

## ARTICLE

The Governance of Economic Unionism after the  
United Kingdom Internal Market ActKenneth A. Armstrong\* 

With the United Kingdom having finally withdrawn from the European Union, and with a new Trade and Cooperation Agreement in place to begin to manage their economic relationship, it might be thought that the constitutional drama of 'Brexit' was finally at an end. Yet the longer-term constitutional implications of Brexit and its repatriation of the European regulatory state are becoming apparent. This is particularly evident in the decision of the UK Government to legislate for a United Kingdom Internal Market (UKIM). The analysis here advances two claims: first, the creation of a statutory internal market represents a strategy to 'de-constitutionalise' the governance of the internal market; and second, as an instrument of 'economic unionism', the United Kingdom Internal Market Act is disruptive of, and for, 'collaborative unionism' within the political and territorial constitution of the UK.

Keywords: Brexit, internal market, regulatory state, economic unionism, regulatory competition, devolution

## INTRODUCTION

With the United Kingdom (UK) having finally withdrawn from the European Union (EU), and with a new Trade and Cooperation Agreement in place to begin to manage their economic relationship,<sup>1</sup> it might be thought that the constitutional drama of 'Brexit' was finally at an end.<sup>2</sup> Yet, the longer-term

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- 1 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part: [2021] O.J. L149/10. Following provisional application, the Agreement entered into force on 1 May 2021.
- 2 P. Craig, 'Brexit: a drama in six acts' (2016) *European Law Review* 447.

constitutional implications of 'Brexit' are becoming apparent. This is particularly evident in the decision of the UK Government to legislate for a United Kingdom Internal Market (UKIM) in goods and services through the United Kingdom Internal Market Act 2020 (UKIM Act 2020).

When introduced into the UK Parliament, the UKIM Bill gained immediate notoriety for its capacity to conflict with the provisions of the Protocol on Ireland/Northern Ireland (the Protocol) that forms an integral part of the UK's Withdrawal Agreement with the EU.<sup>3</sup> With the eventual removal of the offending clauses during the Bill's legislative passage, the implications of creating a statutory internal market for the territorial constitution of the UK began to emerge. That the UKIM Act 2020 was passed notwithstanding that legislative consent was withheld by both the Scottish Parliament and the Welsh Senedd underlines devolved authorities' perception that the Act exposes devolved government to forces that place new limits on the exercise of devolved powers. Meanwhile, the legal concept of a UK-wide internal market failed to quell the anxieties of those in Northern Ireland for whom the Act's eventual accommodation with the terms of the Protocol amounted to an acceptance of a difference in treatment of Northern Ireland within the wider political union of the UK.

It is in this context that this article advances and develops two central claims. The first is that the governance framework for the cross-jurisdictional offer of goods and services within a UKIM differs markedly from the governance architecture for the EU internal market for which it substitutes. A conscious effort has been made to de-constitutionalise the governance framework, replacing European judicial authority and economic constitutionalism with UK parliamentary/executive authority and economic legislation. The second claim is that the construction of an internal market through the Act as a means of managing the repatriation of the European regulatory state also changes the balance that EU law struck between the forces of regulatory competition and regulatory collaboration. In so doing, it will be suggested that a collaborative model of economic unionism initially pursued as a response to Brexit is threatened by a competitive model enshrined in the Act. The argument is presented in four stages.

In the first part the core features of the governance architecture of the EU internal market are identified. Two important dimensions for comparison with the UK internal market are drawn out. The first section focuses on the authority and discretion of the Court of Justice of the EU (CJEU) in elaborating and applying principles of EU free movement law to build an integrated and open European market. As the second section acknowledges, this court-led process of market integration – often described as forming the foundation for a European 'economic constitution' – later encountered a conscious political effort in the

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3 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community: [2019] O.J. C384I/1.

1980s to complete a European internal market. This entailed a reconstruction of the regulatory state at a European level through a combination of legislative harmonisation and collaboration between EU and national administrations in the implementation of common rules and the management of regulatory diversity. This expanded governance architecture produced contestation around the design of the EU internal market and intensified efforts to re-constitutionalise internal market governance.

In the second part, the analysis turns to the UKIM Act 2020 as a substitute legal framework for that which existed during EU membership. The discussion draws attention to what is different about how the UKIM operates compared to EU law. Doctrinally, the UKIM Act's borrowing of some of the language and concepts associated with EU free movement law – the principles of 'mutual recognition' and 'non-discrimination' which become the core 'market access' principles of the Act – also entails a recalibration of their application in important ways. But more significantly, it becomes clear that whereas EU law enshrines these principles within its 'economic constitution' and affords the CJEU both authority and discretion to elaborate the meaning and scope of these principles, the UKIM Act 2020 deliberately de-constitutionalises these norms, placing them on a legislative footing.

In the third part the analysis draws out the manner in which legislative and parliamentary/executive authority over the internal market displace constitutional and judicial authority. In doing so it pays particular attention to the ways in which UK courts are likely to be drawn into contests about the territorial distribution of political authority.

The fourth part expands the analysis yet further. In its first section, the argument is made that the balance struck between 'regulatory competition' and a 'level playing field' in the EU internal market is recast in favour of a competitive mode of governance under the UKIM Act 2020. The second section highlights an alternative 'collaborative' mode of governance through common intergovernmental frameworks for the management of regulatory divergence. The conclusion is drawn that economic unionism as a response to the repatriation of the European regulatory state need not take a competitive form and that strategies of collaborative unionism risk being undermined by the Act.

## THE GOVERNANCE OF THE EU INTERNAL MARKET

In thinking about a UK internal market and the qualities of the governance framework that enshrines it, it is instructive to consider the nature of the EU governance architecture which it replaces. In the first section, the analysis highlights the 'judicial governance' of the EU internal market. It is this aspect of EU internal market law which the UKIM appears to borrow. The second section highlights the contested nature of the governance of the EU internal market as the reconstruction of the regulatory state at a European level produced demands for a re-constitutionalisation of its governance.

## Judicial governance and the European Economic Constitution

Inspired by Germanic ideas of ordo-liberalism, the aim of creating a ‘Common Market’ found expression in the primary law, and the judicial structures of the European Economic Community established by the Treaty of Rome.<sup>4</sup> It was in the context of the enforcement of this primary economic law that the Court of Justice of the European Union (CJEU) developed its concepts of ‘direct effect’ and ‘primacy’; concepts which are at the core of the metaphor of the ‘constitutionalisation’ and ‘transformation’ of the treaties establishing the European Communities.<sup>5</sup> Accordingly, the body of primary free movement law was itself characterised as forming a ‘European Economic Constitution’.<sup>6</sup>

If the embryonic economic constitution had its origins in the formation of the Customs Union, its scope expanded as the Court of Justice extended the reach of free movement law to the regulatory activities of the Member States. The decisive move came in the case of *Cassis de Dijon*.<sup>7</sup> Here the Court applied EU free movement law to apparently ‘neutral’ domestic rules regulating the lawful sale and marketing of goods. While making clear that in the absence of common European rules, it was in principle for each state to apply and enforce its own regulatory standards, this was subject to the proviso that the imposition of local regulatory standards had to undergo a proportionality-based interest-balancing test undertaken by courts. Regulatory requirements that failed this test had to be disapplied.

Although disapplication emphasises the removal of barriers to trade, more accurately, it is concerned with the allocation of regulatory responsibilities between Member States which share competence over the regulation of the market. When it comes to product and production regulation, the presumption is that this is adequately regulated in the state of export unless the importing state can demonstrate a need for the application of its rules. As for retail and other ‘selling arrangements’ the presumption is that the importing state may apply its rules in a non-discriminatory manner provided they do not create barriers to market access. Focused initially on the movement of goods, the law on services and establishment evidences similar constitutional qualities in terms of their effects on the political autonomy of Member States and on the allocation of regulatory responsibilities.<sup>8</sup> The effect is to subject a wide range of national

4 E.-U. Petersmann, ‘German and European ordo-liberalism and constitutionalism in the post-war development of international economic law’ Working Paper, European University Institute, 2020/01.

5 B. de Witte, ‘Direct Effect, Primacy, and the Nature of the Legal Order’ in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford: OUP, 3<sup>rd</sup> ed, 2021).

6 M.E. Streit and W. Mussler, ‘The Economic Constitution of the European Community: From “Rome” to “Maastricht”’ (1995) 1 *European Law Journal* 5, J.H.H. Weiler, ‘The Transformation of Europe’ (1991) 100 *Yale Law Journal* 2403.

7 Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42.

8 F. de Witte, ‘The constitutional quality of the free movement provisions: looking for context in the case law on Article 56 TFEU’ (2017) 42 *European Law Review* 313. As Floris de Witte observes, the effect of this constitutional discipline is not uniform across policy sectors. For a similar point in respect of the free movement of goods see K.A. Armstrong, ‘Governing Goods: Content and Context’ in A. Arnall and D. Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford: OUP, 2015).

regulatory choices to the discipline of EU economic law through legal challenges brought by private litigants as well as the European Commission.<sup>9</sup> In this way, judicial enforcement of free movement rules balances transnational market-making with the allocation of decentralised regulatory authority.<sup>10</sup> This is the functional aspect of the European economic constitution which the UKIM Act 2020 emulates.

EU free movement law has also made its presence felt within European welfare states. Notwithstanding that Member States retain competence in the organisation of their social protection, education and health services, to the extent that the ‘boundaries of welfare’ have excluded the interests of migrant workers, their family members or even simply those who could be considered recipients of services, domestic political choices have been opened up to legal scrutiny.<sup>11</sup> The final significant extension of the European economic constitution has been its application to exercises of private autonomy including mechanisms of collective bargaining.<sup>12</sup>

What is striking about all of this is the authority of the CJEU to interpret and apply relatively open-ended principles of EU economic law. Indeed, the foundations of this European economic constitutionalism as it applied to goods could be found in just sixteen words in Article 30 EEC (now Article 34 TFEU).<sup>13</sup>

### Reconstructing and re-constitutionalising the regulatory state

EU efforts to create an internal market looked beyond the court-led protection of private economic rights.<sup>14</sup> Indeed, the emergence of a concept of an internal market is associated with an expansion of governance capacity at a European

9 R.D. Kelemen, *Eurolegalism: the transformation of law and regulation in the European Union* (Cambridge, MA: Harvard University Press, 2011), D. Chalmers and M. Chaves, ‘The reference points of EU judicial politics’ (2012) 19 *Journal of European Public Policy* 25, A. Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge: Cambridge University Press, 2015).

10 The Court altered that balance when confronted with domestic requirements that related neither to a product or its production but to its manner of sale. These ‘selling arrangements’ are presumptively within the scope of authority of the Member State in which goods are offered for sale: see Joined Cases C-267, 268/91 *Keck and Mithouard* ECLI:EU:C:1993:905. But the Court also extended the reach of EU primary law still further to include any measures which had the effect of hindering the access to the market of imported goods, thereby placing further pressure on the proportionality analysis to determine the legality of the imposition of local regulatory requirements.

11 M. Ferrera, *The Boundaries of Welfare: European integration and the new spatial politics of social protection* (Oxford: OUP, 2005), V.G. Hatzopoulos, ‘Services and free movement in EU law’ (2003) 40 *Common Market Law Review* 997.

12 H. Schepel, ‘Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law’ (2012) 18 *European Law Journal* 177.

13 M.P. Maduro, *We, the Court: the European Court of Justice and the European Economic Constitution: a critical reading of Article 30 of the EC Treaty* (Oxford: Hart Publishing, 1998).

14 For a comprehensive analysis see: S. Weatherill, *The Internal Market as a Legal Concept* (Oxford: OUP, 2017).

level as the regulatory state was reconstructed beyond the nation state.<sup>15</sup> As will become clear, this also created new demands for a re-constitutionalisation of the governance of the European internal market.

In the early 1980s, and as a means of managing the proliferation of national technical regulations, a new instrument was adopted to require national administrations to notify the European Commission and other national administrations of draft technical rules with a view to encouraging cooperation and coordination of regulatory interventions.<sup>16</sup> Efforts were also made to harness the role of European private standards-setting towards the ends of public regulation.<sup>17</sup> But the concept of an internal market was more fully to be realised in the context of an accelerated programme of legislative harmonisation as set out in a Commission White Paper in 1985.<sup>18</sup> A new internal market rulemaking competence was subsequently added by the Single European Act in 1987 – what is now Article 114 TFEU.

Significant institutional evolution accompanies these developments. The European Parliament gradually acquired more influence in the legislative process, becoming co-legislator with the Council in agreeing internal market rules. The collective voice of the Member States in the Council was maintained, but the introduction of qualified majority voting in the Council to facilitate agreement on internal market rules reduced the threat of individual veto and encouraged efforts to achieve consensus without resort to formal voting.<sup>19</sup> Member States also found ways to protect their interests in post-legislative structures of delegated rulemaking.<sup>20</sup> Weiler sought to capture the relationship between the judicial-led market-making described in the previous section and the public and private governance architecture that developed from the 1980s by describing the latter as creating opportunities for ‘voice’ and representation of interests as a response to the limitations of national ‘exit’ – defection from treaty-mandated market integration – due to judicial enforcement of free movement rules.<sup>21</sup>

What became apparent was that a properly functioning internal market relied upon calibrating a mix of governance instruments that included not only judicially-protected economic rights but also legislative frameworks and reporting and information-sharing obligations between and across Member States and the EU, often structured through networks and agencies for administrative

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15 G. Majone, ‘The rise of the regulatory state in Europe’ (1994) 17 *West European Politics* 77, G. Majone, *Regulating Europe* (London and New York, NY: Routledge, 1996).

16 Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations: [1983] OJ L109/8. This Directive has been replaced by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services: [2015] O.J. L241/1.

17 H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2005).

18 European Commission, ‘Completing the Internal Market – White Paper from the European Commission to the European Council’ COM (1985) 310 final.

19 F. Hayes-Renshaw, W.I.M. Van Aken and H. Wallace, ‘When and Why the EU Council of Ministers Votes Explicitly’ (2006) 44 *JCMS: Journal of Common Market Studies* 161.

20 C. Joerges and E. Vos, *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart Publishing, 1998).

21 Weiler, n 6 above.

cooperation. The design of the governance of the internal market had to reflect different balances – between centralised and decentralised decision-making, between legal and political authority, between market and non-market values – in seeking a stable economic and political ‘equilibrium’.<sup>22</sup> Through design choices about the calibration of these different instruments and modes of governance, these balances would be struck in particular ways. This is important when we come to reflect on the choices made for the governance of the UKIM.

The idea of a consciously crafted internal market as a political project encountered resistance from those for whom the judicially-enforced economic constitution was the bedrock of economic integration.<sup>23</sup> Yet, entrusting courts with decisions about exercises of political authority is, of course, far from uncontroversial not least where an external body of law disciplines local regulatory preferences. Discontents abound with how the CJEU has interpreted and applied free movement law with different demands made to constrain the reach and effects of EU economic law.<sup>24</sup> For some, European integration is simply over-constitutionalised with an insufficient boundary line between what ought to be the proper domain of material legislation – which in turn ought to be subject to more direct political contestation – and the realm of constitutional law properly understood.<sup>25</sup> For others, there is a clear vertical asymmetry between the expansive reach of ‘negative’ integration – the impact of court-enforced primary free movement law – and the limits of ‘positive’ integration – the space for collective exercises of political autonomy.<sup>26</sup> It is the balance of economic, social and political values that troubles others with complaints made about how courts strike those balances. But for some, the answer lies less in which values trump others and more in opening up the constitutional domain to greater conflict and contestation.<sup>27</sup>

Looking beyond judicial governance and economic constitutionalism, enhancing the governance capacity of European-level institutions through the reconstruction of the regulatory state creates its own demands for legal control and re-constitutionalisation.<sup>28</sup> One effect is that courts come back into play, not as institutions for market-making but instead to manage and protect constitutional and institutional balances where political authority is divided both

22 *ibid.* For an earlier study of how the governance of the internal market evolved during the 1990s following the internal market programme see K.A. Armstrong, ‘Governance and the Single European Market; in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford: OUP, 1<sup>st</sup> ed, 1999).

23 Streit and Mussler, n 6 above.

24 See M. Höpner and S.K. Schmidt, ‘Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review’ (2020) 22 *Cambridge Yearbook of European Legal Studies* 182.

25 D. Grimm, ‘The Democratic Costs of Constitutionalisation: The European Case’ (2015) 21 *European Law Journal* 460.

26 For the distinction between ‘negative’ and ‘positive’ integration see F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: OUP, 1999) ch 2 and see also F.W. Scharpf, ‘The Joint-Decision Trap Revisited’ (2006) 44 *JCMS: Journal of Common Market Studies* 845.

27 M. Dawson and F. de Witte, ‘From Balance to Conflict: A New Constitution for the EU’ (2016) 22 *European Law Journal* 204.

28 Although not explored here, this demand for ‘control’ was also a response to the expansion of the EU’s administrative capacity through EU-level agencies: see S. Griller and A. Orator, ‘Everything under control? The “way forward” for European agencies in the footsteps of the Meroni doctrine’ (2010) 35 *European Law Review* 3.

horizontally and vertically.<sup>29</sup> For example, the weakening of individual political voices through resort to majority decision-making has led Member States to challenge the authority of EU institutions to legislate for the internal market. The post-Maastricht thickening of European constitutionalism to include political principles such as ‘subsidiarity’ and the subsequent adoption of a binding EU Charter of Fundamental Rights provide new legal resources through which to contest EU internal market governance. Increasingly, judicial analysis is confronted with the need to provide a ‘fair balance’ between the protection of economic interests and the protection of fundamental rights.<sup>30</sup> In this way, the constitutionalisation of EU governance capacity links the process of market-making both to federal principles relating to the distribution of political authority and the protection of private autonomy against collective exercises of political power through fundamental rights.<sup>31</sup>

As the following two parts will make clear, the construction of a UKIM is both a substitute for the legal discipline of EU free movement law and a reaction to this legacy of European economic constitutionalism. But as will also be identified, if the reconstruction of the regulatory state at EU level engendered conflicts about the distribution of political and regulatory authority, then the creation of a UKIM in the context of the repatriation of the regulatory state also creates its own conflicts.

## RECALIBRATING THE GOVERNANCE OF THE UKIM

The centrepiece of the regime under the UKIM is to be found in the two principles that can disapply ‘relevant requirements’ in one of the jurisdictions of the UK in respect of the sale of goods or offer of services originating in another part of the UK. These are the principles of ‘mutual recognition’ and ‘non-discrimination’. The effect of these principles is to facilitate cross-border economic activity in the face of regulatory diversity and policy divergence. Although familiar from EU free movement law, the principles operate differently under the UKIM.<sup>32</sup> Design choices have been made which recalibrate the legal discipline exerted by these principles and their effects on the exercise of political authority within the multinational union. In this part, doctrinal and design differences will be highlighted. The next part will then drill more deeply into

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29 P. Craig, ‘Institutions, Power and Institutional Balance’ in Craig and de Búrca (eds), n 5 above.

30 See for example Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972.

31 True, EU courts have typically protected EU decision-making from legal challenges using a form of review that has limited challenges to federal authority. See D. Harvey, ‘Federal Proportionality Review in EU Law: Whose Rights are they Anyway?’ (2020) 89 *Nordic Journal of International Law* 303; K. Lenaerts, ‘The European Court of Justice and process-oriented review’ (2012) 31 *Yearbook of European Law* 3. As Maduro argues, ‘low intensity’ constitutionalism was derived from a historic judicial deference to the ‘intergovernmental legitimacy’ that dominated both primary law-making and legislative action: M.P. Maduro, ‘The importance of being called a constitution: Constitutional authority and the authority of constitutionalism’ (2005) 3 *Int J Constitutional Law* 332.

32 See also S. Weatherill, ‘Comparative Internal Market Law: the UK and the EU’ *Yearbook of European Law* (forthcoming).



the wider implications of a statutory internal market as an alternative to a constitutionalised European governance architecture.

It should be noted at the outset that the mutual recognition and non-discrimination principles are only described as the ‘market access principles’ for the purpose of Part 1 of the Act which is to promote, ‘the continued functioning of the internal market for goods in the United Kingdom’. Despite both principles being applicable under Part 2 which covers services, there is no equivalent provision in Part 2 stating that they promote the functioning of an internal market in services, or describing them as ‘market access’ principles. Whether or not this oddity proves to be consequential in the interpretation of the Act remains to be seen. But perhaps one explanation for the confinement of the term ‘market access principles’ to the realm of goods is that this is where the Protocol on Ireland/Northern Ireland renders a corpus of EU law on goods applicable in Northern Ireland. To that end, a UK internal market underpinned by market access principle for goods is an assertion of UK political authority as a counter to the authority of the EU and the normative pull of its internal market in goods (discussed further below).

### **The sale of goods**

The UKIM Act 2020 enshrines in domestic law a principle of ‘mutual recognition’ and a principle of ‘non-discrimination’. Whereas these principles are developed and applied by the CJEU in the elaboration of the framework economic law contained in primary treaty law, post-Brexit, in the UK these principles are formally defined in a domestic statute through the UKIM Act. Indeed, a statutory instrument has repealed primary EU free movement law on goods insofar as it would otherwise have formed part of retained EU law.<sup>33</sup>

Section 2 of the Act defines the mutual recognition principle in respect of goods, as:

the principle that goods which –

- (a) have been produced in, or imported into, one part of the United Kingdom (‘the originating part’), and
- (b) can be sold there without contravening any relevant requirements that would apply to their sale,

should be able to be sold in any other part of the United Kingdom, free from any relevant requirements that would otherwise apply to the sale.

Goods that are lawfully placed on the market in one part of the United Kingdom according to the ‘relevant requirements’ applicable in that part can be sold in another part of the UK without having to comply with local rules applicable

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<sup>33</sup> The Prohibition on Quantitative Restrictions (EU Exit) Regulations 2020 S.I. No 1625 (in respect of Northern Ireland Article 34 TFEU’s application is maintained through the Protocol).

in that other part. The lawfulness of sale is secured through the extraterritorial application of the relevant requirements of the originating part and the disaplication of the rules in the ‘destination part’ in accordance with Section 2(3). Importantly, the relevant requirements in the destination part remain applicable to goods that originate in that part. So when used to disapply relevant requirements in a destination devolved jurisdiction the effect is different from that generated by the devolution statutes when they treat rules that are outside of competence as being ‘not law’.<sup>34</sup> In this way, the legislative competence of each jurisdiction is formally maintained, but its exercise constrained by the extraterritorial reach of regulatory norms applicable elsewhere in the UK and by the potential for regulatory competition where local producers are subject to local rules but competing goods can enter that market in compliance with the regulatory standards from where they originate.

As noted in the previous part of this article, EU law presumptively allocates regulatory authority to the state of origin for rules that relate to the product – its composition, labelling, packaging, performance standards – and its production method. The UKIM Act 2020 broadly follows that approach but offers a statutory list of the ‘relevant requirements’ that are covered by the mutual recognition principle. In other words, this is not a matter of judicial discretion but instead of statutory intent. This list is found in Section 3(3).<sup>35</sup> The Act only applies to this defined list of requirements insofar as they are ‘statutory’ meaning that they are contained in ‘legislation’, defined as primary, subordinate or retained direct EU legislation. This would exclude any ‘horizontal’ application of the mutual recognition principle.<sup>36</sup>

That a measure falls within the scope of these relevant requirements is sufficient for its disaplication to goods lawfully sold elsewhere in the UK. There is no requirement to prove either that the measure is discriminatory or that it prevents or impedes market access.<sup>37</sup> It is the legislature – rather than a court

34 See Scotland Act 1998, s 29; Government of Wales Act 2006, s 94; Northern Ireland Act 1998, s 6.

35 According to that provision, the following requirements fall within the scope of the mutual recognition principle:(a) characteristics of the goods themselves (such as their nature, composition, age, quality or performance);(b) any matter connected with the presentation of the goods (such as the name or description applied to them or their packaging, labelling, lot-marking or date-stamping);(c) any matter connected with the production of the goods or anything from which they are made or is involved in their production, including the place at which, or the circumstances in which, production or any step in production took place;(d) any matter relating to the identification or tracing of an animal (such as marking, tagging or micro-chipping or the keeping of particular records);(e) the inspection, assessment, registration, certification, approval or, authorisation of the goods or any other similar dealing with them;(f) documentation or information that must be produced or recorded, kept, accompany the goods or be submitted to an authority;(g) anything not falling within paragraphs (a)–(f) which must (or must not) be done to, or in relation to, the goods before they are allowed to be sold.

36 In principle, Article 34 TFEU is also restricted to state-imposed or state-supported restrictions. However, where a regulatory function has been delegated to, or otherwise carried out by, a juridically private body that may trigger Article 34 TFEU: see Case C-171/11 *Fra.bo SPA v DVGW* ECLI:EU:C:2012:176.

37 Accordingly, a conceptual debate in EU law about the scope of Article 34 TFEU is avoided by the legislature – in this case the UK parliament – simply determining the types of rules that it considers constitute barriers to free movement within the UK internal market. See for example,

– that has defined which types of measure it considers should have which type of legal treatment. It is also worth noting that whereas other provisions of the Act are capable of amendment by UK ministers through statutory instrument, altering the relevant requirements for the purposes of the mutual recognition principle can only be achieved by primary legislation.<sup>38</sup>

The Act also does something at a legislative level which exists but only at the level of judicial interpretation under EU law. The Act excludes what are called ‘manner of sale’ requirements – in EU law terminology ‘selling arrangements’ – from the scope of application of the mutual recognition principle. Such requirements are within the scope of application of the non-discrimination principle. Again, it is legislative choices which underpin the operation of the regime rather than the judicial line-drawing which characterises the scope of application of Article 34 TFEU.

Where the UKIM Act 2020 also departs radically from EU law is the absolute and pre-emptive nature of the allocation of regulatory responsibilities for these relevant requirements to the jurisdiction from which the goods originate. By contrast, under EU law, the presumptive ‘country of origin’ principle operates in a system where regulatory responsibilities are shared between national jurisdictions and where the presumption can be rebutted if a Member State successfully invokes a recognised public interest objective that is either not met in the country of origin or not met to the same standard and provided any restriction on trade is proportionate to the degree of protection sought by the destination state. Although the effect may be that country of origin regulation is the norm, there is neither absolute pre-emption of the regulatory authority of the destination state nor a limitation on the range of judicially-recognised public interest goals that it can seek to advance to defend limitations on free movement. In the end, under EU law, and in the absence of harmonised rules, it is the proportionality principle that allocates regulatory authority between national jurisdictions on a case-by-case basis as determined by courts.

The UKIM Act 2020 only affords destination jurisdictions of the UK a very limited competence to impose local rules as set out in Schedule 1 of the Act.<sup>39</sup> These exclusions are the only permitted derogations from the mutual recognition principle, with no scope for judicial expansion. Indeed, it is only the UK Executive that can amend the Schedules via regulations, albeit after seeking the consent of devolved ministers.<sup>40</sup> There is no proportionality test to be applied by courts. Instead, choices about the allocation of regulatory powers have been fixed by the UK parliament.

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J. Snell, ‘The notion of market access: a concept or a slogan?’ (2010) 47 *Common Market Law Review* 437.

38 This was not the original intention of the UKIM Bill which had included a power of amendment via regulations but at the insistence of the House of Lords, this power was removed.

39 UKIM Act 2020, Sched 1 defines these exclusions as being:• The prevention or reduction of the movement of a pest or disease seriously threatening animal, plant or human health in a part of the UK where the pest or disease is not apparent or less prevalent;• The prevention of reduction of the movement of unsafe food or feed;• Certain authorisations or restrictions covered by the REACH chemicals regime;• Prohibitions or requirements arising under fertiliser or pesticide control regimes; or,• Taxes, duties and similar charges.

40 See UKIM Act 2020, s 10.

The Act excludes from the scope of the mutual recognition principle any relevant requirements that existed at the entry into force of the Act where there was no corresponding requirement in each of the other parts of the UK. This protection of pre-existing divergences is maintained if the requirement is re-enacted but not if that leads to substantial change. The emphasis, then, is upon the Act managing new divergences in the post-transition regulatory landscape.

A different set of 'relevant requirements' are capable of being disapplied if they breach the 'non-discrimination' principle. The sphere of application of the two market access principles is mutually exclusive and the non-discrimination principle only applies to the extent that the mutual recognition principle does not.<sup>41</sup> The relevant requirements within the scope of the non-discrimination principle are listed in Section 6.<sup>42</sup> This list may be changed by regulations adopted by the UK Secretary of State having sought the consent of devolved ministers. As with the mutual recognition principle, relevant requirements applicable at the entry into force of the Act do not trigger the non-discrimination principle.<sup>43</sup>

The non-discrimination principle covers both direct and indirect discrimination. Characterisation of a requirement as being either direct or indirect discrimination is a threshold question that determines its subsequent legal treatment. Under the Act, indirect discrimination is defined negatively as not being direct discrimination. 'Direct discrimination' is defined as treating 'incoming goods' – goods that have a 'relevant connection' with the 'originating part' of the UK – in a way that does not or would not apply to local goods and in so doing puts the incoming goods 'at a disadvantage'.<sup>44</sup> Indirect discrimination does not impose a difference in regulatory treatment based on origin but, nonetheless, also puts the incoming good 'at a disadvantage'. It is what is meant by putting an incoming good 'at a disadvantage' that is the crux of the discrimination analysis and provides its normative content. This is also where the Act recalibrates the nature of the analysis to be undertaken by courts.

A relevant requirement puts an incoming good 'at a disadvantage' 'if it is made in any way more difficult, or less attractive, to sell or buy the goods or do anything in connection with their sale'. References to measures that make trade 'more difficult or less attractive' are squarely within the familiar language of EU law and could have indicated a low threshold to trigger the application of the Act. However, that threshold is considerably raised by restricting the scope

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41 See UKIM Act 2020, s 6(4)(a).

42 UKIM Act 2020, s 6(3) includes the following within the scope of the principle:(a) the circumstances or manner in which goods are sold (such as where, when, by whom, to whom, or the price or other terms on which they may be sold);(b) the transportation, storage, handling or display of goods;(c) the inspection, assessment, registration, certification, approval or authorisation of the goods or any similar dealing with them;the conduct or regulation of businesses that engage in the sale of certain goods or types of goods.

43 But unlike the mutual recognition principle the exclusion is not limited by the need to demonstrate that no comparable requirement existed in the other parts of the UK.

44 A 'relevant connection' is when a good or its components are produced in the originating part, or are produced by a business based in that part, or come from or pass through that part before reaching the destination part. Rules directly discriminate when there is a difference in regulatory treatment because of the origin of the goods outside of the jurisdiction where the relevant requirement applies.

of application of the indirect discrimination analysis to ‘adverse market effects’ defined as ‘a significant adverse effect on competition in the market for such goods in the United Kingdom’. This creates a threshold organised around an economic analysis of the effects of regulation on competition in the UK market. Not only does that demand a specific evidential basis for drawing regulatory requirements within the scope of the analysis,<sup>45</sup> compared with EU law, this seems to raise the bar in terms of making it more difficult to bring impugned requirements within the scope of the principle.

The Act also deviates from the position under EU law in terms of derogations and exclusions. Recall that directly discriminatory measures under EU law can avail only of the list of derogations expressed in Article 36 TFEU and only to the extent that they are a proportionate restriction on trade. Under the UKIM Act, direct discrimination is permissible if it can reasonably be justified as a response to a public health emergency. Pest and disease control allows both direct and indirect discrimination. Discriminatory taxation also falls outside the scope of the market access principles. Otherwise, relevant requirements that are directly discriminatory are to be disapplied.

It is where indirect discrimination is produced by regulatory requirements that the Act departs more noticeably from EU law. Unlike the wide and open-ended list of judicially recognised ‘mandatory requirements’ under EU law, the Act offers a very narrow range of statutory ‘legitimate aims’ being:

- the protection of the life or health of humans, animals or plants, or
- the protection of public safety or security.

Note that unlike the position in EU law, the protection of the environment is not expressly listed in the Act as a legitimate aim. And whereas under EU law legitimate aims are judicially recognised and open to development through case law, under the UKIM Act 2020 this list may be amended by the UK Secretary of State after seeking the consent of devolved ministers to any amendment. The authority of courts under EU law is displaced by parliamentary and executive authority

Where it is claimed that a requirement does pursue a statutory legitimate aim, it remains to be determined whether it can ‘reasonably be considered to be a necessary means’ of achieving that aim. This is not an express proportionality test.<sup>46</sup> But it does incorporate elements of the proportionality analysis. The

45 This begs the question as to how that evidence will be sourced, which in turn, raises issues as to the interaction between Part One of the UKIM Act and the wider role of the CMA in monitoring the functioning of the UKIM.

46 The test of proportionality has several elements the combination of which has been formulated in EU law as either a two-part or three-part test. The first element is a test of ‘suitability’ meaning that a measure is – or is one of a range of measures – capable of achieving a particular aim. The second element is a test of ‘necessity’ meaning that the measure is actually necessary to achieve an aim and as between alternative measures it either does not restrict trade or does so to a lesser extent. The controversial third element is a more open balancing of market and non-market values to determine whether the gains of pursuing a public interest outweigh the restrictions on economic freedom. The UK Supreme Court’s has signalled that it is less comfortable with undertaking the third limb of the analysis than the ‘necessity’ analysis of comparison of two means of achieving the same aim as discussed in detail in respect of the compatibility with EU law of

question of whether a requirement can ‘reasonably’ be considered as a means of achieving an aim broadly corresponds to the ‘suitability’ test under EU law. There is also a condition that an inquiry be made into whether a requirement is a ‘necessary’ means of achieving its aim which mirrors the EU law position. And finally, there is a catch-all provision which requires the assessment to have regard to the ‘effects of the requirement in all the circumstances’ and ‘the availability of alternative means of achieving the aim in question.’ Therefore, in practical terms, the absence of an express proportionality test may turn out to be of less significance given that the elements of the test are largely replicated.<sup>47</sup>

### The provision of services

The UKIM Act 2020 applies the principles of mutual recognition and non-discrimination to the provision of services. The mutual recognition principle is apparent in the control of ‘authorisations’ to conduct services, whereas the non-discrimination principle applies more generally to other regulatory requirements that restrict service providers.

Much of what was said about the UKIM Act’s approach to goods also has application to its treatment of services. In particular, the very restrictive approach to derogation from these principles in respect of goods applies equally to services. The only limited exception to the disapplication of either authorisation requirements in breach of the mutual recognition principle or directly discriminatory regulatory requirements would be a requirement that ‘can reasonably be justified as a response to a public health emergency’. The list of ‘legitimate aims’ that can justify indirect discrimination is the same as applies to goods but includes an additional aim of ‘the efficient administration of justice’. This list of aims can be amended by the Secretary of State having sought the consent of devolved ministers.

But whereas our discussion of goods contrasted the application of these principles under the Act and under EU law as if the EU law position was no longer applicable – due to Brexit statutory instruments repealing provisions of primary EU law that would otherwise form part of retained EU law as of the end of the transition period – there is a subtle, but significant, difference when it comes to services. A Brexit statutory instrument does indeed repeal EU primary law on the freedom of establishment and the provision of services.<sup>48</sup> However, in its ‘Services Directive’ the EU placed some of its experience of the application of this primary treaty law on a legislative footing. This Directive was transposed into UK law through the Provision of Services Regulations (the

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Scottish rules introducing minimum unit pricing for alcohol: *Scotch Whisky Association and others v Lord Advocate and others* [2017] UKSC 76.

47 What is instead of some significance is that the issue of economic analysis and data, which the UK Supreme Court clearly struggled with as an aspect of proportionality in the Scotch Whisky Association case, will arise at an earlier analytical stage in determining whether the threshold ‘indirect discrimination’ has been established in the first place. This returns us to the question as to the evidential basis on which such economic analysis will be based and presented.

48 The Freedom of Establishment and Freedom to Provide Services (EU Exit) Regulations 2019 SI No 1401.

Services Regulations).<sup>49</sup> These Services Regulations form part of retained EU law and, unless modified or repealed would offer a legal framework applicable to authorisation and regulatory requirements for services within the UK. A Brexit statutory instrument has repealed and modified the application of key parts of these Services Regulations but in respect of authorisations, these Services Regulations continue to apply.<sup>50</sup> Rather than there being a clean break between the regime under EU law and that under the Act, potentially either regime could be applicable to an authorisation requirement with the UKIM Act's tighter regime applicable to new or substantially modified authorisation requirements. Subsequent to the entry into force of the Act, the UK Government launched a consultation on whether to align the position under the two instruments in respect of the circumstances in which the mutual recognition principle would itself be disapplied.<sup>51</sup> Underscoring the ability of the UK government to alter the scope of the UKIM regime, any change would be effected through regulations amending Schedule 2 of the Act which contains a list of exclusions.

In terms of services that are excluded from the scope of the market access principles, the Act broadly maintains an alignment with the pre-existing position under EU law. The range of excluded services listed in Schedule 2 overlaps significantly with the services excluded from the application of the Services Regulations, including the controversial spheres of healthcare and social services.<sup>52</sup> Whether or not to maintain this post-Brexit alignment formed the second part of the UK Government's consultation following the entry into force of the Act. The consultation enquired whether there should be additions or deletions from the list of excluded services contained in the schedules.<sup>53</sup> This is a point of particular sensitivity – as it was during the negotiation of the EU Services Directive – given the legitimate anxieties that surround 'services of general interest' including water and health services. Although the Secretary of State is obliged to seek the consent of devolved ministers in making any changes to the scope of the Act there is no bar to making changes if that consent is withheld. The UK Executive has the ultimate control.

There is, then, a re-design and a recalibration of the legal framework for the UKIM. This has obvious implications for its application to new regulatory choices made by UK and devolved decision-makers. But as the following part identifies, the significance of change runs deeper than this and the

49 The Provision of Services Regulations 2009, SI No 2999.

50 Provision of Services (Amendment etc) (EU Exit) Regulations 2018, SI N 1329.

51 Department for Business, Energy and Industrial Strategy, 'UK Internal Market: continuity of exclusions from the principles of mutual recognition and non-discrimination for services' (25 February 2021).

52 The UKIM Act goes further in excluding waste services, water supply and sewerage services from the application of the non-discrimination principle.

53 It should be noted that, when introduced, the UKIM Bill would have given UK ministers a three-month window to amend Schedule 2 via the 'made affirmative' procedure. It wasn't clear why this procedure was required and during its legislative passage the clause was dropped. The subsequent consultation, however, tends to suggest that there was already a view within Government that there might be reasons to diverge from the position under the Provision of Services Regulations once the Act came into force either by adding new exclusions or indeed by deleting services hitherto excluded.

analysis demonstrates the first central claim made here, namely that the UKIM Act 2020 consciously de-constitutionalises the governance of the UKIM.

## DE-/RE-CONSTITUTIONALISING THE INTERNAL MARKET

It is apparent from the preceding analysis that despite its use of the terminology and concepts associated with EU free movement law, the UK internal market imposes a different quality of legal discipline than that previously supplied through EU law. Beyond the doctrinal differences, there is a broader shift represented by an apparent de-constitutionalisation of internal market governance. The first section below indicates the instrumental, institutional and material dimensions of this de-constitutionalisation. But echoing the analysis in the second section of the previous part, it is also apparent that the repatriation of the European regulatory state following Brexit requires a certain re-constitutionalisation in terms of the distribution of political authority within the union. In the following part, this re-constitutionalisation is given conceptual form in terms of the suggestion that collaborative and competitive modes of governance emerge as rival ways of thinking about the territorial constitution. More immediately, the second section of this part highlights the manner in which UK courts are being asked to reconcile the effects of the changing governance architecture for a UK internal market within the distribution of political authority within the UK's territorial constitution.

### De-constitutionalising internal market governance

The principles of non-discrimination and mutual recognition form part of the corpus of EU free movement rules which were characterised earlier as forming a European economic constitution. At one level, the UKIM Act 2020's enforcement of these principles by private actors and the judicial protection of private autonomy against exercises of public authority share certain of the attributes of this economic constitution. Once triggered, the effect of the Act is the same as the effect of EU law namely the 'disapplication' of incompatible statutory requirements. That EU law could no more 'strike down' domestic rules than can the UKIM Act 2020 did not prevent this effect being attributed the quality of constitutional review. It is tempting, then, to see the UKIM Act as a substitute economic constitution for the UK internal market.

However, this is to miss the point and the point is that the legal discipline that is exerted is very deliberately statutory. The market access principles are not free-standing legal principles. They are neither the product of the common law, nor a codification in statute of principles that retain the life they had under EU law. More explicitly, section 1(4) of the Act makes clear that the market access principles 'have no direct legal effect except as provided by this Part.'<sup>54</sup>

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54 Again, limiting this to 'this Part' creates an unspecified legal distinction between how these principles are applied to either goods or services.



This could be interpreted in two ways. One interpretation could be that the principles are simply not justiciable by private litigants with enforcement left to some statutory or other body. Although the UKIM Act 2020 does confer powers on the Competition and Markets Authority (CMA) to advise on the functioning of the Act it is not tasked with enforcement of these principles.<sup>55</sup> The second interpretation is that a conscious distinction is being drawn between, and a break made from, the enforcement of these principles under the economic constitution of the EU and their enforcement under the legislative authority of the UKIM Act. By listing what constitutes ‘relevant requirements’; by giving different statutory treatment to when the mutual recognition or the non-discrimination principles will apply; by delimiting the range of ‘legitimate aims’; by creating schedules of ‘exclusions’, the aim and the intent has been to construct a legal framework that derives its authority from statute. The authority of courts and constitutionalism is substituted by the authority of the UK parliament and legislation.

That still leaves open the possibility to argue that the UKIM Act is also a ‘constitutional statute’ of sorts. While the UK does not afford ordinary statutes the sort of quasi-constitutional status that some European legal systems give to ‘organic laws’, there has been significant discussion about recognising particular statutes as ‘constitutional statutes’.<sup>56</sup> In that regard it should be highlighted that the UKIM Act has been added to the schedules of the devolution statutes to prevent devolved legislatures modifying its terms.

Nonetheless, it remains the case that the discipline the UKIM exerts is contained in a statute that is capable of amendment – by both primary and secondary legislation – or even repeal in the ordinary way and the regimes it creates are intended to be defined in, and circumscribed by, the Act. In that sense, it responds to Grimm’s criticism of the ‘over-constitutionalisation’ of material economic law in EU primary law. This feels far from the *ordo-liberalism* that inspired the EU’s directly effective free movement provisions and the limiting of political autonomy through a ‘higher’ law which underpinned its depiction as an economic constitution.

While this de-constitutionalisation manifests itself at instrumental and institutional levels, it is also worth stating that it has a material component in respect of the relationship between economic law and fundamental rights. In EU law, the development of the doctrinal features of European constitutionalism prompted demands for the protection of fundamental rights both as a substitute for the protection that would otherwise be guaranteed in domestic law and – in the post-Lisbon era of a binding EU Charter of Fundamental Rights – as a means of tethering EU governance more generally (including its

55 The Act establishes an Office for the Internal Market (OIM) within the auspices of the CMA. The OIM does have information-gathering powers which sections 41 and 42 confer associated enforcement powers – see Office for the Internal Market, ‘Statement of Policy on the Enforcement of the OIM’s Information Gathering Powers’ 21 September 2021 at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1019095/Statement\\_of\\_Policy\\_on\\_the\\_Enforcement\\_of\\_the\\_OIM\\_s\\_Information\\_Gathering\\_Powers\\_-\\_pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1019095/Statement_of_Policy_on_the_Enforcement_of_the_OIM_s_Information_Gathering_Powers_-_pdf).

56 F. Ahmed and A. Perry, ‘Constitutional Statutes’ (2016) 37 *Oxford Journal of Legal Studies* 461.

governance of the internal market) to fundamental rights norms. Indeed, with the EU Charter including economic rights as fundamental rights, the interconnections between fundamental economic freedoms and fundamental rights has been intensified.

The UKIM Act 2020 has nothing to say about the relationship between internal market governance and fundamental rights. While the corpus of EU law as it existed at the end of the transition period has been domesticated as retained EU law, the obvious exception to this is that the EU Charter of Fundamental Rights does not form part of retained EU law. Of course, domestic human rights arguments via the Human Rights Act 1998 may arise in the course of disputes. But it remains clear that the intensification of the connection between the integration of the European market and the protection of fundamental rights has been severed in the design of the UKIM. This de-linking of the market from fundamental rights is a further signifier of a process of de-constitutionalisation.

### **Courts and the re-constitutionalisation of governance**

During the UK's EU membership, the regulatory state was reconstructed in multi-level terms within and between European and national levels of governance. The repatriation of the regulatory state following Brexit equally has multi-level features. After all, the post-EU membership UK is not the same nation state that became a Member State in 1973. During its EU membership, a process of devolution has produced a territorial constitution characterised by McHarg as one of 'increasing divergence'.<sup>57</sup> As Mullen also observes, Brexit encountered a system of territorial governance in the UK that had not stabilised.<sup>58</sup> It is within a system of divergent and unstable multi-level governance that the UKIM seeks to create a legally protected 'union' market. But as will be demonstrated, this has heightened tensions within the wider political constitution in ways that also draw courts into contestation around the distribution of political authority.

As was noted in the introduction, both the Scottish Parliament and the Welsh Senedd withheld legislative consent to the UKIM Act. However, the Sewel Convention that the UK parliament will not normally legislate on devolved matters without the consent of devolved legislatures – and which was placed on a statutory footing – is not itself enforceable by courts.<sup>59</sup> Instead, its application relies on political cooperation between UK and devolved institutions. In other words, there ought not to be a demand for judicial enforcement because its observance should be secured by political agreement. And prior to Brexit, this was

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57 A. McHarg, 'Unity and Diversity in the United Kingdom's Territorial Constitution' in M Elliott, J. Varuhas and S. Wilson-Stark (ed), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford: Hart Publishing/Bloomsbury, 2018).

58 T. Mullen, 'Brexit and the territorial governance of the United Kingdom' (2019) 14 *Contemporary Social Science* 276.

59 *R (Miller) v Secretary of State for Exiting the European Union; In re McCord; In re Agnew* [2017] UKSC 5. For a wider discussion of the Convention in the post-Brexit period see G. Anthony, *Devolution, Brexit and the Sewel Convention* (London: The Constitution Society, 2018).

generally the case with few examples of consent being withheld.<sup>60</sup> However, as Rawlings identifies, the domestic ‘reregulation’ produced by Brexit generates tensions within a divergent and unstable territorial constitution.<sup>61</sup> Nowhere is that more obvious than in the UKIM Act’s attempt to manage regulatory diversity and regulatory divergence through the market access principles analysed in the second part above.

Within months of the UKIM Act 2020 gaining Royal Assent, a judicial review was sought by the Counsel General for Wales to obtain advisory declarations as to the constitutional implications of the Act.<sup>62</sup> Although permission to proceed with the application was refused on the grounds that the application was premature, it is an obvious indication that devolved administrations fear that the Act constrains their capacity to exercise legislative powers. What is striking is that in its UKIM Act judgment refusing permission to proceed, the Administrative Court in Wales noted: ‘It is not for the courts to determine the appropriate allocation of powers as between the devolved legislatures and the United Kingdom Parliament. That is a subject of legitimate public interest but it is not a matter for the courts to determine.’<sup>63</sup>

Yet, as EU courts found as the European regulatory state was developed, UK courts are highly likely to be arenas for constitutional contestation as the regulatory state is repatriated and regulatory powers redistributed between UK and devolved institutions. Indeed, the Welsh Government subsequently obtained the leave of the Court of Appeal to bring judicial review proceedings.<sup>64</sup> Courts may not wish to be drawn into disputes about the distribution of political authority but they may equally find it hard to avoid.

This litigation is one of a number of cases that dramatise the ways in which UK courts are likely to be faced with constitutional complaints about the distribution of authority within the union. Some of these cases are unconnected to Brexit whereas others are more clearly concerned with managing the repercussions of withdrawal from the EU. For example, the UK Supreme Court cannot avoid being engaged when issues as to legislative competence are referred to it under the procedure provided for in devolution statutes. Brexit has already engaged the Supreme Court with a referral concerning the limits of devolved legislative competence when that competence is exercised in a post-EU

60 Institute for Government, ‘Sewel Convention’ 8 December 2020 at <https://www.instituteforgovernment.org.uk/printpdf/5697>.

61 R. Rawlings, *Brexit and the Territorial Constitution: Devolution Reregulation and Inter-governmental Relations* (London: The Constitution Society, 2017).

62 The claim sought to clarify that legislation by the Welsh Senedd in conflict with the mutual recognition principle could not also be considered to be beyond its legislative competence as a consequence of the inclusion of the UKIM Act in the list of enactments that cannot be modified by devolved legislatures. Further clarity was sought that the power of UK ministers to make regulations changing the scope of application of the UKIM Act could not also change the scope of devolved legislative competence.

63 *Counsel General for Wales v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 950 (Admin).

64 Certainly, the UK Government’s consultation on whether to alter the UKIM Act’s list of excluded services – achievable through regulations made by UK ministers – would seem to counter arguments about the premature nature of the proceedings.

context.<sup>65</sup> Given that the UKIM Act 2020 is now also a protected enactment, any attempt by devolved legislatures to modify or limit its reach could be referred to the Supreme Court and some non-Brexit related examples may suggest a willingness by the UK Government to test the boundaries of devolved competence in this manner.<sup>66</sup> But the point is raised most starkly in respect of Northern Ireland's place not just in two internal markets,<sup>67</sup> but also caught between the normative pull of two unions.

The UKIM Act 2020 attempts to square the circle of the UK's obligations in respect of Northern Ireland by stating that the implementation of the Protocol requires that 'special regard' is had to Northern Ireland's place in the UK internal market and in its customs territory and to the smooth flow of trade between Great Britain and Northern Ireland.<sup>68</sup> Unionist politicians in Northern Ireland have continued to see the Protocol as an existential threat to Northern Ireland's constitutional position in the UK, resulting in a judicial review application being brought in the Belfast High Court.<sup>69</sup> The applicants claimed, and the High Court found, a breach of the obligation contained in Article VI of the Acts of Union 1800 namely that in respect of trade '[T]he subjects of Great Britain and Ireland shall be on the same footing'. But the High Court also found that it was the express will of the UK Parliament that the Withdrawal Agreement and its Protocol be given domestic legal effect. In that respect, the sovereignty of the union parliament prevails over any conflict between the Protocol and Article VI. It also applies in any conflict between two 'constitutional' statutes meaning that the later constitutional statute will take precedence in any conflict with an earlier one (a point of relevance in considering the relationship between the UKIM Act and the devolution statutes).

Courts – including not just the UK Supreme Court but also the courts of the constituent territorial jurisdictions of the union – are likely to remain important arenas in which conflicts over the distribution of political authority will be played out. To repeat the points made earlier, the repatriation of the European regulatory state is a source of instability in what was an already 'unsettled' constitutional space.<sup>70</sup> It should not be a surprise, then, if attempts are made to re-constitutionalise the governance of the union through litigation.

65 In 2018, the Attorney General and Advocate General for Scotland referred the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill to the UK Supreme Court to determine the limits of competence of the Scottish Parliament when modifying retained EU law. Finding conflicts between the Bill and the European Union (Withdrawal) Act 2018 – an enactment that is protected against modification by its inclusion within the Scotland Act 1998, Sched 4 – the Supreme Court found provisions of the Bill to be outside of the Scottish parliament's legislative competence: *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Referral from the Attorney General and the Advocate General for Scotland* [2018] UKSC 64.

66 Further examples of referrals in 2021 by the UK Government of legislative initiatives in Scotland may serve to underline the willingness to engage the Supreme Court in these types of dispute: see *References by the Attorney General and Advocate General for Scotland – European Charter for Local Self-Government (Incorporation) (Scotland) Bill/United Nations Convention of the Rights of the Child (UNCRC)(Incorporation)(Scotland) Bill* [2021] UKSC 42.

67 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

68 UKIM Act 2020, s 46.

69 *Allister and others v Secretary of State for Northern Ireland* [2021] NIQB 64.

70 N. Walker, 'Our constitutional unsettlement' (2014) *Public Law* 529

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## COMPETITION AND COLLABORATION IN THE GOVERNANCE OF ECONOMIC UNIONISM

In this final part, the analysis of the UKIM Act 2020 is deepened yet further. Building on the earlier insights it is suggested that the design choices made for the UKIM Act's legal framework are about more than the recalibration of the discipline of free movement law or the de-constitutionalisation of internal market governance. They represent a choice to pursue economic unionism through a competitive rather than a collaborative 'mode' of governance. This claim is demonstrated in two ways. In the first section, and absent any consideration of any alternative governance technique, it is suggested that the balance struck in EU internal market governance between the facilitation of regulatory competition and a regulatory level-playing field is recast by the UKIM Act. The second section introduces an alternative governance technique – 'common frameworks' – as a means of pursuing a more collaborative approach to the management of post-Brexit regulatory diversity and divergence. But it will be suggested that instead of forming a governance architecture that promotes their constructive co-existence, the UKIM Act and common frameworks appear more as rival approaches.

### **Regulatory competition within a domestic internal market**

The UKIM Act's insistence on a strong version of the mutual recognition principle is highly significant. It creates the conditions for regulatory competition in which market actors make decisions about where to produce/import goods or obtain authorisations to provide services based on their assessment of the most favourable regulatory conditions under which to access the internal market. In turn, this extraterritorial application of regulation exposes local regulators to competitive pressures to adjust regulation in light of these decisions.

While regulatory competition is certainly not excluded under EU free movement rules given the presumption of market access for goods and services lawfully offered on the markets of other EU states, the design of the EU internal market recognises the shared competence of the EU and its Member States in regulating the EU internal market. That is expressed both vertically – the autonomy of Member States to regulate in the absence of common harmonised EU rules – and horizontally – the allocation of regulatory responsibilities between home and host state regulators. Moreover, the harmonisation of rules by the EU legislature, removes or sets a floor to regulatory competition as well as creating an arena for political representation.<sup>71</sup> As Saydé argues, EU free movement law manages an apparent contradiction between allowing 'regulatory competition' between sovereign states while promoting 'regulatory neutrality' within a common regulatory space.<sup>72</sup> This design of the EU internal market is part of what is

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71 S. Deakin, 'Legal diversity and regulatory competition: which model for Europe?' (2006) 12 *European Law Journal* 440.

72 A. Saydé, 'One Law, Two Competitions: An Enquiry into the Contradictions of Free Movement Law' (2011) 13 *Cambridge Yearbook of European Legal Studies* 365.

meant both by a ‘social market economy’ and a regulatory ‘level playing field’; indeed, it is these internal limitations on regulatory competition which the EU has sought to protect in its new relationship with the UK.<sup>73</sup>

The balance between regulatory neutrality and regulatory competition within the UKIM is different for three obvious reasons. Firstly, the UKIM Act 2020 does not start with a blank sheet. A body of harmonised EU rules remains part of UK law as retained EU law. Insofar as this body of retained EU law remains unchanged a common set of rules will continue to operate thereby minimising any potential regulatory competition. However, the intention behind the Act is that its competitive discipline will gradually apply to new divergences from the baseline position at the end of the transition period. The limits on regulatory competition derived from the laws of EU harmonisation are, therefore, short term.

Secondly, the division of policy competences between devolved and UK-wide rule-making powerfully shapes how the UKIM will operate. That means that the UKIM Act’s effects will be focused on a narrower range of regulatory interventions relating in particular to human, animal and plant health and environmental protection. These are not unimportant domains. Rules on things like single-use plastics, alcohol pricing, food labelling, genetic modifications to plants and animals are not of low salience and choices about policy in these areas often reflect strong local preferences. To the extent that the UKIM Act 2020 allows extraterritorial application of rules that reflect different preferences or even undermines local preferences through regulatory competition, its effects are not insignificant for devolved legislatures.

Thirdly, the distribution of power within the UK is also asymmetric not just in policy terms but in constitutional terms. There is a difference between the governance of an internal market of sovereign equals in the EU and the governance of a UKIM in which only the union parliament is sovereign. The sovereignty of the UK parliament has been continuously reasserted throughout the UK’s withdrawal from the EU,<sup>74</sup> including in the context of Brexit-related litigation. While devolved legislatures and the UK legislature (when legislating for England) are subject to the operation of the Act, there is nothing to stop the UK legislature from responding to the disapplication of its rules under the UKIM Act 2020 by legislating otherwise. Unlike the EU legislature in which the constituent Member States are sovereign equals and have equal representation within the Council, the devolved legislatures have no direct voice in UK rule-making. All of which exposes the devolved legislatures to the effects of the UKIM Act in a way that may be different for the UK legislature when it acts as the rule-making power for England.

What brings this argument into even sharper relief is the existence of a clear alternative to the UKIM Act 2020. As the next and final section identifies, a programme of work to agree ‘common frameworks’ for intergovernmental co-operation suggests the possibility of a more collaborative approach to managing post-Brexit regulatory diversity and divergence.

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73 K.A. Armstrong, ‘Regulatory autonomy after EU membership: alignment, divergence and the discipline of law’ (2020) 45 *European Law Review* 207.

74 It is given particular expression in European Union (Withdrawal Agreement) Act 2020, s 38.

## The governance of economic unionism – collaboration or competition?

In its White Paper launching the initial consultation on its proposals for a UKIM, the UK Government found itself able to claim that: ‘the UK’s Internal Market dated back to the Acts of Union guaranteeing basic economic freedoms to all British citizens’ and that ‘the Internal Market has been enshrined in British law for over three centuries’.<sup>75</sup> But if this earlier phase of economic unionism – in reality the creation of a custom union rather than an internal market – linked market-making to nation-state building, it is the repatriation of the European regulatory state that lies behind the contemporary impulse to create a governance architecture for economic unionism in the post-Brexit and post-devolution period.

To say that the UKIM Act 2020 is an instrument of economic unionism is not to foreclose the capacity for the governance of economic unionism to take different forms. Indeed, a key test for that governance is whether the imperative to integrate markets can also tolerate regulatory diversity. In the context of Brexit, this test would arise directly as a consequence of the decision to domesticate EU law through the European Union (Withdrawal) Act 2018. While this would mean that pre-existing common rules would continue to govern the sale of goods and provision of services within the UK, any modifications to those rules by devolved authorities risked producing new internal regulatory divergences and new barriers to trade. After strong pushback against attempts to centralise authority over modifications to retained EU law – including a counter-strategy to give the Scottish parliament control through a ‘Continuity Bill’ – the UK and devolved authorities agreed to a programme of work to coordinate future modifications to retained EU law through ‘common frameworks’.<sup>76</sup> These frameworks – including for example on nutrition labelling; food and feed safety and hygiene; food standards and labelling; blood safety and public procurement – cover policy fields that overlap with devolved powers. Each framework establishes working intergovernmental methods and processes for managing modifications in retained EU law in fields covered by the frameworks together with institutional mechanisms for dispute resolution.

The common frameworks programme obtained the support of the Scottish and Welsh administrations (the Northern Ireland Executive being largely unable to contribute due to the suspension of devolved government until January 2020). The programme was governed by principles which both respected devolved responsibilities and acknowledged that divergence was a legitimate

75 Department for Business, Energy and Industrial Strategy, ‘UK Internal Market’ CP 278 (July 2020).

76 The background to this is explored in depth in Rawlings, n 61 above. It is important to note that the European Union (Withdrawal) Act 2018, s 12 inserts into the devolution statutes a limit on devolved competence by inhibiting the modification of retained EU law of such a description as laid down in regulations by a UK minister. In this way, the common framework programme and its tolerance of regulatory diversity is conducted within the shadow of this power to ‘freeze’ competence. This power expires two years following ‘exit day’ and by the time of the entry into force of the UKIM Act, it had never been exercised. However, it is the discipline of the UKIM Act that will replace the freezing power of the 2018 Act.

outcome of intergovernmental cooperation.<sup>77</sup> What the introduction of the concept of a statutory UKIM left open was whether that tolerance of divergence would be preserved under the Act or be subject to its legal discipline. Or to put it differently would collaborative and competitive approaches to the governance of economic unionism co-exist within different spheres of application or rival one another in managing future regulatory changes?

By the time that the UKIM Bill was making its way through the UK parliament, a revised analysis undertaken by the Cabinet Office indicated that twenty-two non-legislative frameworks were being pursued while in eighteen other areas some level of primary legislation was being undertaken or contemplated.<sup>78</sup> True, that programme of work had fallen behind schedule and the onset of the coronavirus pandemic in early 2020 delayed that work further. Nonetheless, the commitment remained to produce the frameworks and even to give provisional application to frameworks pending their completion, scrutiny and ministerial sign-off. Nothing in the Bill as introduced would have insulated a new divergence agreed within the scope of a common framework from being disapplied should it conflict with the UKIM Act. Indeed, as introduced, the Bill made no reference to common frameworks at all. Amendments to the Bill in the House of Lords that sought to take new divergences as they emerged from common frameworks outside of the scope of the legislation were fiercely resisted by the UK Government. In the end the Government conceded that the power to amend the schedules of the Act to exclude certain matters from the scope of the Act could be used to give effect to a 'common frameworks agreement'.<sup>79</sup> The discretion whether to make such amendments, nonetheless, remains with UK ministers. Once again, it is the union parliament that has entrusted the UK executive with authority to determine the scope of application of the Act.

The question of how common frameworks fit within the scheme of the UKIM Act 2020 is, therefore, a dramatisation of a wider question of whether the pursuit of economic unionism respects the distribution of political authority across, and tolerates regulatory diversity within, the UK. It is important to

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77 The principles to guide intergovernmental cooperation through common frameworks were set out in an October 2017 communiqué of the Joint Ministerial Committee (EU negotiations) (JMC(EN)). Uppermost in the list of principles is that the common frameworks will 'enable the functioning of the UK internal market, while acknowledging policy divergence' and respecting the devolution settlement: 'Joint Ministerial Committee (EU Negotiations) Communiqué' 15 October 2017 at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/652285/Joint\\_Ministerial\\_Committee\\_communique.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf).

78 Cabinet Office, 'Frameworks Analysis 2020' September 2020 at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/919729/Frameworks-Analysis-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919729/Frameworks-Analysis-2020.pdf). Further revisions reduced the number of active common frameworks to thirty-two, twenty-two of which apply to Scotland, Wales and Northern Ireland and six of which only apply to Northern Ireland.

79 See UKIM Act 2020, ss 10 and 18. Section 10(4) defines a 'common framework agreement' as 'a consensus between a Minister of the Crown and one or more devolved administrations as to how devolved or transferred matters previously governed by EU law are to be regulated after IP completion day'. Given the reference to a 'Minister of the Crown' rather than 'Secretary of State' this should encompass provisionally applied common frameworks which have got to the stage of portfolio ministerial sign off but not yet obtained final approval. This may be important should final approval of frameworks become embroiled in wider political disputes over intergovernmental relations.



acknowledge that common frameworks are intended to manage divergences from the baseline of retained EU law. There will be areas of regulation and regulatory divergence that are novel and which don't have their origins in the legacy of EU rules applicable to the UK during its EU membership. As such the mechanisms and procedures for intergovernmental cooperation established by common frameworks will not be applicable, leaving novel regulatory requirements subject to the operation of the UKIM Act.

Yet this rather begs the question whether as a governance technique, collaboration between different levels of political authority within an economic union is preferable to the sort of regulatory competition which the UKIM enables. In other words, an alternative to the UKIM Act would have been to expand the governance toolkit to include mechanisms of notification, dialogue, coordination and collaboration to improve intergovernmental relations. As the House of Lords Common Framework Scrutiny Committee noted in its *Common frameworks: building a cooperative Union* report, intergovernmental relations require a 'reset' which 'should be based on the consensual approach taken in common frameworks with the involvement of all three territorial offices, identifying areas of shared interest and demonstrating mutual respect'.<sup>80</sup>

Accordingly, this analysis of the UKIM forms part of a wider constitutional conversation about the review of intergovernmental relations prompted both by latent weaknesses in the governance of devolution and by the novel challenge of the repatriation of powers back to the UK. In that regard, it is salient that the Dunlop Review of 'UK Government Union Capacity' recommended tasking a sub-committee of a proposed UK Intergovernmental Council – as a successor to the Joint Ministerial Committee – with coordinating internal market issues between UK and devolved governments.<sup>81</sup> Work remains ongoing but in a review of progress, the need for 'effective collaboration' between UK and devolved governments has been accepted, with a proposed new 'Interministerial Standing Committee' to be charged with the task *inter alia* of considering 'issues bearing an impact on regulatory standards across the UK for internal trade'.<sup>82</sup> Nonetheless, the UKIM Act has contributed to a deteriorating level of trust between UK and devolved governments making progress on reform of intergovernmental relations harder rather than easier.

## CONCLUSIONS

The practical implications of the UKIM Act 2020 will take some time to emerge as new regulatory choices are made or take effect as the European

80 House of Lords, Common Frameworks Scrutiny Committee, 'Common frameworks: building a cooperative Union' 1<sup>st</sup> report (Session 2019–21) HL Paper 259 (2021).

81 'Review of UK Government Union Capacity' November 2019 at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/972987/Lord\\_Dunlop\\_s\\_review\\_into\\_UK\\_Government\\_Union\\_Capability.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972987/Lord_Dunlop_s_review_into_UK_Government_Union_Capability.pdf).

82 Cabinet Office, 'Progress update on the review of intergovernmental relations' 24 March 2021 at <https://www.gov.uk/government/publications/progress-update-on-the-review-of-intergovernmental-relations>.

regulatory state is repatriated. Albeit that the range of measures on which the Act bites is a subset of the fields of regulatory policy – with important areas like consumer protection and product safety remaining within UK competence – salient decisions about the recycling of drinks containers or the gene editing of animals or plants are within scope. What matters in an internal market is how such regulatory decisions are managed which is a function of the design of the governance architecture of the internal market. That design is also a matter of political choice.

The decision to create a statutory internal market that emulates but recalibrates the legal discipline previously derived from EU economic law is a choice which exacerbates tensions within the political and territorial constitution of the UK. The Act emerges as an instrument of economic unionism governed by a logic of regulatory competition and as a rival to strategies of collaborative unionism as exemplified by the common frameworks programme.

It is also apparent that Brexit continues to have implications for UK courts. The operation of the market access principles will be subject to adjudication as economic interests seek to disapply regulatory requirements that they find unfavourable. The UKIM Act 2020 – more so than under EU primary law – seeks to limit the discretion of courts in their balancing of economic and non-economic values. But beyond the operation of these principles, and has been experienced by the EU itself in its creation of an internal market, it is clear that issues of the distribution of political and legal authority within the market will be the subject of litigation. Internal markets are sites for contestation making the UKIM Act 2020 a somewhat destabilising instrument of economic unionism.