Changes' (Guardian, 8 September 2022).

² 'UK Government "Sacrificing the Future of the Union" and "Stealing Power" Says Wales' Brexit Minister' (Nation Cymru, 8 September 2020).

³ D. Vevers, 'UK's New Brexit Bill "Will Break Law and Break Devolution"' (STV News, 9 September 2020).

⁴ Department for Business, Energy, and Industrial Strategy, 'UK Internal Market' (July 2020) 1.

the longstanding economic and political ties between the four nations, the internal market which is taking shape represents a fundamental change to their relations.⁵

As a consequence of the creation of new policies in this area, UK internal market law has surfaced as a novel field of academic enquiry. Scholars have analysed UKIMA's impact on economic unionism⁶ and devolution;⁷ examined the differences between the Act's provisions and corresponding EU rules;⁸ and started assessing post-Brexit developments in substantive areas such as food law.⁹ Little attention has so far been paid to the international comparative dimension. The UK internal market is the latest example of market integration, but it is far from being the only one. A myriad of composite market structures exists across the world. In addition to the EU, this includes, *inter alia*, Australia, Canada, Germany, Spain, Switzerland, and the US. As multi-level polities, they all face similar challenges when managing trade and allocating regulatory powers. Against this backdrop, it was unsurprising – indeed, prudent – when the UK government declared in the White paper on the internal market that it would take inspiration from these global experiences and incorporate insights from them in its own policy choices.¹⁰

This article seeks to investigate to what extent and to what effect that has been done: how does the UK internal market compare to other internal markets? In what ways does it follow pre-existing paths, in what ways does it depart from them? The main argument advanced will be that the UK internal market diverges from international blueprints in several important ways. Despite, on the surface, drawing on legal rules and governance tools that are frequently employed for achieving economic integration, it modifies and combines them in previously unseen ways. The result is an exceptional or, one might even say, extreme internal market which is defined by a remarkable degree of centralisation, strong trade rights, and a high potential for de-regulation.

The article proceeds as follows. Section I will start by explaining the main tensions that arise from pursuing economic integration in multi-level polities and the basic options that are available when designing an internal market. Section II will provide a brief overview of the choices that the UK has made in relation to its own internal market. Section III will compare these to the approaches adopted in other international market structures, highlighting

⁵ The economic relations between England and Scotland after the Acts of Union of 1707 are best described as a customs union; see K. Armstrong, 'The Governance of Economic Unionism after the United Kingdom Internal Market Act' (2021) 85 *Modern Law Review* 635, 657.

⁶ *Ibid.*

⁷ M. Dougan et al, 'Sleeping with an Elephant: Devolution and the United Kingdom Internal Market Act 2020' (2022) 138 *Law Quarterly Review* 650.

⁸ S. Weatherill, 'Comparative Internal Market Law: The UK and the EU' (2021) 40 *Yearbook of European Law* 431. Similarly, see T. Horsley, 'Constitutional Reform by Legal Transplantation: The United Kingdom Internal Market Act 2020' (2022) 42 *Oxford Journal of Legal Studies* 1143.

⁹ E. Lydgate and C. Anthony, 'Brexit, Food Law and the UK's Search for a Post-EU Identity' (2022) 85 *Modern Law Review* 1168.

¹⁰ Department for Business, Energy, and Industrial Strategy, White Paper on UK Internal Market (July 2020), Appendix B.

differences on issues such as trade rights, mutual recognition, cooperation mechanisms, and governance tools. Section IV will analyse the constitutional and institutional implications of the path chosen by the UK, explaining the impact it will have on free trade, institutional responsibilities, and devolved powers.

Before we start, one disclaimer is in order. For the sake of simplicity, the article at times speaks of all devolved governments in a joint manner. Constitutional reality, of course, is more complex. Although there are some common principles underpinning the devolution settlements,¹¹ each of them is ultimately unique, giving the relevant administrations different sets of powers and providing the UK government with different control mechanisms. The resulting divergences have been amplified by the Withdrawal Agreement's Northern Ireland Protocol, which stipulates that Northern Ireland remains bound by the rules of the EU internal market in certain areas, thus distinguishing it from the rest of the UK.¹² Therefore, some of the consequences described below will play out differently depending on which devolved territory one finds oneself in.

I. Designing an Internal Market

Market integration is a problem, or privilege, of all polities with a federal or multi-level structure. The need for it results from the existence of multiple entities under a shared umbrella or, more precisely, the parallel desire to allow different sites of governance and to form a common whole. The terminology for these phenomena varies from country to country, and organisation to organisation, but typically a distinction is made between the constituent units (states, provinces, regions, etc.) and the central government (federal, national, EU, etc.). What emerges from the economic integration of these component parts is the internal market or, as it is called in some places, simply 'the (national) market'.

The issues that market integration must solve are largely the same, regardless of where it occurs. Beyond the simple abolishing of tariff barriers, which forms the basis of a customs union, in an internal market a decision must be made on how much regulatory uniformity is required and, by contrast, how much diversity should be tolerated between the constituent units. The relative importance of ensuring free trade as opposed to promoting non-economic concerns, such as public health, social policy, or environmental protection, must be calibrated. Relatedly, the appropriate level of regulation within the common market space must be determined. It can range from light-touch to substantial public (or private) intervention. Finally, there are institutional questions, too: which actors will be in charge of establishing and advancing the internal market, and which ones of monitoring and enforcing compliance with its rules?

¹¹ N. Barber, *The United Kingdom Constitution* (OUP 2021) 217.

¹² S. Weatherill, 'The Protocol on Ireland/Northern Ireland: Protecting the EU's Internal Market at the Expense of the UK's' (2020) 45 *European Law Review* 222.

The way in which these issues are solved differ from place to place. When one is at the drawing-board stage, first approaching the question of how to design an internal market, there is a variety of options. In EU scholarship, which has spent a lot of effort reflecting on this topic, three main models of market integration have been identified: decentralised, centralised, or competitive.¹³ Under the decentralised model, the constituent units retain the competence to regulate economic activity. They can freely set the rules on matters such as labour law, consumer rights, and product standards and, crucially, ask incoming goods or service providers to comply with these rules. To prevent protectionist behaviour, their autonomy is usually tempered by the principle of non-discrimination, which requires that the constituent unit does not treat goods or economic actors from other units worse than local ones. Under the competitive model, constituent units have the power to regulate economic activity, too. However, in the case of cross-border movement, they cannot require that the product or activity abides by their own local standards – instead, its legality is judged primarily based on the rules of the home country, i.e. the place in which a good is produced, a service is authorised, or a person is qualified. This is known as the principle of mutual recognition and it inserts an element of competition into the internal market as constituent units strive to provide the best conditions for economic activity. Finally, under the centralised model, the central government takes over the task of market regulation. It adopts common rules which replace pre-existing diverging local rules. The consequence is a harmonisation of the internal market, resulting in economic actors in all of its parts having to abide by the same set of standards.

These models are just ideal types. In reality, internal markets tend to combine aspects of each of them or use different models in different areas. The EU itself is a good example. While the free movement of goods has historically been defined by competitive features through an embrace of mutual recognition,¹⁴ the free movement of persons is marked by a far more decentralised approach which is accompanied by minimal harmonisation. Even within the same broader field, specific subject-matters can follow different approaches. While, for instance, chemicals and digital services are governed by detailed EU legislation, the regulation of slot machines and security services remains in the purview of Member States. Finally, the nature of an internal market can change over time. The evolution of the US market illustrates this. Having started as a strongly decentralised structure in the 18th century, in which States played a major role in economic regulation, often to the detriment of domestic trade and commerce, it acquired more centralised streaks after the Civil War and during the early 20th century with the creation of federal institutions and more robust trade rights.¹⁵

¹³ M. Maduro, *We the Court* (Hart 1998) Ch 4. Similarly, see K. Armstrong, 'Mutual Recognition' in Barnard and Scott (eds.), *The Law of the Single European Market: Unpacking the Premises* (Hart 2002) 225; Snell, 'The Internal Market and the Philosophies of Market Integration' in Barnard and Peers (eds.), *European Union Law* (3rd edition, OUP 2020) 334. The analysis of the costs and benefits of each model below draws on this scholarship.

¹⁴ This has changed over time, see Zglinski, J. 'The End of Negative Market Integration: 60 Years of Free Movement of Goods Litigation in the EU (1961–2020)' (2023) *Journal of European Public Policy*.

¹⁵ M. Egan, *Single Markets: Economic Integration in Europe and the United States* (OUP 2015).

Thinking in terms of models in the context of internal market design is useful still, as it demonstrates that different approaches produce distinct constitutional, institutional, and economic effects. Decentralised forms of market integration lead to the constituent units retaining a broad scope of autonomy. An emphasis is put on local political processes and countries that have high regulatory standards are able to maintain them. However, this also typically means that little domestic trade materialises as actors face the problem of having to comply with different sets of rules. Competitive forms of market integration generate higher levels of trade as economic actors, by only complying with their home rules, can access the entire internal market. Yet, this comes at the cost of curtailing the regulatory autonomy of the constituent units of destination which must *de facto* accept standards they did not set. It also means that courts end up playing a more prominent role when it comes to market governance as traders will challenge restrictive laws judicially, basing their claims on the principles of mutual recognition. A common side effect is de-regulation. The most visible implication of centralised forms of market integration is that constituent units lose their direct regulatory powers at the expense of the central government. From a democratic perspective, this has some benefits, as the range of those represented in the legislative process is widened,¹⁶ but it can also have drawbacks, as the importance of local law-making is diminished. Although the harmonisation of rules can lead to incentivising trade, reaching an agreement can, at times, be difficult, especially if there are significant political divergences across the constituent units and the decision-making process is onerous.¹⁷

It will have become clear by now that each internal market design represents a trade-off between different objectives: trade *versus* non-economic policy aims, regulation *versus* de-regulation, judicial *versus* political decision-making, and unity *versus* local autonomy. When markets are being integrated, usually most of these ambitions are pursued. Yet, no internal market achieves them all, or at least not to the same extent. It will either prioritise trade or autonomy; encourage commercial freedom or regulatory interventions; rely predominantly on political or adjudicative processes; and so on. Consequently, every market design is best thought of as a choice. Certain qualities will be emphasised at the expense of others.

The choice eventually made will depend, firstly, on political considerations. Countries placing a high value on local decision-making will establish more robust protections for their constituent units, states geared towards unity tend to create market structures with substantive constraints that are enforced by the central government. It can, secondly, be influenced by geographic and cultural factors. The level of homogeneity within a country may affect to what extent the internal market can – but also to what extent it needs to be – centrally regulated. It can, thirdly, be driven by socio-economic concerns. Liberal market economies will favour models which minimise state intervention, whereas social market economies will try to maintain high regulatory standards. Finally, the trust in and availability of institutions can play

¹⁶ C. Joerges and J. Neyer, “‘Deliberative Supranationalism’ Revisited’ (2006) EUI Law Working Paper No. 2006/20.

¹⁷ F. Scharpf, ‘The Joint-Decision Trap: Lessons from German Federalism and European Integration’ (1988) 66 Public Administration 239.

a role as well. Preconceptions about the appropriate role of courts and legislatures will determine to what extent each actor is entrusted with regulating economic activity. In the next section, we will turn our attention to the choices the UK has made in designing its internal market.

II. The Structure of the UK Internal Market

The UK internal market rests on three principal pillars: substantive UK legislation; the common frameworks; and UKIMA.

UK legislation is the most, both quantitatively and qualitatively, significant – yet often forgotten – component of the internal market. The UK’s territorial constitution is based on the principle of devolution. The devolution settlements have over time converged on a model under which all power is devolved unless it has been reserved for the central government.¹⁸ Against this backdrop, one might expect that most economic regulation is done in Belfast, Cardiff, and Edinburgh. Yet, the reality is that the reserved powers are defined so widely that the large bulk of regulatory work is (or is not) done in Westminster. They include, to name some of the most important ones: regulation of businesses; fiscal, economic, and monetary policy; international trade; competition law; customer protection and product safety; as well as financial, telecommunications, and energy services.

While the UK government always had a broad range of regulatory powers, including during its EU membership, they have considerably expanded since Brexit as the competences that had hitherto been exercised by the EU were repatriated. Although these repatriated powers were allocated to both the devolved administrations and the UK (depending on whether they constituted devolved or reserved matters), it is the latter that profited disproportionately – a result of the internal division of competences within Britain which is heavily skewed in favour of the central government. Initially, the majority of EU legislation was retained by simply transforming it into UK legislation, to prevent regulatory gaps and ensure legal certainty.¹⁹ This will change now that the Retained EU Law (Revocation and Reform) Act 2023 was adopted, which contains a sunset clause stipulating that significant parts of retained law will be revoked by the end of 2023.²⁰

Despite this asymmetry, the devolved administrations do have substantive regulatory power. They have the competence to adopt laws and policy measures in a number of fields, ranging from agriculture and education to public health and social welfare. Therefore, after the decision to leave the EU was taken, the question arose as to how to deal with the divergences that could arise between the four nations. The so-called ‘common frameworks’ were the initial

¹⁸ Barber (n 11).

¹⁹ C. Barnard, ‘Retained EU law in the UK Legal Orders: Continuity between the Old and the New’ (2021) Cambridge Legal Studies Research Paper Series No. 27/2021.

²⁰ The Retained EU Law (Revocation and Reform) Act 2023..

answer. Established in 2017, they are an institutionalised form of intergovernmental cooperation between the UK and the devolved administrations, whose aim is to work out agreements on regulatory approaches in areas that used to be covered by EU law but now fall into devolved competence.²¹ These agreements can consist of ‘common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition’.²² The overarching principles of the common frameworks are to enable the functioning of the UK internal market, while respecting ‘the devolution settlements and the democratic accountability of the devolved legislatures’.²³ They are based on the idea of consent: for an agreement to be reached, all participating governments must support the proposal.

The common frameworks developed in the shadow of hierarchy. Section 12 of the European Union (Withdrawal) Act 2018 placed a limit on the exercise of devolved powers by stipulating that legislation in the devolved administrations could not modify retained EU law so far as the modification was of a description specified in regulations made by a Minister of the Crown. This ‘freezing power’ was intended to be a transitional arrangement to secure legal stability in the UK by preventing regulatory divergences to become too great across the four nations. It expired two years after Britain’s departure from the EU and ended up never being used. Yet, in hindsight, it was an early harbinger of things to come, signalling a willingness of the UK government to interfere with local autonomy where deemed necessary.

The common frameworks process had a slow start, but more recently some progress has been made. At the outset, 160 policy areas were identified in which EU law intersected with devolved competence and, thus, potentially made the adoption of frameworks necessary; this number was later corrected to 154.²⁴ The UK government and devolved administrations decided that in the vast majority of these no further action was required and embarked on working towards finding common solutions in the remaining fields. At the time of writing, only one framework has been finalised (on hazardous substances)²⁵ and a further 29 have been provisionally confirmed.²⁶ Many of them lay down base standards that will apply across the UK but leave the devolved administrations the possibility to impose more protective requirements, a strategy resembling the EU’s minimum harmonisation approach,²⁷ and establish non-judicial dispute settlement for the governments involved. Some have been translated into legislative, others into non-legislative arrangements.

²¹ Joint Ministerial Committee (EU Negotiations) Communiqué of 16 October 2017.

²² Ibid.

²³ Ibid.

²⁴ UK Government, ‘Frameworks Analysis 2020: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland’ (September 2020).

²⁵ Hazardous Substances (Planning) Common Framework.

²⁶ UK Department for Levelling Up, Housing and Communities and Cabinet Office, ‘The European Union (Withdrawal) Act and Common Frameworks: Fourteenth Report’ (10 March 2022), at 1.16.

²⁷ See S. Weatherill, ‘The Fundamental Question of Minimum or Maximum Harmonisation’ in Garben and Govaere (Eds.), *The Internal Market 2.0* (Hart 2020).

The undisputed centre piece of the new UK internal market, however, is UKIMA. The Act contains a number of horizontal rules that govern free movement and economic activity in the UK, in addition to making provisions in a few adjacent areas such as financial assistance and subsidy control. In-depth legal analyses of the Act have been published,²⁸ so an overview of its key norms shall suffice for our purposes. At the heart of UKIMA, we find two ‘market access principles’: mutual recognition and non-discrimination. Both are justiciable to the extent that they are established in the Act and can, consequently, be invoked by companies and private individuals to challenge legislation.²⁹ Mutual recognition entails the idea that lawfully producing or importing a good, or obtaining an authorisation or qualification, in one part of the UK entitles the economic actor to offer their goods, services, or labour in any other part of the UK. Non-discrimination prevents products or economic actors from outside the relevant jurisdiction from being treated, directly or indirectly, in a less favourable way than their local counterparts.

The market access principles apply to goods, services, and professional qualifications alike, albeit in slightly different ways. In relation to goods, mutual recognition extends to regulatory requirements relating to the characteristics of a product (including its nature, composition, age, quality, or performance), its presentation (name, description, packaging, labelling, etc.), and any matter connected with its production.³⁰ It does not apply to ‘manner of sale requirements’, which are defined as rules that govern any aspect of the circumstances or manner in which goods are sold. These fall into the scope of the – less demanding – principle of non-discrimination, as do rules regulating the transportation, storage, display of goods, inspection, and certification of goods.³¹ In relation to services, the Act distinguishes between authorisation and regulatory requirements. The former concern rules that require providers to obtain permission before offering a service and are governed by the principle of mutual recognition, whereas the latter concern requirements as to how a service is to be provided and are governed by the principle of non-discrimination.³² For professional qualifications, the Act uses different language but, in substance, establishes broadly equivalent protections by giving UK residents who are qualified to exercise a profession in one part of the UK the right to exercise it in the remaining parts, and lays down the principle of equal treatment in relation to other regulatory requirements.³³

Restrictions on the market access principles can, as a general rule, not be justified, but the Act sets out a number of exclusions which are listed in Schedules 1 and 2. What immediately stands out is how narrowly these are drawn. There are a few horizontal clauses which stipulate exceptions for pest and disease control (however, only if free movement poses a ‘serious’ threat to public health and can ‘reasonably be justified as necessary’ to address the threat),

²⁸ A. Bates et al., *The UK Internal Market Act 2020* (OUP 2021).

²⁹ S 1(3).

³⁰ S 3(3).

³¹ S 6(3).

³² Ss. 17(2)-(3) and 19-21.

³³ Ss. 24, 25 and 28.

public health emergencies, and tax legislation. In addition, for goods, there is an exclusion for unsafe food (again, limited to health threats that are serious and measures that are necessary to address the threat). For services, we find a list of a dozen of activities that are excluded from the Act's scope of application. This includes healthcare, legal, gambling, and audiovisual services.

A similarly restrictive approach has been adopted in relation to discrimination. Direct discrimination, i.e. measures expressly distinguishing based on the origin of goods or economic actors, can, in principle, not be justified. For goods, this is true in a literal sense: the prohibition is, the aforementioned exclusions aside, absolute. For services, the Act provides, as it does for mutual recognition, a list of activities to which non-discrimination does not apply. The UKIMA rules are a little more relaxed when it comes to indirect discrimination, which is defined as legislation that puts non-local goods at a disadvantage and has an adverse market effect.³⁴ Here, unequal treatment can be justified if it can be considered a necessary means of achieving a legitimate aim – a category which, however, is confined. Only two aims are accepted as legitimate grounds that justify restrictions on trade in goods: the protection of the life or health of humans, animals, or plants and the protection of public safety or security. In relation to services, the efficient administration of justice serves as an additional justification ground.

UKIMA is much less detailed when it comes to internal market governance beyond the market access principles. Other than through private litigation, compliance with the Act's provisions is mainly supervised by the newly established Office for the Internal Market (OIM), which forms part of the Competition and Markets Authority but enjoys significant operational independence. Its designated role is 'to support... the effective operation of the internal market', keeping in mind the interests of consumers and all constituent countries of the UK.³⁵ The OIM may review any matter it considers relevant for the functioning of the internal market. In addition, it must report, once a year, on the operation of the internal market and, once every five years, on the effectiveness of UKIMA and the common frameworks.³⁶ Devolved administrations may seek the OIM's non-binding advice on how a regulatory proposal falling into the scope of UKIMA would affect trade and competition, or ask it for an *ex post* assessment of their or another administration's laws. Yet, in both scenarios the OIM can decline to respond.

One unresolved issue is the relationship between UKIMA and the common frameworks. Somewhat surprisingly, the Act does not provide an explanation as to how it interacts with existing and future common frameworks, which rest on a mechanism predating its enactment. Common frameworks are only mentioned as a potential source for introducing further

³⁴ S 8(1).

³⁵ S 31(2)-(3).

³⁶ The first annual and periodic reports were published in March 2023 and are available at < <https://www.gov.uk/government/publications/oim-annual-report> > and < <https://www.gov.uk/government/publications/oim-periodic-report> >.

exclusions to the market access principles. The Secretary of State may amend Schedules 1 and 2, which contain exclusions to the free movement of goods and services, to ‘give effect to an agreement that forms part of a common frameworks agreement, and provides that certain cases, matters, requirements or provision should be excluded from the application’ of the rules on market access.³⁷ This suggests that common frameworks are subordinate to the provisions of UKIMA and can only have legal effect if and insofar they are translated into modifications of the Act itself which, in turn, substantially lowers their impact.

Relatedly, there remain open questions about the extent to which the Act can limit the law-making capacity of the devolved legislatures. UKIMA establishes that any laws contravening the market access principles are rendered inapplicable – not, however, invalid. The Counsel General for Wales brought an application of judicial review, arguing that this interferes with devolved competences and violates the constitutional guarantees enshrined in the devolution settlements. Both the Divisional Court and the Court of Appeal have dismissed the case as premature in the absence of specific legislation colliding with UKIMA, but similar litigation will undoubtedly reappear on the judicial docket in the near future.³⁸ As Kilford shows, the crux of the problem is how far we ought to interpret the notion of competence: is it sufficient for devolved legislation to remain valid law, or does it need to be effective as well?³⁹ The recently adopted Welsh ban on single-use plastic, which will be discussed below, may pave the ground for further legal challenges that will shed light on these issues.

III. Taking Back Control: A Comparative Perspective

The UK internal market is the fruit, and symbolic embodiment, of the country’s new post-Brexit autonomy. Yet, it has not been created in a vacuum. This is true internally. The design of the internal market was influenced by the constitutional, political, and socio-economic characteristics of the UK. But it is also true externally. The various internal markets that already existed across the world provided reference points for the British government.

The White Paper recognised this explicitly when stating that ‘[r]esearch into other countries’ Internal Market systems has informed the development’ of the proposals and ‘important lessons’ were learnt from the comparative study.⁴⁰ It provides supporting material in its Annexes that covers the basic structure of select international examples of internal market

³⁷ Ss. 10(3) and 18(3).

³⁸ *Counsel General for Wales, R (On the Application Of) v The Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 118; *Counsel General for Wales, R (On the Application Of) v Secretary of State for Business Energy and Industrial Strategy* [2021] EWHC 950 (Admin).

³⁹ N. Kilford, ‘The UK Internal Market Act 2020 and the Power to Make Effective Laws’ Institute of Welsh Affairs (27 September 2022). The Supreme Court appears to have adopted the latter position for UK legislation in the Continuity Bill reference, stating that ‘Parliament cannot meaningfully be said to “make laws” if the laws which it makes are of no effect’; see *In re The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] 2 WLR 1 [52].

⁴⁰ White Paper (n 10), 98.

systems; the Australian, Swiss, and Spanish models are briefly explained here.⁴¹ In the main text, additional references to and comparisons with other countries are made, including Canada, Germany, and the United States. What lessons have exactly been learnt from this survey, by contrast, remains unclear. In what ways does the UK internal market follow existing global models? In what ways does it depart from them? Concepts like market access, mutual recognition, and non-discrimination are frequently employed in the context of regulating domestic or international trade, but they are often defined in very different manners. Understanding the parallels and similarities with other market structures is central to understanding the nature of the UK internal market.

A. EU Internal Market

It makes sense to begin our comparative analysis with the internal market which the UK has just left: that of the EU.⁴² The UK government had, perhaps understandably, made a point of underlining the radical departure from the EU and its free movement principles in the process leading up to the creation of its own internal market. With one small exception, the White Paper does not refer to any European law or jurisprudence. And yet, the final product might be best understood as a critical reflection on Britain's EU membership.

The UK internal market has ended up sharing many structural similarities with its European counterpart. This is most visible when looking at the substantive provisions of UKIMA. EU lawyers will feel a slightly odd *déjà-vu* when reading through the market access principles. The parallels are striking, especially in the field of goods where the Act contains all basic ingredients of EU free movement law. The principle of mutual recognition was established by the CJEU in the famous *Cassis de Dijon* decision.⁴³ It creates the rebuttable – an issue to which I shall return below – presumption that goods lawfully produced in one Member State can be sold anywhere in the EU. The principle of non-discrimination has been a cornerstone of free movement law for longer still, prohibiting both direct and indirect discrimination between domestic and foreign goods or economic actors.⁴⁴ Even doctrinal details like *Keck* have been replicated.⁴⁵ Under EU law, mutual recognition applies to 'product requirements', i.e. regulatory requirements relating to the composition, presentation, labelling, or packaging of a product. Rules on 'selling arrangements', i.e. the circumstances in which a good can be sold, are governed by the principle of non-discrimination. UKIMA copies this distinction and applies it to cross-border trade within the UK.

Perhaps more instructive than the similarities, however, are the ways in which UKIMA departs from European free movement law. In addition to a number of smaller, if intriguing,

⁴¹ Ibid, Annex B.

⁴² See also Armstrong (n 5) and Weatherill (n 8).

⁴³ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ('*Cassis de Dijon*') [1979] ECLI:EU:C:1979:42.

⁴⁴ Case 155/73 *Sacchi* [1973] ECLI:EU:C:1974:40; Case 41/74 *Van Duyn* [1974] ECLI:EU:C:1974:133; Case 33/74 *Van Binsbergen* [1974] ECLI:EU:C:1974:131.

⁴⁵ Case C-267/91 *Keck and Mithouard* [1993] ECLI:EU:C:1993:905.

divergences relating to the Act's scope of application,⁴⁶ the central difference concerns the breadth of the market access principles. Mutual recognition is turned into a quasi-absolute principle. In EU law, the presumption that goods which are legally produced in one Member State are fit for the entirety of the internal market is qualified. Other Member States can rebut it by demonstrating that legitimate reasons exist for not allowing the marketing of a product, as long as the restriction is proportionate. The Treaties contain derogation clauses for each free movement right which vary in scope but, at a minimum, include public health, policy, and security. In addition, Member States can rely on 'mandatory requirements', an open-ended catalogue of other policy objectives in the general interest that includes consumer protection, social policy, road safety, human rights, environmental protection, and many more.⁴⁷ This solution, known as 'conditional' or 'managed' mutual recognition,⁴⁸ acknowledges that not all regulation is bad – or, to put it differently, that markets sometimes produce undesirable outcomes that need to be corrected – and that there can be legitimate variations in protective standards among the Member States. UKIMA keeps the first element of this model (mutual recognition) while largely removing the second (possibility to justify restrictions). In doing so, it takes the mutual recognition model *ad extremis*: this is, as one group of scholars put it, 'Cassis on steroids'.⁴⁹

A similar decision was made regarding the principle of non-discrimination. Direct discrimination is, contrary to European law, completely prohibited, aside from the scenarios listed in Schedules 1 and 2. In relation to indirect discrimination, the Act sets out a (short) exhaustive list of justification grounds. The adjustments will certainly improve market access for traders, yet it remains to be seen to what extent they will prove sustainable. In its conclusions on the Internal Market Bill, the House of Lords observed: 'It is not clear why a more limited set of legitimate aims [than available under EU law] has been included.'⁵⁰ As the EU experience shows, there can be situations in which it makes sense to distinguish, indirectly or sometimes even directly, based on the origin of a product or actor. It could prove illusory to try, as the Act does, to restrict the policy objectives pursued by economic regulation to public health and safety and, in the case of services, the administration of justice.

A final difference between the UK and EU internal market concerns its broader governance structure. The role of the OIM, which is meant to be the guardian of the internal market, differs considerably from that of its European equivalent, the Commission. As was explained,

⁴⁶ UKIMA applies only to restrictive legislation, not administrative practices or private action, and requires an 'adverse market effect' for indirect discrimination; see Weatherill (n 8) at 439 and 447. In other respects, it is wider than EU free movement law, notably when it comes to services, which are protected by the principle of mutual recognition.

⁴⁷ J. Zglinski, 'Defending Trade Barriers: Justification, Proportionality and Standards of Review in the Free Movement of Goods', in Schütze and Tridimas (eds.), *Oxford Principles of EU Law: Volume II – The Internal Market* (OUP, forthcoming).

⁴⁸ K. Nicolaidis and G. Schaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' (2005) 68 *Law and Contemporary Problems* 263.

⁴⁹ Dougan et al. (n 7).

⁵⁰ House of Lords (Select Committee on the Constitution), 'United Kingdom Internal Market Bill' (17th Report of Session 2019-21) at 94.

the OIM has been given a number of soft powers that will allow it to monitor the operation of the market access principles. It can issue interpretive guidelines as to how these principles are to be understood and write reports about problems it deems worthy of its attention. In addition, it can advise the devolved administrations on the effects of their legislation on trade and even engage in informal dispute resolution. However, most of these competences work on a 'may' not 'must' basis and none of them come with the hard power that would make it possible to enforce the relevant rules. The OIM will not be able to take Scotland, Wales, or Northern Ireland to court if they disregard the obligations under the UKIMA. Nor will it have the right to initiate legislation in the areas it oversees, even when serious problems become apparent. And it will not have some of the further EU governance tools at its disposal either, such as an automatic notification system of new legislation potentially restricting free movement.⁵¹

B. International Market Structures

The UK internal market may deviate from the EU internal market in important ways, but the differences are even more pronounced when we look at other internal market structures across the world, from which the UK chiefly intended to draw inspiration. Several elements merit attention.

The first is the fact that the UK internal market is, through the adoption of UKIMA, to a significant degree based on legislation, legislation that was unilaterally adopted by the central (UK) government. This may sound banale at first – in reality, it is anything but. Although some federal and quasi-federal countries, such as Spain and Switzerland,⁵² have dedicated internal market laws that regulate trade and commerce between their constituent units, many others do not. Germany is one example. Despite of, or perhaps due to, its strong decentralised nature, there is no special horizontal legislation that lays down on what terms free movement of goods and services can proceed internally. Instead, domestic trade is governed by a mix of constitutional provisions, sectoral federal legislation, and intergovernmental agreements between the *Länder*. The United States follow a similar approach. Its constitution contains the generally worded commerce clause, which gives Congress the power 'to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes'. This competence has been used to adopt federal legislation in specific areas, but not for cross-cutting measures that would govern all inter-state trade.

The second noteworthy feature of the UK internal market is the strength of the trade rights which it establishes. While trade or free movement rights are protected in many jurisdictions, they are typically not nearly as expansive as the market access principles laid down in UKIMA. Some constitutions only protect individuals against discrimination and protectionism, not

⁵¹ 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] OJ L241/ 1.

⁵² Ley 20/2013, de 9 de diciembre, de garantía de la unidad de mercado (Law on the Unity of the Market); Bundesgesetz über den Binnenmarkt (Internal Market Law).

against further barriers to trade; removing these is a task which is left to the political process. Canada and Australia exemplify this. In Canada, the free movement of goods between provinces and territories is protected by Section 121 of the Constitution, the free movement of labour by Article 6 of the Charter of Rights. The former has been interpreted by the Canadian Supreme Court as only precluding the creation of customs duties and the regulation of inter-provincial trade.⁵³ The latter is understood to entail a principle of non-discrimination.⁵⁴ In Australia, Section 92 of the Constitution guarantees free trade among the states. In *Cole*, the High Court of Australia held that the provision merely prohibits measures which impose a burden on intra-state trade and have a protectionist effect.⁵⁵ Despite the longstanding lobbying efforts of trade lawyers and practitioners to extend this definition to equally applicable technical standards,⁵⁶ the High Court has resisted departing from the *Cole* principles.⁵⁷

Elsewhere, the scope of trade rights extends to non-discriminatory obstacles to market access. However, where this more expansive approach is adopted, it usually goes along with generous possibilities for defending local laws and/or a low intensity of scrutiny. Article 139 of the Spanish Constitution establishes a general right to free movement for persons and goods, but courts have adopted a deferential approach to judicial review of non-discriminatory legislation adopted by the autonomous communities.⁵⁸ Only measures that are manifestly unsuitable, unnecessary, or disproportionate to promote public interest goals are deemed to be unconstitutional.⁵⁹ The US Supreme Court follows a similar approach in its jurisprudence on the 'dormant' commerce clause, a judicially-created second limb of the aforementioned provision which protects individuals against state legislation restricting trade. While applying a strict standard of scrutiny in relation to protectionist measures, it employs a more lenient balancing test in cases on concerning non-discriminatory state action, departing from a presumption of legality.⁶⁰ Even Switzerland, which has relatively wide-ranging free movement rights,⁶¹ gives its cantons considerable discretion to justify trade barriers. Any non-

⁵³ This last issue is primarily viewed as a question of legislative competence, see A. Hinarejos, 'Free Movement, Federalism and Institutional Choice: A Canada-EU Comparison' (2012) 71 Cambridge Law Journal 537.

⁵⁴ Supreme Court of Canada, *Canadian Egg Marketing Agency v Richardson* [1998] 3 S.C.R. 157

⁵⁵ High Court of Australia, *Cole v. Whitfield* (1988) 165 CLR. 360.

⁵⁶ C. Staker, 'Free Movement of Goods in the EEC and Australia: A Comparative Study' (1990) 10 Yearbook of European Law 219; G. Villalta Puig, *The High Court of Australia and Section 92 of the Australian Constitution: A Critique of the Cole v Whitfield Test* (Lawbook 2008).

⁵⁷ High Court of Australia, *Betfair Pty Ltd v. Racing New South Wales* (2012) 286 ALR 221.

⁵⁸ L. Jiménez, 'Mutual Recognition in the Spanish Multi-level Administrative State' (2020) 13 Review of European Administrative Law 159.

⁵⁹ Spanish Constitutional Tribunal, Judgment 111/2017, ECLI:ES:TC:2017:111, para 4.

⁶⁰ D. Regan, 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause' (1985) 84 Michigan Law Review 1091; B. Denning, 'Reconstructing the Dormant Commerce Clause Doctrine' (2008) 50 William and Mary Law Review 417; C. Barnard, 'Restricting Restrictions: Lessons for the EU from the US' (2009) 68 Cambridge Law Journal 575.

⁶¹ N. Diebold, 'Freizügigkeit im Mehrebenensystem: Eine Rechtsvergleichung der Liberalisierungsprinzipien im Binnenmarkt-, Aussenwirtschafts- und Europarecht' (2016) 26 Swiss Review of International and European Law 560.

discriminatory trade barrier which is proportionate and ‘essential to safeguard overriding public interests’ – any public interest, that is – must be accepted.⁶² In this light, the UK’s choice to establish market access principles whose scope of application covers both discriminatory and non-discriminatory requirements, while providing very limited possibilities to defend laws falling into that scope of application, deviates from international practices.

A separate note is warranted on mutual recognition. The differences with the EU’s version of mutual recognition have already been highlighted, but several other internal markets, as well as a growing number of international trade agreements, also make use of the concept.⁶³ Some of these countries and organisations have adopted, or tried to adopt, strong variants of mutual recognition. But here, too, we see significant divergences with the UK’s approach. Spain is an illustrative example. In an attempt to extend the protections laid down in Article 139 of the Constitution, the Spanish legislature in 2013 adopted the Law on the Unity of the Market. The Law imposed, *inter alia*, a rule of origin whereby economic actors who complied with, or were authorised under, the laws of one region could operate anywhere in Spain.⁶⁴ The rule had practically no exceptions and applied across all economic sectors. The autonomous regions challenged it in a series of proceedings before the Constitutional Tribunal – with success.⁶⁵ The Tribunal held that the rule of origin constituted a far-reaching intrusion into the principle of local autonomy. This intrusion could only be justified where the government had evidence of specific sectoral problems that caused to a fragmentation of the Spanish market and an equivalent level of protection between home and host region existed. Absolute horizontal mutual recognition, analogous to the system established in UKIMA, was deemed to be incompatible with a multi-level governance structure.

Another instructive case study is Australia which has a mutual recognition regime that, in substance, closely resembles the UK’s new model. The Mutual Recognition Act 1992 establishes that goods produced in one state can be sold in another and that persons legally entitled to exercise an occupation in one state can exercise it throughout the country.⁶⁶ Similarly to UKIMA, it excludes regulations concerning the manner of sale and carrying on an occupation from its scope, while, in addition, exempting a broader range of trade barriers.⁶⁷ But there is a crucial difference: as the Act goes beyond the protections laid down in the Australian Constitution and touches on state competences, it was subject to intergovernmental agreement. All states and territories were involved in its drafting and had to consent to its adoption. This *modus operandi*, in fact, is common to all countries that are referenced in the White Paper. Market integration in areas of local competence can only

⁶² Art. 3 Binnenmarktgesetz (Internal Market Law).

⁶³ E. Leinarte and C. Barnard, ‘Negotiating Mutual Recognition Agreements: Challenges and Techniques’ in Albors-Llorens, Barnard, and Leucht (Eds.), *Cassis de Dijon: 40 Years On* (Bloomsbury 2021) 217.

⁶⁴ Arts. 6, 19, and 20 Law on the Unity of the Market.

⁶⁵ Spanish Constitutional Tribunal, Judgment 79/2017, ECLI:ES:TC:2017:79; Judgment 110/2017; ECLI:ES:TC:2017:110; Judgment 111/2017, ECLI:ES:TC:2017:111.

⁶⁶ Ss. 8 and 17 Mutual Recognition Act 1992.

⁶⁷ For goods, see Ss. 14 and 15 Mutual Recognition Act 1992 which refer to Schedules 1 and 2.

materialise under the condition that local governments agree to it,⁶⁸ even if the result is a slowing down of the integration process.⁶⁹ Not so in the UK. Although consent is a guiding principle of the common frameworks process, it is possible for the UK government – due to constitutional rules that will be explored in greater detail below – to adopt legislation in devolved areas without obtaining the approval of the devolved administrations, as demonstrated by UKIMA itself.

In terms of governance structures, the UK is more in line with international standards, even if having embraced an approach which minimises constraints on central policy-making. Globally, different models have emerged when it comes to market governance. At one end of the spectrum, we have polities which have created independent watchdogs with hard law-making and enforcement powers. This is most prominently exemplified by the EU, whose governance tools were discussed above. A more limited role for internal market authorities is envisaged in Spain and Switzerland, where the competent institutions have no legislative power but can bring legal challenges against local measures restricting trade.⁷⁰ At the other end of the spectrum, we find countries in which internal market bodies are given a softer, coordinating role. Australia, for instance, primarily relies on the Productivity Commission, an independent government body, for non-binding advice on how to improve trade regulation;⁷¹ further impetus comes from the Council of Australian Governments (now National Cabinet), which is comprised of representatives of the federal as well as state and territorial governments. In its design of the OIM, the UK has adopted a strategy that firmly falls into the category of soft power. The Office plays a mere supplementary role in relation to internal market management, one that interferes with the competences of the UK government as little as possible.

⁶⁸ For a recent example, see the 2017 Canadian Free Trade Agreement, which all federal, provincial, and territorial governments had to accept. It replaces the 1995 Agreement on Internal Trade, which followed the same approach; see F. Vaillancourt, 'Canada's Internal Markets: Legal, Economic and Political Aspects' in Pelkmans et al. (eds.), *The EU Internal Market in Comparative Perspective* (Peter Lang 2008) 281.

⁶⁹ In Australia, the free movement of services illustrates the difficulties that can arise; see A. McNaughton, 'Integrating services markets: a comparison of European Union and Australian experiences' (2011) 65 *Australian Journal of International Affairs* 454.

⁷⁰ The Swiss Competition Commission may issue non-binding reviews of local laws and intervene in court proceedings concerning the Internal Market Act and, since a reform of the Act in 2006, also has the right to lodge complaints against decisions that restrict market access; see Arts. 9 (2bis) and 10(1) *Binnenmarktgesetz*. In Spain, internal market governance is divided between the Council for the Unity of the Market, whose chief task is to report on the functioning of the Spanish market and issue proposals on how to improve it, and the National Commission on Markets and Competition, which can bring legal challenges measures restricting trade; see Arts. 11 and 26 *Ley de garantía de la unidad de mercado*.

⁷¹ See e.g. Productivity Commission, *Review of Mutual Recognition Schemes* (Research Report January 2009).

IV. A Global Outlier: Implications for UK Economic Integration

The UK has created an internal market which in significant ways departs from existing blueprints – not just that provided by the EU, but other countries across the world. Despite drawing on some familiar techniques from the economic integration toolkit, it has reinterpreted and combined these in previously unknown ways. The differences show in the use of comprehensive internal market legislation, the creation of expansive trade rights, the centrally-mandated adoption of a strong version of mutual recognition, and the limited availability of further market governance tools. This section will explore the implications of these choices in greater detail. Their result is that the UK internal market is, in comparative terms, marked by a high degree of centralisation, substantial means of political control, a simultaneous propensity towards judicialisation, and a far-reaching potential for de-regulation.

A. Centralisation

The UK government was keen to emphasise that devolved administrations would profit from Brexit in general and the construction of the UK internal market more specifically.⁷² And in one basic, but important way they did: the departure from the EU resulted in a repatriation of powers, some of which ended up in the hands of the devolved governments. Yet, these gains are offset by the parallel emergence of a series of constraints on local decision-making. Taken together, they suggest that, overall, devolved governments have suffered a net loss in terms of regulatory authority. Their autonomy is also considerably more limited than that of constituent units in other composite market structures. Three issues are of particular relevance in this respect.

Firstly, the scope of application of UKIMA is broader than the scope of the UK's legislative competences. This means that the Act will apply to laws and regulatory measures which the UK itself could never adopt, as they fall into areas of devolved competence. Litigants will be able to challenge an increasing range of devolved legislation judicially, thus further limiting the anyway limited regulatory competences of the devolved administrations. The latter's reactions show that they understand this risk all too well. The Scottish Parliament and the Senedd withheld their legislative consent to UKIMA precisely over its implications for devolution. And it is easy to imagine what types of problems may arise. When a devolved government will want to introduce minimum resource efficiency standards or energy labelling requirements for certain products in order to reduce their carbon footprint, initiatives which are currently discussed as part of Scotland's Circular Economy strategy,⁷³ this will potentially infringe the principle of mutual recognition as it defines product characteristics. Defending the measures will be challenging under the UKIMA framework given that environmental protection is not a valid justification ground. Even adopting seemingly simple and legitimate regulatory

⁷² See e.g. UK Government, 'Revised Framework Analysis: Breakdown of areas of EU Law that Intersect with Devolved Competence in Scotland, Wales and Northern Ireland' (April 2019) 2.

⁷³ Scottish Government, 'Delivering Scotland's Circular Economy A Consultation on Proposals for a Circular Economy Bill' (May 2022) 18.

interventions like restrictions on advertising, for instance for food and drinks with high fat, sugar, or salt content,⁷⁴ could become difficult. Despite relating to the manner in which goods are sold (meaning they fall outside the scope of mutual recognition), they might affect products from other parts of the UK more severely than local ones and, thus, constitute indirect discrimination.⁷⁵ Given that consumer protection is not among the accepted defences, the lawmaker would have to demonstrate that the measure is necessary to protect the life or health of humans, including that alternative, less restrictive measures such as raising taxes on the products concerned would not have the same impact. This is a marked difference to the situation in countries like Spain, Switzerland, the United States, as well as the EU, where constituent units have broader possibilities for defending trade barriers.

Consequently, there will be a strong incentive for devolved administrations not to touch existing laws for as long as possible. UKIMA excludes the application of the market access principles to legislation that predates the Act and has not undergone ‘substantive’ changes.⁷⁶ As updating the laws in a given sector might prove a perilous move for the aforementioned reasons, devolved governments might prefer to stick to their outdated rules instead. Alternatively, they can seek to protect their reform plans via common frameworks agreements and corresponding changes of the UKIMA schedules. The developments relating to the ban of single-use plastic demonstrate both the promise and perils of pursuing this path. Scotland enacted legislation prohibiting seven single-use plastic items, which came into force in June 2022.⁷⁷ Yet, due to UKIMA’s principle of mutual recognition, the rules could initially not be enforced against products lawfully manufactured in other parts of the UK, resulting in considerable legal uncertainty and regulatory frustration. Therefore, an exclusion from the Act was requested by the Scottish government and eventually adopted by the Secretary of State.⁷⁸ Making use of his powers under Article 10(2) UKIMA, he added the products caught by the Scottish regulations to Schedule 1, thereby exempting them from the market access principles. In the meantime, Wales has passed similar legislation which, however, prohibits plastic items going beyond those listed in the exclusion – a deliberate deviation that will allow to bring the Welsh government a test case to challenge the validity of the Act.⁷⁹

Secondly, and relatedly, there is the impact of free trade agreements. In the UK, the central government has the competence to conclude international treaties. Now, the mutual recognition provisions in UKIMA apply not only to all goods that have been lawfully produced

⁷⁴ The Scottish government has recently completed a consultation on this matter, see < <https://www.gov.scot/publications/consultation-restricting-promotions-food-drink-high-fat-sugar-salt/documents/> >.

⁷⁵ Case C-405/98 *Gourmet International* [2001] ECLI:EU:C:2001:135.

⁷⁶ Ss. 4(4) and (6) for goods and mutual recognition; ss. 9(2) and (3) for goods and non-discrimination; ss. 17(5)(c) and (6) to (8) for services; similarly, for professional qualifications, see s 27.

⁷⁷ The Environmental Protection (Single-use Plastic Products) (Scotland) Regulations 2021.

⁷⁸ The United Kingdom Internal Market Act 2020 (Exclusions from Market Access Principles: Single-Use Plastics) Regulations 2022.

⁷⁹ See statement of First Minister Mark Drakeford made during a Senedd plenary on 5 July 2022, available at < <https://record.assembly.wales/Plenary/12900#A73258> >.

in one part of the UK, but also to those that have been lawfully *imported* into it.⁸⁰ The services provisions do not contain an explicit clause to this effect, but can be interpreted in a similar manner.⁸¹ This means that if the UK government signs a trade deal and adopts implementing legislation for England, products from outside the UK that comply with the agreement can be imported into England and, from there, be moved to Scotland, Wales, and Northern Ireland – even if the treaty has implications for areas falling into devolved powers and consent of the devolved administrations was not, as it should be, obtained. Given the far-reaching scope of the principle of mutual recognition, there would be no way of stopping the sale of the product, unless the narrow exclusions are triggered.

Thirdly, the territorial and socio-economic asymmetry within the UK puts further pressure on devolved power. The UK is a highly uneven union. Although the constituent countries are formally on the same footing, England is, in many respects, the clear *primus inter pares*. It hosts over 84% of the UK's population and generates an even larger share of the GDP. This is an aspect that makes the UK internal market unique. All federal or composite markets have larger and smaller, economically stronger and weaker parts, but nowhere are the differences nearly as pronounced. To put this into perspective: the largest US State has 12% of the country's overall population (California); the largest Spanish region (Andalusia) and Swiss canton (Zurich) have 18%; the largest EU Member State has 18.5% (Germany); even in Australia and Canada, which have greater disparities, the respective shares are 32% (New South Wales) and 38% (Ontario).

This asymmetry could generate an 'England effect'. Economic actors in Scotland, Wales, and Northern Ireland may choose to abide by English instead of local regulatory standards. Goods manufacturers may move (parts of⁸²) their production facilities over the border; service providers could seek authorisation from English authorities. (Simply meeting English standards while producing goods or offering services locally would not be sufficient to trigger the market access rules.) The additional efforts connected with taking such steps may be a price worth paying, especially if English standards are substantially lower, thus reducing production or operating costs, and the business has a nationwide clientele anyway. Mutual recognition would mean that the goods or services can still be sold anywhere in the UK, while guaranteeing the given company direct access to the largest domestic market. This could turn English law into the *de facto* law of the UK internal market in certain sectors. Local laws would accordingly decline in importance.

Many of the foregoing issues could be solved, or at least attenuated, by providing robust safeguards to protect devolved administrations in UK law and policy-making processes, but one would be hard-pressed to find these. UKIMA is symptomatic in this regard. The manifold

⁸⁰ S 2(1)(a) UKIMA.

⁸¹ S 19 UKIMA states that authorisation requirements in one part of the UK do not apply to providers who are authorised to provide the respective service in another part.

⁸² Pursuant to s 16(3) UKIMA, goods are to be regarded as produced in a part of the UK if the most recent 'significant' production step has occurred there.

amendment powers that the Act grants to the Secretary of State, which allow him or her to change the scope of application of the market access principles and the extent to which these can be restricted,⁸³ require consent of the devolved administrations. This is an improvement over the original system set out in the Internal Market Bill, which only made consultation necessary. Yet, should the devolved administrations not consent within one month or, as is easily imaginable, at all, the amendments can still be implemented. The sole condition is that the Secretary of State publishes a statement explaining why they decided to make the regulations without the consent of the competent authorities, a rather easy hurdle to overcome. This is a curious concept of consent: you can agree or disagree, but it may happen either way.⁸⁴

The situation is similar when it comes to UK legislation more broadly. In comparison to local governments in most other (quasi-)federally organised polities, devolved administrations enjoy distinctly weak protections against central overreach. Even where a subject-matter falls into devolved competences, the UK can, if it so chooses, legislate in the field. In the case of this happening, the Sewel Convention requires that the UK government normally seeks the consent of the devolved administrations.⁸⁵ This creates a constitutional expectation with which the central government is meant to comply, but no hard, justiciable obligation⁸⁶ – if consent is refused, the UK Parliament can still pass the law.⁸⁷ By all accounts, this process has worked reasonably well in the past, with Westminster ordinarily respecting its obligations vis-à-vis Belfast, Cardiff, and Edinburgh.⁸⁸ However, there have been prominent instances of breaches of the Convention more recently. Most crucial pieces of Brexit legislation, such as the European Union (Withdrawal) Act 2018 and the European Union (Future Relationship) Act 2020, were adopted against explicit protests of the devolved governments; this, as mentioned, includes UKIMA itself.⁸⁹ The disregard of the Sewel principles in these key instances does not bode well for devolution.⁹⁰ It signals that unitarist and centralising tendencies are on the rise within the UK.⁹¹

⁸³ UKIMA, ss. 6(5), 8(7), and 10(2).

⁸⁴ See Armstrong, 'Governing With or Without Consent – The United Kingdom Internal Market Act 2020' (UK Constitutional Law Association, 19 December 2020).

⁸⁵ Scotland Act 1998, s 28(8); Government of Wales Act 2006, s 107(6).

⁸⁶ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁸⁷ Scotland Act 1998, s 28(7); Government of Wales Act 2006, s 107(5); Northern Ireland Act 1998, s 5(6). For a critical assessment, see M. Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jowell and O'Connell (eds.), *The Changing Constitution* (9th edn, OUP 2019).

⁸⁸ See the analysis of the Institute for Government, available at < www.instituteforgovernment.org.uk/explainers/sewel-convention >.

⁸⁹ R. Masterman, 'Brexit and the United Kingdom's Devolutionary Constitution' (2022) 13 *Global Policy* 58.

⁹⁰ G. Davies, 'Brexit, Wales and the Internal Market Bill: A Failure of Soft Law?' (Centre on Constitutional Change, 10 November 2020).

⁹¹ M. Keating, 'Taking Back Control? Brexit and the Territorial Constitution of the United Kingdom' (2022) 29 *Journal of European Public Policy* 491, 505.

B. Politicisation and Judicialisation

The UK has, through the adoption of an internal market act, subjected economic integration to political control. The ‘de-constitutionalisation’ of UK internal market law increases the influence of the political process over market regulation.⁹² This follows the approach taken by states such as Spain and Switzerland, which also have special statutory instruments governing trade between their constituent units. It is, by contrast, a significant departure from polities like the EU, where large parts of internal market law are (co-)determined by provisions in the Treaties. Bolstering the role of political decision making has been a longstanding dream of a number of EU scholars, who bemoan that market governance is exceedingly judicialised due to the constitutional status of the four freedoms and their expansive interpretation by the CJEU, which stifles both national and European democratic processes.⁹³ UKIMA promises to fulfill this dream, albeit outside of the EU’s structures.

Although a debate has already commenced about the possibility of UKIMA being a ‘constitutional statute’ (which would mean that we are not witnessing a de-constitutionalisation *stricto sensu*),⁹⁴ it does not change the fact that we are fundamentally dealing with a statute here, not a classical constitutional norm. The market access principles, and any case law resulting from them, can be modified by means of a simple parliamentary majority (in Westminster).⁹⁵ The main beneficiary of this is the UK legislature, which finds itself in a singular position of power. It has created the Act, can amend it unilaterally, and can even revoke it altogether if it so chooses.

This, however, is only part of the story. Somewhat paradoxically, UKIMA also strengthens the role of courts and, thereby, contributes to judicialising the internal market. It does so in two ways: one direct, the other indirect. Let me begin with the former. The expansive scope of the market access principles allows more laws to be challenged in court.⁹⁶ Creating strong rights, which are justiciable, in areas in which significant economic interests are at play, generates considerable potential for litigation. The stronger the rights, the greater the incentive for businesses to fight laws that restrict trade and economic activity. The reason is simple: as the prospects of winning increase, bringing legal action becomes more appealing, especially if the potential reward in terms of economic freedom and additional revenue is substantial.⁹⁷ By

⁹² Armstrong (n 5) 650.

⁹³ D. Grimm, ‘“The Democratic Costs of Constitutionalization”: The European Case’ (2015) 21 *European Law Journal* 460; G. Davies, ‘The European Union Legislature as an Agent of the European Court of Justice’ (2016) 54 *Journal of Common Market Studies* 846; F. Scharpf, ‘De-constitutionalisation of European Law: The Re-empowerment of Democratic Political Choice’ in Garben and Govaere (eds.), *The Division of Competences between the EU and the Member States* (Hart 2017). For a critique, see J. Zglinski, ‘Governing the Internal Market: From Judicial Politics to Ordinary Politics’ in Dawson, De Witte, and Muir (eds.), *Revisiting Judicial Politics in the EU* (Elgar forthcoming).

⁹⁴ Armstrong (n 5) 651. On constitutional statutes more generally, see F. Ahmed and A. Perry, ‘Constitutional Statutes’ (2016) 37 *Oxford Journal of Legal Studies* 461.

⁹⁵ In EU law, correcting the CJEU’s interpretation of the free movement rights would require constitutional change in the form of a Treaty amendment.

⁹⁶ Similarly, see Horsley (n 8).

⁹⁷ N. Komesar, *Imperfect Alternatives* (University of Chicago Press 1997).

establishing far broader trade rights than any other internal market system, UKIMA paves the way for a greater degree of judicialisation.

More importantly, however, litigation is likely to exert a 'shadow effect'.⁹⁸ The prospect of having their regulatory measures rendered inapplicable in court may lead to devolved administrations pre-emptively self-censoring. The categorical nature of the market access principles makes it relatively easy to anticipate for law makers which legislative projects could potentially violate these principles. Where such risks are identified, the threat of UK internal market law biting will force devolved administrations to tune down or step away from their regulatory plans or, alternatively, find ways of implementing these which cannot be challenged judicially. In this way, courts may become relevant without ever being invoked. The spectre of legal challenges or, more broadly, judicially backed enforcement of the market access rules will impact on political decisions.

The developments surrounding the Organics (Derogations) (Amendment) Regulations 2022 illustrate this.⁹⁹ The Regulations were proposed to make technical amendments to retained EU legislation on organic production and labelling rules. The legislation contains a set of derogations that allow the use of non-organic substances and non-organically reared livestock where these are not available on the market. These derogations are usually in place for a limited period of time. Given that the validity of the derogations for non-organically reared pullets and the food additive gellan gum was expiring, and organic versions of both products were not available, the Welsh and Scottish administrations wanted to extend those derogations by one year. This may sound straightforward, yet was anything but. The Scottish government urged its Parliament to work towards a Great Britain-wide agreement on this issue. If not, Scotland would, as a result of the application of UKIMA, not be able to make the necessary regulatory changes itself as they 'would have limited effect since they could not apply to any products produced in any other part of the UK but then sold in Scotland.'¹⁰⁰ An intergovernmental agreement was eventually reached, but it is easy to imagine what would have happened otherwise. Scotland may have sensibly chosen to not implement the reforms, for fear of violating the market access principles and having its rules rendered ineffective through imports from other parts of Britain.

That the internal market will become more judicialised in these ways is likely. To what extent it will do so will depend on the approach that courts adopt: how broadly will they interpret the market access principles? How much discretion will they grant Scottish, Welsh, and Northern Irish law makers? Two issues will be relevant in this context. The first concerns the intensity of judicial review. Traditionally, the British judiciary has been comparatively deferential when reviewing acts of the legislative and executive branches.¹⁰¹ Although this has changed to some

⁹⁸ T. Pavone and Ø. Stiansen, 'The Shadow Effect of Courts: Judicial Review and the Politics of Preemptive Reform' (2021) 116 *American Political Science Review* 322. Similarly, see S. Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (OUP 2018).

⁹⁹ The Organic Production (Amendment) Regulations 2022.

¹⁰⁰ Notification to the Scottish Parliament, available at < www.parliament.scot/-/media/files/committees/rural-affairs-islands-and-natural-environment-committee/si-notification-the-organics-derogations-amendment-regulations-2022.pdf >.

¹⁰¹ *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

extent with the arrival of proportionality analysis, deference has remained a defining feature of how British judges approach judicial review, especially when it comes to examining legislation. This has become apparent in *Scotch Whisky Association*, where the UK Supreme Court decided – plausibly, but contrary to CJEU guidance¹⁰² – that the Scottish minimum alcohol price legislation was a proportionate restriction on free movement, deferring to the assessment of the Scottish Parliament.¹⁰³ UKIMA does not establish a proportionality test, instead requiring that courts assess, where derogations are permitted, whether legislation ‘can reasonably be justified as necessary’ to achieve certain policy objectives. (The practical difference between the necessity and proportionality tests is minimal.¹⁰⁴) Rulings like *Scotch Whisky* suggest that courts in the UK could end up applying such open-ended principles in a less stringent way than would some of their counterparts in continental Europe and the rest of the world. However, it is equally reasonable to expect that there will not be much wiggle room when it comes to some of the harder rules laid down in the Act, such as mutual recognition and non-discrimination. British judges are unlikely to shy away from applying these principles as intended, given that they have been given a clear mandate from the sovereign to do so.

The second issue concerns devolution. Disputes regarding the application of UKIMA will by definition have a strong vertical dimension, with rules of the UK used to scrutinise laws of devolved administrations. The conflict thus arising is, as explained, one between local autonomy and central control. The UK judiciary will be charged with determining how the balance between these two competing constitutional ideals is struck. The Supreme Court’s jurisprudence until the early 2010s suggested that devolved powers would be interpreted broadly, with *Imperial Tobacco* referring to the Scotland Act as ‘a generous settlement of legislative authority’.¹⁰⁵ So did comments made by some high-level justices, perhaps the most famous one being Lady Hale’s plea for ‘devolved Parliaments... to be respected as democratically elected legislatures and... not to be treated like ordinary public authorities’ and her assertion that the United Kingdom had ‘indeed become a federal state’.¹⁰⁶ In the more recent *Continuity Bill* and *UNCRC Incorporation Bill* references, the Supreme Court adopted a markedly different tone.¹⁰⁷ Despite acknowledging that the Scotland Act formed part of the UK’s ‘constitutional settlement’, it chose, in substance, to provide a restrictive interpretation of devolved powers in order to protect the competences of the UK legislature.¹⁰⁸ This might

¹⁰² Case C-333/14 *Scotch Whisky Association* [2015] ECLI:EU:C:2015:845.

¹⁰³ *Scotch Whisky Association and others v The Lord Advocate and another* [2017] UKSC 76. For an analysis, see N. Dunne, ‘Minimum Alcohol Pricing: Balancing the “Essentially Incomparable” in Scotch Whisky’ (2018) 81 *Modern Law Review* 890.

¹⁰⁴ A. Stone Sweet and J. Matthews, ‘Proportionality and the Global Model of Balancing’ (2008) 47 *Columbia Journal of Transnational Law* 72.

¹⁰⁵ *Imperial Tobacco Ltd v The Lord Advocate* [2012] UKSC 61, [2013] 1 AC 792 [51].

¹⁰⁶ Rt Hon the Baroness Hale of Richmond, ‘The Supreme Court in the UK Constitution’, *Legal Wales* 2012, speech available at < www.supremecourt.uk/docs/speech-121012.pdf >.

¹⁰⁷ *In re The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] 2 WLR 1; *In re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 WLR 5106.

¹⁰⁸ M. Elliott, ‘The Supreme Court’s judgment in the Scottish Continuity Bill case’, *Public Law for Everyone* (14 December 2018), available at < <https://publiclawforeveryone.com/2018/12/14/the-supreme-courts-judgment-in-the-scottish-continuity-bill-case/> >; N. Kilford, ‘Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case’ (2002) 26 *Judicial Review*

indicate a greater readiness to interfere in local autonomy, which could end up affecting the application of the market access principles further down the road.

C. De-Regulation

A final trait of the new UK internal market is its comparatively strong emphasis on de-regulation. The structural choices made when designing the internal market, and the various legal, political, and economic pressures resulting from them, facilitate and, partly, even incentivise a lowering of regulatory standards. This is fed by dynamics playing out at both devolved and UK level.

At devolved level, one important way in which the internal market rules will have a de-regulatory impact has already been explored at various points of this article. The broadly defined market access principles will, through litigation or the threat of it, lead to rendering devolved laws inapplicable and disincentive regulatory change. Protecting non-economic policy objectives will become more difficult in some cases (e.g. public health) and impossible in others (e.g. environmental protection and social policy). But even where devolved administrations do not see their regulatory measures challenged legally, they might be tempted to engage in de-regulation through political means. By imposing a strong version of mutual recognition, UKIMA has laid the groundwork for competitive unionism.¹⁰⁹ The new rules give the four nations a chance to contend with one another and try to attract foreign business – both from outside and from within the UK – by lowering their regulatory standards. So far, the devolved governments have resisted this temptation. Scotland, in fact, made provision in the Continuity Act for voluntarily implementing new EU legislation, in order to maintain its regulatory alignment with the European internal market.¹¹⁰ However, it is not hard to envisage future scenarios in which greater emphasis is put on de-regulation, notably in a context where governments seek to generate wealth and increase employment opportunities. Just one constituent country going down this path would put pressure on the others to follow suit, creating the potential for a regulatory race to the bottom.

The de-regulatory effects are further amplified by action at the UK level. The UK government has been eager to demonstrate that the new-found regulatory freedom which results from leaving the EU can and will benefit its citizens and companies. After some soul searching, these benefits have been primarily identified as lying in removing regulatory burdens.¹¹¹ Slowly but steadily the government has begun to deliver on this promise (however, with different Prime

321. For a different reading, see S. Court-Brown, 'Lessons for the Government from Miller I and the Scottish Continuity Bill Case' (2021) 2 Queen Mary Law Journal 1.

¹⁰⁹ On competitive regionalism in the UK more broadly, see M. Keating, *State and Nation in the United Kingdom: The Fractured Union* (OUP 2021) 135 et seq.

¹¹⁰ UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

¹¹¹ UK government, 'The Benefits of Brexit: How the UK is taking advantage of leaving the EU' (January 2022).

Ministers taking different courses of action¹¹²). While an early post-Brexit attempt at modifying the provisions of the Working Time Directive on rest breaks and holiday pay failed to gain necessary political support,¹¹³ other reform projects have fared better. The rules on gene editing, which hitherto had been governed by strict European biotech regulations, have been loosened;¹¹⁴ changes to GMO legislation might ensue.¹¹⁵ A reform of the insurance sector, which will entail an overhaul of the Solvency II Directive, is in the making.¹¹⁶ The Financial Services and Markets Act, which promises more ‘agile’¹¹⁷ regulation on financial services, obtained Parliamentary approval.¹¹⁸

The aforementioned Retained EU Law (Revocation and Reform) Act is intended to be the capstone of this process.¹¹⁹ First announced under the title ‘Brexit Freedoms Bill’ in January 2022,¹²⁰ it has received Royal Assent on 29 June 2023, after much back and forth between the House of Commons and Lords. The Act establishes that a long list of retained law and subordinate legislation will be sunset at the end of 2023, a manoeuvre which is supposed to end the continued legacy of EU law in Britain.¹²¹ Primary legislation remains outside its scope and UK ministers have been given the power to restate, reproduce, or replace existing rules,¹²² but otherwise the relevant laws will cease to apply. Schedule 1, which contains all legislative instruments that are affected, spans 60 pages. The areas impacted include consumer protection, food regulation, environmental standards, and workers’ rights. Even where ministers choose to maintain or amend existing legislation, they are prohibited from doing so

¹¹² See the UK-EU regulatory divergence tracker of UK in a Changing Europe, whose latest edition finds evidence of a reduction in ‘active divergence’ between UK and EU legislation during Rishi Sunak’s premiership, as compared to under Boris Johnson and Liz Truss; available at < <https://ukandeu.ac.uk/research-papers/uk-eu-regulatory-divergence-tracker-sixth-edition/> >.

¹¹³ ‘UK workers’ rights at risk in plans to rip up EU labour market rules’ Financial Times (14 January 2021).

¹¹⁴ Defra, ‘Plans to unlock power of gene editing unveiled’, available at < [¹¹⁵ The Genetically Modified Organisms \(Deliberate Release\) \(Amendment\) \(England\) Regulations 2022.](https://www.gov.uk/government/news/plans-to-unlock-power-of-gene-editing-unveiled#:~:text=Gene%20editing%20is%20a%20tool,reducing%20impacts%20on%20the%20environment.> .</p></div><div data-bbox=)

¹¹⁶ HM Treasury, ‘Review of Solvency II: Consultation – Response’, available at < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1118359/Consultation_Response_-_Review_of_Solvency_II_.pdf >.

¹¹⁷ HM Treasury, ‘Financial Services Future Regulatory Framework Review: Proposals for Reform’, available at < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1032075/FRF_Review_Consultation_2021_-_Final_.pdf >.

¹¹⁸ Financial Services and Markets Act 2023.

¹¹⁹ The Retained EU Law (Revocation and Reform) Act 2023.

¹²⁰ Prime Minister’s Office, ‘Prime Minister pledges Brexit Freedoms Bill to cut EU red tape’, available at < <https://www.gov.uk/government/news/prime-minister-pledges-brexit-freedoms-bill-to-cut-eu-red-tape> >.

¹²¹ S 1(1) REUL Act.

¹²² See notably ss. 11-14.

in a way that would ‘increase the regulatory burden’.¹²³ A lowering of regulatory standards appears thus to be pre-programmed.¹²⁴

Further de-regulatory pressure is coming from the UK’s trading partners. As a result of Brexit, the UK is no longer party to a number of free trade agreements that the EU has in place with countries around the world. Therefore, it is forced to negotiate new agreements on its own, a task that has been given priority by the post-Brexit governments. Yet, given the relative size of the British as compared to the European market, the UK is in a weaker bargaining position and has, therefore, been confronted with demands to lower its regulatory standards to a level below that during its EU membership.¹²⁵ (Demands that, as explained, are not necessarily out of sync with the UK government’s own political vision.) One symbolic victim of this process could be the precautionary principle. A hallmark of EU policy in various domains involving risk assessment, such as food law and pharmaceuticals regulation,¹²⁶ the principle has long been a thorn in the side of many of Europe’s international partners, who criticise it as overly cautious and restrictive. Political and legal pushback against the EU’s stringent food rules has been registered within the WTO.¹²⁷ This pushback is now re-appearing in trade negotiations with the UK, with countries like the US openly demanding that Britain change its approach to food regulation.¹²⁸ After a public outcry over the possibility of ‘chlorinated chicken’ ending up on British supermarket shelves,¹²⁹ the negotiations were suspended. Yet, it could be a matter of time before concessions on regulatory standards will be made, in particular when the prize will be gaining access to a large foreign market.

It is not without irony that the EU, which has been condemned in progressive circles for its strong neoliberal bias and its negative impact on social policy,¹³⁰ might act as a counterweight to the de-regulatory processes within the UK. The Trade and Cooperation Agreement which governs the UK’s post-Brexit relationship with the EU contains, as part of its ‘level playing field’ obligations, a non-regression principle in relation to labour and environmental standards whereby both parties cannot reduce, in a manner affecting trade or investment between them, the levels of protection below those in place at the end of the transition period.¹³¹ In addition, while recognising ‘the right of each Party to determine its future policies and

¹²³ S 14(5) REUL Act.

¹²⁴ C. Barnard and J. Grogan, ‘The Retained EU Law (Revocation and Reform) Bill’, UK in a Changing Europe (5 January 2023); Fox, ‘Five Problems with the Retained EU Law (Revocation and Reform) Bill’, Hansard Society (22 October 2022).

¹²⁵ J. Kane, *Trade and Regulation after Brexit* (Institute for Government 2020).

¹²⁶ J. Tosun, ‘How the EU Handles Uncertain Risks: Understanding the Role of the Precautionary Principle’ (2013) 20 *Journal of European Public Policy* 1517.

¹²⁷ WTO, *European Communities — Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States* (WT/DS389).

¹²⁸ Lydgate and Anthony (n 9).

¹²⁹ E. Millstone et al., *Chlorinated Chicken: Is the UK Being Softened Up to Accept Lower Food Standards?* (Food Research Collaboration 2019).

¹³⁰ For one among many, see F. Scharpf, ‘The Asymmetry of European Integration, or Why the EU Cannot Be a “Social Market Economy”’ (2010) 8 *Socio-Economic Review* 211.

¹³¹ Arts 387 and 391 TCA. For the level playing obligations more broadly, see Title XI of the Agreement.

priorities with respect to labour and social, environmental or climate protection, or with respect to subsidy control', the Agreement also stipulates that if 'significant divergences' emerge between the Parties which will have 'material impacts' on trade or investment, appropriate rebalancing measures, such as proportionate tariffs, may be taken by the affected side.¹³² Although these mechanisms may be used to prevent or disincentivise drastic strong forms of market de-regulation in the future, it is important not to overstate their potential. They can only be triggered when regulatory differences have a discernible or, in the case of rebalancing, a material impact on trade and investment, which gives the UK a great deal of leeway when it comes to defining the legal and political framework of its internal market.

V. Concluding Remarks: The Path(s) Not Taken

The UK has created a new internal market. It took Brexit as a chance to (re-)define the relations between its constituent countries in order to ensure that trade and commerce remained possible. The main instruments through which it has done so are substantive UK legislation, which lays down rules for economic activity in areas of reserved competence; the common frameworks, an intergovernmental negotiation process aimed at finding regulatory agreements on devolved matters; and, most prominently, the UK Internal Market Act, which establishes market access rights that facilitate cross-border movement between the four nations. These instruments embody certain structural choices, choices that are, on the one hand, inspired by other internal markets across the world but, on the other, depart from existing blueprints in significant ways – not just the EU, but also countries such as Australia, Canada, Germany, Spain, Switzerland, and the US. What emerges is that the UK's internal market, in comparison, appears unique on several levels: it will have the greatest degree of centralisation, the strongest trade rights, and the highest potential for de-regulation.

Is this type of internal market the right fit for the UK? Only time will tell. It is easy to reconstruct the considerations that may have motivated the design choices of its drafters. Despite making meaningful steps towards devolution over the past few decades, the UK remains a country marked by strong political centralisation. It has a comparatively high level of cultural and socio-economic homogeneity among its territorial units, which is the result of having co-existed as part of the same state, or union of states, for centuries. Against this backdrop, it may appear only logical to opt for an internal market that, similarly, values uniformity over diversity, and perceives legislative variations as a risk for frictionless trade and a worrying sign of fragmentation which needs to be corrected, not a legitimate expression of local autonomy.

Yet, the same considerations would have also justified a very different market model, one based on political integration, intergovernmental cooperation, and regulatory tolerance. The fact that the UK is already so centralised, with Westminster exercising legislative competences

¹³² Art 411 TCA.

in most significant policy areas, suggests that granting devolved administrations a wider degree of decision-making freedom would neither have upset the foundations of the internal market nor excessively limited the possibilities for trade. It would have merely created pockets of regulatory diversity in an otherwise fairly uniform market structure. At the same time, it would have allowed the devolved administrations, which have over the past decades regularly diverged from the liberal economic paradigm promoted by the UK government, to accord greater protection to non-economic policy objectives in their areas of competence. The close cultural ties and relative homogeneity between the four nations would have warranted putting greater trust in intergovernmental bargaining processes. In this way, trade disputes could be settled politically, in a spirit of cooperation, instead of judicially, based on the idea of adversity.

Looking at other international market structures, the UK's choices appear even more striking. If, indeed, the UK internal market constitutes, first and foremost, an attempt at re-assessing the advantages and disadvantages of the EU internal market, one may legitimately wonder about the conclusions that were drawn. The EU has long been criticised, including by Britain, for interfering in Member State autonomy too strongly, facilitating judicial activism through an expansive interpretation of free movement rights, and prioritising economic over non-economic concerns. That one would take this model as a starting point and amplify some of its most controversial features appears remarkable. This is especially so given the many alternative market designs across the world from which the UK government could have – and purports to have – drawn inspiration.

What could this alternative UK internal market have looked like? There would have been a variety of possibilities. Market integration in devolved areas could have been entirely put in the hands of the collaborative common frameworks mechanism.¹³³ This would mean that it would be up to devolved governments to regulate freely in areas of devolved competence and decide when obstacles to free movement become so onerous that political action, and what kind of political action, is necessary. If the dangers stemming from giving local governments this degree of autonomy were deemed too great, UK legislation could have added a 'federal' principle of non-discrimination to prevent protectionist behaviour, which could be enforced either politically or judicially. Had that been considered still insufficient, safeguards against non-discriminatory trade barriers could have been introduced as well, be it in the form of a general right to free movement or the principle of mutual recognition, while giving local governments generous possibilities to defend legitimate regulatory measures. Any of these options, which are all based on actual models of economic integration adopted by countries including Australia, Canada, Germany, Spain, Switzerland, and the US, would have made the UK internal market a less centralised, de-regulated, and trade rights-driven place.

Yet, as tempting as it might be, dwelling on such alternative imaginaries risks missing the point. History suggests that internal market law tends not only to prompt changes in the politics and economy of a country, but also reflect these.¹³⁴ Therefore, it might be short-sighted to focus

¹³³ See Armstrong (n 5).

¹³⁴ Egan (n 15).

exclusively on what consequences legislative measures such UKIMA have on trade and local autonomy in the UK. It is equally important to understand what their adoption says about the state of the union. The UK has long been said to be on a 'federal trajectory',¹³⁵ making space for and even gradually expanding the role of sub-national forms of government. As a member of the EU, it has, even if at times begrudgingly, accepted and implemented relatively demanding regulatory standards in many economic sectors. The developments surrounding its internal market signal that these times are over.¹³⁶ A distinctly 'muscular' unionism appears to be gaining strength which seeks to concentrate political power again in Westminster, as is the desire for free(er) markets and regulatory restraint. The devolved administrations legitimately feel threatened by these developments and have begun voicing their discontent with increasing force, a sign that tension – territorial and political – will accompany the process of market integration in the UK.¹³⁷

¹³⁵ S. Tierney, 'Drifting Towards Federalism? Appraising the Constitution in the Light of the Scotland Act 2016 and the Wales Act 2017' in Schütze and Tierney (eds.), *The United Kingdom and the Federal Idea* (Hart 2019) 121.

¹³⁶ More broadly on the developments surrounding Brexit, see Masterman (n 89).

¹³⁷ See S. Weatherill, 'Will the United Kingdom Survive the United Kingdom Internal Market Act?' (2021) UKICE Working Paper 03/2021.