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# WILL THE UNITED KINGDOM SURVIVE THE UNITED KINGDOM INTERNAL MARKET ACT?

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## THE UK HAS AN INTERNAL MARKET!

The EU has an ‘internal market’. So do Canada, Australia, the United States and Germany. And now, with the enactment of the United Kingdom Internal Market Act 2020, the United Kingdom too has an ‘internal market’.

They aren’t the same. Internal markets come in different shapes and sizes. The extent to which the constituent units are permitted to pursue different regulatory policies differs, the scope of lawmaking competence and powers allocated to the central authority is not the same, the governing institutional arrangements vary. A range of politically, economically and constitutionally distinct options is available.

What sort of internal market has the UK chosen for itself, and why?

It has chosen a *divided* and a *divisive* one. It is an internal market which is *divided* between Great Britain and Northern Ireland. Northern Ireland is unwillingly excluded from the market rules enacted in London in the areas covered by the Protocol attached to the EU-UK Withdrawal Agreement. It is moreover an internal market marked by a *divisive* relationship between Scotland and Wales, on the one hand, and on the other England. Scotland and Wales are likely to be unwillingly included in the application of market rules enacted in London, to the detriment of the regulatory autonomy promised under their devolution settlements. The Act aims to sustain the UK as an integrated trading area but dissatisfaction surrounds Northern Ireland’s place *outside* it and Scotland and Wales’s place *inside* it.

And so - to draw on this paper’s title - has the statutory attempt to impose structure on the UK’s internal market provided momentum that will destabilise the UK itself? This paper begins by summarising the problem to which the UK Internal Market Act is a solution, and then explains precisely what form the UK’s internal market takes according to the Act, before engaging with the dismay and distrust felt in different ways in Northern Ireland, and in Scotland and Wales about the implications of the UK internal market as a political project. All internal markets tell a story about the intimate relationship between economic motivations and political consequences. The shaping of the UK internal market accentuates the sense that this United Kingdom is no longer based on consent but instead on London’s preferences alone.

## THE PROBLEM TO WHICH THE UK INTERNAL MARKET ACT IS A SOLUTION

The UK Internal Market Act 2020 was drafted, debated and adopted with extraordinary speed during 2020, from a White Paper published in July, to a Bill presented in September and, with light amendments, an Act which became law in December.

The problem to which the Act is a solution is that impediments to trade within the United Kingdom may arise in so far as different rules governing goods or services are applied in the four constituent elements of the United Kingdom. The pattern of the UK's devolved settlement is highly asymmetric, and for historical reasons idiosyncratic, but for present purposes the overall issue is the scope for divergent regulatory choices which may lead to hindered trade within the UK and distortion of competition consequent on different cost bases depending on location of production. In short, then, the problem is the fragmentation of the UK's internal market as a result of regulatory divergence within its four constituent elements.

It is a 'post-Brexit' problem. The concept of a UK internal market was never discussed in such terms before the UK joined what is today the EU in 1973 because even though, after centuries of re-shaping, the UK has in its modern form comprised four distinct elements since 1921 it was in reality a relatively centralised state dominated by the Westminster Parliament in London. Consequently, no significant obstacles to trade between the four constituent elements existed. During the period of EU membership Scotland acquired a Parliament, Wales an Assembly, subsequently restyled Senedd, and Northern Ireland always had a distinct status. But although occasional instances of regulatory diversity came to the surface, such as the fee-free status of UK nationals resident in Scotland and nationals of other EU Member State studying at undergraduate level at Scottish Universities which did not extend to UK nationals from the other three constituent elements of the UK, in general the common rules of the EU acted as a blanket which held together the integrity and uniformity of the UK internal market without it ever being depicted in those terms. On 1 January 2021 that changed. Rule-making previously subject to the disciplines of EU membership became the preserve of the UK government and the devolved administrations in Northern Ireland, Scotland and Wales, according to choices made within the UK about how to distribute them.

The headline aspiration of the Act is spelled out in its section 1 in relation to goods. It is to promote the continued functioning of the United Kingdom's internal market by establishing the 'United Kingdom market access principles'. For services a similar model is employed but under a slightly more cumbersome statutory formulation set out in Part 2 of the Act. A special but comparable regime contained in Part 3 of the Act governs professional qualifications and regulation.

There are two 'United Kingdom market access principles'. They are a mutual recognition principle and a non-discrimination principle.

The mutual recognition principle holds that if a product or service is freely marketed in one of the constituent elements of the UK then it is entitled to unrestricted access to the markets of the other constituent elements, subject only to a very cramped range of possible exceptions to this general rule. The non-discrimination principle requires that each constituent element of the UK shall treat goods or services arriving from another constituent element in the same way as it treats locally produced goods and services. This, like any discrimination-based test, invites careful examination of the nature of direct and indirect discrimination, and of the scope for showing that any discrimination which may be uncovered is not unlawful discrimination.

It is a feature of the Act that no attempt has been made to write the generally applicable principles with elegant simplicity. Instead, although common patterns may be discerned, goods, services and professional qualifications are subjected to detailed separate treatment. But as a rough summary the principle of mutual recognition is designed to secure access to the UK's internal market for goods and services wherever they are made, while the principle of non-discrimination protects traders selling those goods and services from differential treatment once they are active on their target market. It is about entry to and treatment on the target market, in short.

Engaging in a more practical inquiry into the likely implications of the model of an internal market chosen for the UK under the Act reveals two quite distinct rhythms. One concerns Northern Ireland, which is in important respects and, for some, unwillingly *excluded* from the UK's internal market and the other concerning Scotland and Wales, which are in important respects and, for some, unwillingly

*included* in the UK's internal market.

The new focus on the concept of a UK internal market suggests this is primarily a matter with economic consequences, but in truth this is a matter of intense political sensitivity. Each of the three 'devolved administrations' has its own distinct settlement, but the pattern is complicated further both by the model chosen under the Internal Market Act and by London's extraordinarily arrogant and insensitive approach to the anxieties and aspirations of the three smaller constituent elements in the UK. The pursuit of a United Kingdom internal market has created an increasingly unstable United Kingdom.

## **MUTUAL RECOGNITION IN THE UK INTERNAL MARKET**

The mutual recognition principle provides that goods which have been produced in or imported into one part of the UK and which can be sold there without contravening any applicable relevant requirement (as defined in the Act, explained below) are entitled to be sold in any other part of the UK, free from any relevant requirement that would otherwise be applicable. Similarly, an authorisation requirement in relation to the provision of services in one part of the UK does not apply to a person who is authorised to provide those services in another part of the UK.

The Act seeks, in the familiar Westminster style, to pin down in detail what the obligation entails. What is at stake in the notion of a 'relevant requirement', to which the mutual recognition principle applies, is a statutory requirement which prohibits the sale of the goods or imposes an obligation or condition which, if not complied with, results in a prohibition of the sale of goods. This would readily cover rules associated with the composition, packaging, or labelling of products. A similarly motivated and structured scheme controls authorisation requirements which must be met as a pre-condition to the provision of services. But simply put the broad idea is that if it's good enough for Wales, it's good enough for England, and if it's good enough for England, it's good enough for Scotland, and so on. It is a deregulatory model. Under this mutual recognition principle stricter standards in one part of the UK may be maintained and applied to locally produced goods and services but they are disabled in application to goods and services coming from

another part of the UK where regulation is more lenient or non-existent.

## NON-DISCRIMINATION IN THE UK INTERNAL MARKET

The scheme of the Act is to demarcate practices subjected to the discipline of the mutual recognition principle from those instead subject to the second and less intrusive of the two market access principles, which is the non-discrimination principle.

The non-discrimination principle covers statutory provisions which address the circumstances or manner in which goods are sold, the handling or display of goods, inspection or certification of goods and the conduct or regulation of businesses that engage in the sale of certain types of goods. So, for example, rules that regulate how goods are displayed on shelves in shops cannot provide for better treatment of local goods. Similarly, for services, an ex ante authorisation requirement is subject to the mutual recognition principle, whereas a regulatory requirement which, if not satisfied, would prevent the activities of a service provider is controlled only by the non-discrimination principle.

The Act provides that the sale of goods or services in one part of the United Kingdom should not be affected by requirements that directly or indirectly discriminate against goods or services that have a relevant connection (as defined, widely) with another part of the United Kingdom. Rules which violate the non-discrimination principle are declared to be 'of no effect'.

The question then is when will a relevant requirement offend against the non-discrimination norm.

Direct discrimination is the subject of an intricately drawn statutory definition, but the core concept holds that it occurs when incoming goods or services are put at a disadvantage compared to local goods or services which are materially the same.

Indirect discrimination is - as ever - more awkward. It arises where incoming goods or services are put at a disadvantage in circumstances where there is no direct discrimination but where there is an 'adverse market effect' and where 'it cannot reasonably be considered a necessary means of achieving a legitimate aim'. Both notions are the subject of elaboration in the Act.

An 'adverse market effect' exists where 'a significant adverse effect on competition' in the UK market arises because the requirement puts incoming goods or services at a disadvantage but does not put at that disadvantage comparable goods or services possessing a relevant connection to the part of the UK to which the goods are targeted. The test involves a comparison between treatment of goods or services which are not materially the same (because that would be an instance of direct discrimination) but are 'comparable'. The issue, then, is discrimination which does not operate between like products or services but between products or services in a competitive relationship with each other. This is notoriously awkward in trade law, where comparisons of this nature are needed, for example, in the application of rules which forbid tax discrimination, where it needs to be determined when products are in competition with each other even though they are not materially the same, and in competition law, where the market in which goods and services are offered needs to be defined with reference to consumer readiness to substitute one for another in order to provide a basis for judging an economic operator's market power. More generally in equality law it is familiar and awkward territory that application of an anti-discrimination norm requires identification of a valid comparator against which treatment of members of a protected category is measured. This is sure to generate some tricky issues in the elaboration of the regime intended by the UK Internal Market Act.

If the threshold is crossed and, an adverse market effect demonstrated, the matter is to be treated as indirect discrimination within the meaning of the Act, then attention turns to whether it can reasonably be considered a necessary means of achieving a legitimate aim. For goods, the notion of a 'legitimate aim' is defined to cover the protection of the life or health of humans, animals or plants, or the protection of public safety or security - and nothing else, although it is possible for the list to be altered subsequently by the adoption of secondary legislation. For services, the same list of legitimate aims applies, to which is added the efficient administration of justice.

This pattern will doubtless give rise to awkward questions of demarcation. The trader faced by an obstructive rule will wish to have it treated as a relevant requirement subject to the mutual recognition principle because that makes it inapplicable unless one of the very narrow exceptions applies (considered below),

whereas the regulator will aim to define it as a requirement associated with the manner of sale, which may be applied provided only that it is not tainted by direct or indirect discrimination. This may affect the framing of policy. Consider, for example, a policy concern to ensure that a product be sold only to those aged 18 or over. If pursued by a requirement that a product be so labelled, it would be subject to the mutual recognition principle. If pursued by a requirement that premises where the product be sold shall be off limits to those under the age of 18, it would be subject to the non-discrimination principle.

## **SCOPE, EXCLUSIONS, JUSTIFICATION AND COMMON FRAMEWORKS**

Measures which offend against either of the two UK market access principles may escape condemnation. However, it is a feature of the Act that the restraints placed upon the application of the two market access principles are carefully limited.

### **Scope**

A requirement is subject to the market access principles only if imposed by legislation. This covers not only an Act of the UK Parliament but also acts promulgated by the three devolved jurisdictions. It also covers not only primary but also secondary legislation. This means that administrative practices which are not legislative in character are not caught by the Act. Nor are actions of private parties even where they might constitute severe obstacles, such as collectively agreed industry-wide standards applicable in a constituent part of the UK.

Only newly introduced measures are caught by the Act, not measures already in effect on the entry into force of the Act. The Act, then, is prospective rather than retrospective in effect, which preserves the existing patterns of market regulation across the UK. This means that any proposed law reform has this Act hanging over the head of those assessing if reform is even worthwhile.

### **Exclusions**

The sections of the Act dealing with goods are of general application, but this is not true of those addressing services.

The mutual recognition principle does not apply to audiovisual services, debt

collection services, electronic communications services and networks, financial services, gambling services, healthcare services, legal services, notarial services, private security services, services of temporary work services, services provided by a person exercising functions of a public nature, social services as defined and transport services. There is also a special exclusion for any authorisation requirement in connection with taxation.

The non-discrimination principle does not apply to the services excluded from the mutual recognition principle, mentioned above, but nor does it catch postal services, services connected with the supply of gas and electricity, services of a statutory auditor, waste services and water supply and sewerage services. There is also a special exclusion for any authorisation requirement in connection with taxation.

These lists may be amended subsequently by the adoption of secondary legislation.

### **Justification**

The Act provides scope to justify measures for the regulation of markets for goods which otherwise offend against the market access principles. The application of the principles is excluded where threats to human, animal or plant health are at stake. There are also exceptions foreseen in particular limited contexts in the case of chemicals, fertilisers, and pesticides and more broadly for taxation.

The market access principles are therefore not absolute, but this room to prefer local regulatory autonomy over UK-wide market access is strictly limited. The threat to health is not a generally applicable notion, apt to cover any foreseen or unforeseen problem, but rather is confined to cases of action aimed at preventing or reducing the movement of a pest or disease into the part of the UK which regulates, or the movement of unsafe food or feed. Moreover it is stipulated that it must be reasonable to believe that the pest or disease is present in the part against which a restriction is raised and not present or significantly less present in the regulating part. The threat must be serious; an assessment of the threat and the likely effectiveness of the measures in addressing the threat must be provided; and the action taken must reasonably be justified as necessary.

The Act also makes special provision for a public health emergency, defined as ‘an event or a situation that is reasonably considered to pose an extraordinary threat to

human health'. A measure reasonably justified as a response to such an emergency is not to be treated as directly discriminatory.

This, then, is to offer room to justify practices required for sanitary or phytosanitary exigency, or in case of a public health emergency. It is *not* a general public health exception to market access across the UK. The only opportunity to defend regulatory practices on the basis they make a more general contribution to the protection of the life or health of humans, animals or plants arises in the case of measures which are indirectly discriminatory, which is clearly treated as the least objectionable of the barriers to intra-UK trade envisaged by the Act.

The Act therefore excludes more generous opportunity to justify measures which fall within its scope. Environmental protection may not be invoked as a justification, nor may consumer protection or cultural concerns. The list of permitted justifications may be extended (or reduced) by the adoption of secondary legislation, but as it stands the Act offers a relatively limited list of justified restrictions on intra-UK trade in goods and services - strikingly more limited than is available under EU internal market law. The Act contains a strong bias in favour of market access.

### Common frameworks

A 'common framework' is an agreement between central government in London and one or more of the devolved administrations in Scotland, Wales and Northern Ireland as to how matters which were previously governed by EU law are to be regulated in future. The Act envisages the adoption of secondary legislation in order to give effect to an agreement that forms part of a common framework. This could provide for fresh exclusions from the aggressively deregulatory application of the market access principles.

Work on the elaboration of common frameworks began in 2017, the year after the fateful referendum. In October 2017 the Joint Ministerial Committee (EU Negotiations) set out principles which would guide the negotiations on the approval of common frameworks.<sup>1</sup> A flexible range of possibilities was envisaged, including agreement on minimum or maximum standards, harmonization, limits on action, or

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<sup>1</sup> Joint Ministerial Committee, '(EU Negotiations) communiqué: 16 October 2017' Available at: <https://www.gov.uk/government/publications/joint-ministerial-committee-communique-16-october-2017>

mutual recognition. The abiding tension is between the aim to promote the functioning of the UK internal market on the one hand and, on the other, respect for policy divergence within the four constituent elements of the UK. The aspiration is to manage this within a consensual process of dialogue, according to a generously broad set of available instruments.

But this co-operative vision has been almost entirely lost.

In late 2020 neither the Scottish Parliament nor the Welsh Senedd were willing to give legislative consent to the UK Internal Market Act, and although this did not prevent it becoming law, since no veto over statutes is granted to the devolved administrations under the UK's constitutional settlement, it revealed a high degree of dissatisfaction with the aptitude of common frameworks to deliver genuine respect for diversity. The main (but not the only) point that provoked protest in Scotland and Wales is that there is no obligation on the UK government to agree a common framework and, in the absence of any such agreement, the market access principles bite without any modification to account for Scottish or Welsh sensitivities. Moreover, the Internal Market Act itself provides that it is not open to the devolved administrations to legislate in a way that contradicts it. Therefore the priority established by the Act makes plain that stricter rules preferred by one part of the UK must be set aside in so far as they contradict one of the market access principles, unless they fall within one of the currently applicable and very narrow exceptions or justifications. Once again, the Act's structural bias in favour of market access, and against local regulatory cultures, is evident.

## **THE DOMINANCE OF THE MARKET ACCESS PRINCIPLES**

Summarised, the Act ensures that the market access principles which impose structure on the UK internal market, though not absolute, are endowed with real vigour by the statutory scheme. A regulator within the UK assessing the virtue of a legislative intervention into goods or services markets knows that if what is planned is (i) a measure subject to the Act's market access principles, (ii) not within a defined exception and ineligible to claim justification and (iii) likely to be undercut by products or services arriving from another part of the UK where such intervention does not exist, then the likely consequence is that such an initiative will place a

burden on local traders which will not be shouldered by others elsewhere. And mitigation achieved through the negotiation of common frameworks is unlikely to come to the rescue.

The Act's scheme makes it likely and normal that the constituent element of the UK with the lowest level of regulation - which may be no regulation at all - sets the weather for all four constituent elements. The UK internal market has a strongly deregulatory flavour.

But that deregulatory flavour has a very different tinge when one considers Northern Ireland, on the one hand, and Scotland and Wales on the other. The UK's withdrawal from the EU generated questions about the distribution of repatriated competences and powers within the UK which were bound to be politically sensitive in any circumstances. The drafting of the Act during 2020 increased these sensitivities, and its application in 2021 and beyond is likely to be still more inflammatory. It has the potential to act as a factor providing momentum towards the destabilisation of the four nation state itself, but for distinct reasons. In Northern Ireland the friction arises because for important purposes it is not within the UK internal market, whereas in Scotland and Wales friction arises because they are. Northern Ireland is protected from the Act's deregulatory energy by the obligations contained in the Protocol attached to the EU-UK Withdrawal Agreement. By contrast Scotland and Wales are fully exposed to this deregulatory energy. So those in Northern Ireland who would wish for full participation in the UK internal market are left disappointed, while those in Scotland and Wales who would wish to prioritise local variation over full participation in the UK internal market as shaped by the Act are left disappointed.

## **NORTHERN IRELAND**

The UK Internal Market Act applies to the provision of services in and to Northern Ireland in the same way as it applies to the rest of the United Kingdom. But the regulation of goods in Northern Ireland is fundamentally different from the regulation of goods in England, Scotland and Wales. The regulation of goods in Northern Ireland is subject to the arrangements recorded in the Protocol attached to the Withdrawal Agreement which was concluded by the EU and the UK in October

2019 and which entered into force at the end of January 2020. This is carried over into domestic law in the UK by the European Union (Withdrawal Agreement) Act 2020, which entered into force in January 2020 and so pre-dates the rise of open concern for the UK internal market by several months.

### What the Protocol does

The Protocol has the effect of placing a regulatory and customs border between Great Britain (that is, England, Scotland, and Wales) and Northern Ireland. The terms of the UK's withdrawal from the EU therefore include a direct partition of its internal market into two blocs, Northern Ireland and Great Britain.

So as far as goods are concerned the UK Internal Market Act is not the place to go to grasp Northern Ireland's status. It does not ignore it. Its section 11(1) cross-refers to the Protocol and the 2020 Act as the place to go to understand the regulation of goods in Northern Ireland, and the same section identifies that 'qualifying Northern Ireland goods' (as defined) shall enjoy the protection of the UK market access principles once they reach Great Britain. This means that such goods benefit from the market access principles when exported from Northern Ireland to Great Britain but the reverse is not and cannot be true, in order to comply with the Protocol.

Part 5 of the Internal Market Act is entitled *Northern Ireland Protocol* and takes as its sub-title *Northern Ireland's place in the UK internal market and customs territory*. This is tendentious - in truth it is deceptive. It exhorts that regard be had to maintaining Northern Ireland's 'integral place' in the UK internal market and its place in the UK's customs territory, but this is stated to be subject to the overarching need to meet the obligations imposed by the Protocol. Its purpose therefore cannot be understood without first going back to the Protocol itself, but the story in short is that compliance with the Protocol requires that Northern Ireland be treated as a part of the UK internal market which is distinct from Great Britain and that its place in the UK customs territory is more form than reality. And the Protocol itself, like Part 5 of the Internal Market Act, deliberately mis-states the practical reality. What it says is not what it does.<sup>2</sup> De facto Northern Ireland is part of the EU's internal

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<sup>2</sup> Weatherill, S. (2020) 'The Protocol on Ireland / Northern Ireland: What it says is not what it does', <http://eulawanalysis.blogspot.com/2020/03/> accessed: 27/04/2021

market for goods and the EU's customs territory, and the protection of the integrity of those two valued political, legal and economic constructs is the reason why a hard or visible regulatory and customs border between Great Britain and Northern Ireland - that is, *inside* the UK - is unavoidable.

The Protocol achieves this by locking Northern Ireland (but not Great Britain) into regulatory alignment with an extensive body of EU rules governing manufactured and agricultural goods. The detail is found in Annex 2 to the Protocol to which deceptively brief reference is made in Article 5(4) Protocol. 287 EU legislative instruments are listed in Annex 2 (and pursuant to Articles 13(3) and (4) the list is not static). The alignment between Northern Ireland and the EU is extended by the Protocol also to cover trade rules concerning the EU's customs regime (Article 5), VAT and excise rules (Article 8), the single electricity market (Article 9) and state aid rules in respect of measures which affect the trade between Northern Ireland and the EU which is subject to the Protocol (Article 10). A series of Annexes contain precise and intricate detail on exactly which EU measures are to be applied by the UK in Northern Ireland.

Given that Northern Ireland is bound to the EU *acquis* on goods whereas Great Britain is not, there must be checks on trade in goods between Great Britain and Northern Ireland. The full range of checks is not spelled out in the Protocol, in line with its thematic concern to avoid telling the full story about its extent, and the detail has to be sought sector-by-sector across the many measures of goods law applicable to Northern Ireland but not Great Britain, conformity with which will need to be checked according to the normal rules and procedures governing entry to the EU's territory.<sup>3</sup> Sanitary and phytosanitary checks will be the most onerous, and the need to check goods of animal origin passing from Great Britain to Northern Ireland is entirely new and doubtless highly costly and inconvenient, and disruptive of existing supply chains, but across many sectors the terms of trade have been radically changed, to reflect the adherence of Northern Ireland to the EU's legislative *acquis* on goods and Great Britain's departure from it. The obligation stated by the Protocol is implacable: customs formalities and regulatory checks are always required even

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<sup>3</sup> The UK government's site is at <https://www.gov.uk/government/collections/moving-goods-into-out-of-or-through-northern-ireland>; On the EU (Commission) side, see: [https://ec.europa.eu/info/relations-united-kingdom\\_en](https://ec.europa.eu/info/relations-united-kingdom_en)

for goods targeted exclusively at the Northern Ireland market.

New controls are also needed to ensure collection of customs tariffs on goods entering Northern Ireland. Article 5 of the Protocol, which cross-refers to EU Regulation 952/2013, locks Northern Ireland into the entirety of the EU's Customs Code and related customs legislation. So, although Article 4 states that Northern Ireland is part of the UK customs territory the Protocol treats Northern Ireland for most purposes as part of the EU's customs territory. Article 13(1) confirms this. New arrangements are needed to collect customs duties, because it is assumed pursuant to Article 5 that goods brought into Northern Ireland from Great Britain are at risk of subsequently being moved into the EU, an assumption rebutted only if criteria on risk elucidated by the Joint Committee in December 2020 are met in the case of goods which are not subject to commercial processing in Northern Ireland.<sup>4</sup> The EU-UK Trade and Cooperation Agreement which entered into force in January 2021 has reduced the scale of the problem by securing tariff-free trade between the UK and the EU, with the consequence that tariffs are payable only on goods which do not qualify for such treatment under the Agreement, most obviously goods originating in third countries and imported into Great Britain.

Trade in goods moving from Northern Ireland to Great Britain is subject to fewer new restrictions than trade moving in the other direction, from Great Britain to Northern Ireland, but there are some. Article 5(3) of the Protocol requires that the normal formalities applicable to goods leaving the EU's customs territory shall apply to goods leaving Northern Ireland for Great Britain. This entails that a pre-departure declaration be lodged, which shall take the form of a customs declaration, a re-export declaration or an exit summary declaration. However, mitigation has occurred. In January 2021, the UK in a unilateral declaration announced it would not require export and exit summary declarations.<sup>5</sup> The EU took note, and accepted this. That acceptance is doubtless conditional on the provision of equivalent information through other means.

Article 6 also envisages impediments to trade between Northern Ireland and Great

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<sup>4</sup> See: Dec 4/2020 of the Joint Committee of 17 December 2020, [https://ec.europa.eu/info/relations-united-kingdom/eu-uk-withdrawal-agreement/meetings-eu-uk-joint-and-specialised-committees-under-withdrawal-agreement\\_en](https://ec.europa.eu/info/relations-united-kingdom/eu-uk-withdrawal-agreement/meetings-eu-uk-joint-and-specialised-committees-under-withdrawal-agreement_en)

<sup>5</sup> [https://ec.europa.eu/info/relations-united-kingdom/eu-uk-withdrawal-agreement/meetings-eu-uk-joint-and-specialised-committees-under-withdrawal-agreement\\_en](https://ec.europa.eu/info/relations-united-kingdom/eu-uk-withdrawal-agreement/meetings-eu-uk-joint-and-specialised-committees-under-withdrawal-agreement_en)

Britain 'to the extent strictly required by any international obligations of the Union' and requires that 'The United Kingdom shall ensure full protection under international requirements and commitments that are relevant to the prohibitions and restrictions on the exportation of goods from the Union to third countries'. The Protocol characteristically fails to provide any detail on what is at stake, and no exhaustive list exists. One example is obligations imposed by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) which concern controls including export permits applicable to trade in endangered species. There are also special rules on movement of some cultural goods. Probably there are not many obligations of the type envisaged by Article 6 of the Protocol, but even if they are applied with a light touch they introduce a friction to trade in goods between Northern Ireland and Great Britain - that is, *within* the UK internal market - which did not exist before the UK withdrew from the EU.

Accordingly the Protocol is highly misleading in its depiction in Article 6 of trade between Northern Ireland and Great Britain as 'unfettered'. The high level of regulatory divergence that now exists between one constituent element of the UK and the other three entails that there is an internal market covering Great Britain, which the Act strives to manage, and a quite separate status for Northern Ireland.

Most of the changes wrought by the Protocol concern the separation of Great Britain from Northern Ireland, but the provisions in Article 10, which commit the UK to apply state aid rules in respect of measures which affect the trade between Northern Ireland and the EU which is subject to the Protocol, are much broader in reach, even if, with characteristic evasion, the Protocol does not trouble to spell this out. Article 10 and Annex 5 apply the key instruments of EU law on state aid to the UK 'in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol'. This jurisdictional threshold is plainly inspired by Article 107 TFEU, the key EU Treaty provision on state aid, which subjects to control any aid granted by a Member State which distorts or threatens to distort competition 'in so far as it affects trade between Member States'. Drawing on EU practice, one may confidently predict that it will frequently not be difficult to find aid which affects trade between Northern Ireland and the EU which is subject to the Protocol because once aid is being used in the Northern Ireland market (even if it is mainly being used in Great Britain) it may help the recipient to expand its activities into Ireland (and

beyond) and/or it may deter Irish (or other EU) firms from entering the Northern Ireland market because any competitive advantage they enjoy is eroded by the aid provided by the UK.<sup>6</sup> The grant of aid to a firm based in Northern Ireland active in markets for goods is likely to cross the threshold with ease but so too is the grant of aid to any firm active in markets for goods in the UK which does significant business in Northern Ireland, even if Northern Ireland makes up only a small part of its activities (subject only to a limited exception applicable to the agricultural sector). Such aid is not automatically unlawful but, pursuant to Article 10, it is subject to supervision and it must be compatible with EU law.

The most important point is that Article 10 of the Protocol is not limited to aid granted directly to firms based in Northern Ireland. It is *much* wider than that. Again there is more to it than the Protocol admits.

The separation within the UK internal market is accentuated by the methods of enforcement applicable under the Protocol. Rather than rely on the arbitration-based dispute resolution mechanisms in the EU-UK Withdrawal Agreement EU law will apply to Articles 5 and 7 - 10 of the Protocol (the core market provisions) in the same way that EU law applied generally throughout the period of UK membership of the EU. That entails enforcement through two distinct routes - both through the supervisory jurisdiction conferred on the Commission backed up by the role of the Court of Justice and through enforcement by private parties before national courts relying on (inter alia) the direct effect and primacy of EU law, which extends also to the Protocol, embracing too the preliminary reference procedure and interpretation in conformity with the relevant case law of the Court of Justice. Northern Ireland is tied not only to EU rules but also to EU procedures in a way that Great Britain is not.

The overall effect and purpose of the Protocol is to establish a regulatory and customs border between Northern Ireland, where large chunks of EU law governing goods, customs and VAT apply, and Great Britain, where (state aid aside) none does.

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<sup>6</sup> See: Peretz, G. (2020) 'UK parliamentary scrutiny of the Withdrawal Agreement Joint Committee and application of the Northern Ireland Protocol', *House of Commons European Scrutiny Committee*, <https://committees.parliament.uk/writtenevidence/10162/html/> accessed: 27/04/2021, and Weatherill, S. (2020) 'UK parliamentary scrutiny of the Withdrawal Agreement Joint Committee and application of the Northern Ireland Protocol', *House of Commons European Scrutiny Committee*, <https://committees.parliament.uk/writtenevidence/10163/html/> accessed: 27/04/2021

The Protocol slices open the UK's internal market.

### Why the Protocol does it

Although the Protocol is drafted to obscure the scale of the regulatory divergence that now exists between one constituent element of the UK and the other three, the reality is that the UK internal market is separated into two blocs, Northern Ireland and Great Britain, in the regulation of important matters, most of all in markets for goods and in the application of customs and VAT laws. This entails changes in patterns of trade, because Northern Ireland-made products will be different from products made in Great Britain. Production and supply chains are thereby disrupted. It means too that the border between Northern Ireland and Great Britain as territories with divergent regulatory regimes, though not a formal *international* border, acquires a higher legal, economic and political significance than in the past. The UK has accepted a division within its own internal market.

But the EU has made concessions too. It has - exceptionally - agreed that its de facto external frontier will lie within the territory of a third country, the UK, and that the primary responsibility for its policing will belong with the public authorities of that third country, while also accepting that its own de jure external frontier, between Ireland and Northern Ireland, will remain unpoliced. The EU has also conceded the fragmentation of its own internal market *acquis*. Pursuant to the Protocol, Northern Ireland is to be regulated by some but not all the EU rules governing goods, and not at all by EU rules governing workers or service provision.<sup>7</sup>

Why the need for compromise, why the need for *this* compromise?

All involved in the negotiations on the terms of the UK's withdrawal from the EU agreed that there should be no change to the current soft or invisible border between Ireland and Northern Ireland. The Protocol itself records in its Article 1(3) that there are 'unique circumstances on the island of Ireland'. Sacrificing the soft or invisible border between Ireland and Northern Ireland would by common consent imperil the preservation of peace under the terms set out in the 1998 'Good Friday' or 'Belfast' Agreement. The governments of the UK and Ireland, with the EU and the

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<sup>7</sup> Weatherill, S. (2020) 'The Protocol on Ireland/ Northern Ireland: Protecting the EU's internal market at the expense of the UK's' *European Law Review*, 45: 222

USA in the background, ruled this choice out.

This commitment to keep the border between Ireland and Northern Ireland soft or invisible then allowed just two choices. Either the UK could commit to alignment with the EU's legislative acquis on goods and related matters such as customs law and VAT or the UK could accept such alignment for Northern Ireland alone, thereby achieving regulatory autonomy for Great Britain, while accepting a customs and regulatory border between Great Britain and Northern Ireland. Theresa May chose a version of the former, which was enshrined in the Withdrawal Agreement struck in 2018, but her failure to secure Parliamentary support for that choice cost her her job as Prime Minister in the summer of 2019. Boris Johnson, her replacement, chose the other model. He agreed a deal with the EU with a customs and regulatory border between Great Britain and Northern Ireland pursuant to the Protocol at its heart, won a General Election in December 2019 on the platform of delivery of that deal and secured Parliamentary approval for it in January 2020, paving the way to the UK's withdrawal from the EU at the end of that month on terms including those contained in the Protocol.<sup>8</sup>

### **How the Protocol is being implemented**

Keeping the border between Ireland and Northern Ireland soft or invisible reduces economic costs on the island of Ireland and - far more important - avoids obstacles that could imperil the hard-won peace process. This is a scheme of governance which is unique seen from both the EU and the UK perspectives. It is also a compromise that is proving uncomfortable.

Northern Ireland voted heavily to Remain in the EU in 2016 so a majority of its population were disappointed by the outcome of the referendum, whereas the Protocol, which ties Northern Ireland to important parts of EU law and transforms the Irish Sea into a border with major regulatory and customs significance, has generated plenty of discontent among some (largely Leave-supporting) parts of the population.

Progress was made in late 2020 and early 2021 in smoothing the rough edges of the Protocol, thanks to the decisions of the Joint Committee and the unilateral

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<sup>8</sup> See also McStravick, J. and Hayward, K. and Rutter, J. (2021) 'The Protocol on Ireland/Northern Ireland', *The UK in a Changing Europe*, <https://ukandeu.ac.uk/explainers/the-protocol-on-ireland-northern-ireland/> accessed: 27/04/2021

declarations made by both the EU and the UK.<sup>9</sup> But there is a deeply troubling dimension. The UK, having accepted the Protocol as a compromise, is expected to enforce these rules and respect this border with fidelity. Instead there is a sustained refusal by some members of the UK government to act upon or even to admit the existence of the deal agreed under the Protocol.

The words of the Prime Minister Boris Johnson at a drinks party in Belfast in November 2019 have become notorious. Glass in hand and gesturing erratically, he told local traders asked to complete formalities foreseen by the Protocol to put them in the bin.<sup>10</sup> He has repeatedly denied the reality of the Protocol in Parliament. On 22 October 2019 he said ‘there will be no checks between Great Britain and Northern Ireland’; on 22 January 2020, asked whether a commitment to unfettered access applies to goods moving from Great Britain to Northern Ireland, he replied ‘emphatically it does’; on 8 July 2020 he asserted that ‘Not a sausage, not a jot and not a tittle of the Northern Irish Protocol will provide any such impediment to the unfettered access of goods and services between all parts of the UK’; and on 3 February 2021 he added that ‘the protocol should not place unnecessary barriers - or barriers of any kind - down the Irish sea’.

All of this is entirely inconsistent with the Protocol.

Nor is he alone among members of his government in taking this approach. Brandon Lewis, Secretary of State for Northern Ireland, began January 2021 by declaring ‘There is no Irish Sea border’- even as controls at that very border were being newly applied.<sup>11</sup> Foreign Secretary Dominic Raab chose St Patrick's Day, 17 March 2021, to accuse the EU of ‘trying to erect a barrier down the Irish Sea between Northern Ireland and Great Britain’, which led responsible, and doubtless wearily bemused, Commissioner Maroš Šefčovič to accuse Raab of ‘a total misunderstanding of the deal we have signed’ and a violation of the UK's international obligations.<sup>12</sup> Such

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<sup>9</sup> House of Commons European Scrutiny Committee (2020) ‘Northern Ireland Protocol: Withdrawal Agreement Joint Committee Decisions and declarations of 17 December 2020’,

<https://publications.parliament.uk/pa/cm5801/cmselect/cmeuleg/1343/134302.htm> accessed: 27/04/2021

<sup>10</sup> @ManufacturingNI, Twitter, <https://twitter.com/ManufacturingNI/status/1192801585140768769>

<sup>11</sup> Hughes, B. (2021) ‘NI secretary Brandon Lewis faces backlash for claiming ‘there is no Irish Sea border’ post-Brexit’, *Belfast Live*, <https://www.belfastlive.co.uk/news/belfast-news/ni-secretary-brandon-lewis-faces-19552275> accessed: 27/04/2021

<sup>12</sup> Wintour, P. (2021) ‘Dominic Raab accuses EU of trying to erect Irish Sea border’, *The Guardian*, <https://www.theguardian.com/politics/2021/mar/17/dominic-raab-accuses-eu-of-trying-to-erect-irish-sea-border> accessed: 27/04/2021; Boffey, D. (2021) ‘Dominic Raab ‘totally misunderstands’ Northern Ireland Brexit terms, warns EU’, *The Guardian*, <https://www.theguardian.com/politics/2021/mar/18/dominic-raab-totally->

utterances amount to a concerted and high-level refusal to take responsibility for what the UK government agreed in the Protocol, even though it was central to what Mr Johnson had described as his ‘oven ready’ deal with the EU during his successful General Election campaign in late 2019, which was approved by Parliament with the support of all his MPs in January 2020 and duly given legislative effect in the UK by the European Union (Withdrawal Agreement) Act 2020.

This recalcitrance was taken onto even more dangerous terrain when the UK Internal Market Bill was published in September 2020. This included sections that would have empowered the setting aside by secondary legislation of the detailed obligations undertaken pursuant to the Protocol and which would have directly contradicted the obligation in Article 4 of the Withdrawal Agreement to grant direct effect and supremacy to those provisions. These, to remember with a shudder, were the provisions which the Secretary of State for Northern Ireland Brandon Lewis described in the House of Commons on 8 September 2020 as ‘a very specific and limited’ breach of international law. The government produced an explanation covering just one page, laced with weasel words which sought to emphasise the (entirely accurate) point that Treaty obligations have effect in the UK only in so far as they are transposed into domestic law while concealing the (equally accurate) point that reliance on domestic law may never excuse a violation of a Treaty as a matter of international law.<sup>13</sup> The second reading of the Bill in the House of Commons on 14 September 2020 is a painfully instructive place to go to appreciate the astonishing ignorance of many Conservative MPs of not only international law generally but also of the very terms of the Agreement for which they had all eagerly voted in the House of Commons in January 2020.<sup>14</sup>

The offending clauses do not appear in the finally adopted UK Internal Market Act. They were removed, in part as a result of domestic political anguish and pushback, particularly in the House of Lords, but also as a result of the deal with the EU which the UK concluded in late 2020 which led the UK government to the political conclusion that no value attached to the clauses’ retention. So the UK Internal

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misunderstands-northern-ireland-brexite-terms-warns-eu available: 27/04/2021

<sup>13</sup> UK Government (2021) ‘HMG Legal Position: UKIM Bill and Northern Ireland Protocol’, UK Government, <https://www.gov.uk/government/publications/hmg-legal-position-ukim-bill-and-northern-ireland-protocol> accessed: 27/04/2021

<sup>14</sup> Hansard, Internal Market Bill second reading, vol. 680 col. 41-143, 14/09/2020

Market Act does not violate the obligations undertaken pursuant to the Withdrawal Agreement, and compliance with detailed aspects of the Protocol concerning customs and VAT law is secured by the Taxation (Post-Transition Period) Act 2020, approved in December alongside the Internal Market Act. That one anxiously scans primary legislation and greets with relief an absence of conflict with international law, *in casu* an absence of conflict with an international Treaty concluded by the UK only a few months previously, shows how dismally transformative has been the effect of Brexit on expectations about the conduct of the UK.

Hopes for a new - and compliant - dawn were dashed in March 2021 when the UK government's disregard for the rule of law generally and the scheme of the Protocol it had freely accepted in particular re-emerged. It announced unilateral measures which would set aside application of checks on trade between Northern Ireland and Great Britain to which the UK had committed under the Protocol. The EU responded by announcing it would take legal action against the UK under both the arbitration-based procedures foreseen by the Withdrawal Agreement and directly through the procedures which run in parallel to orthodox EU law foreseen by Article 12 of the Protocol.<sup>15</sup> The UK government's attitude to the Protocol continues to reveal a bewildering combination of hostile political bluster and grudging edging towards compliance. Suggestions of agreement on a 'roadmap' to be agreed in late March were followed by briefed disappointment on the EU side, while violent scenes on the streets of Belfast in April 2021 emphasised the high stakes.

### The fragility of the Protocol

The Protocol is worryingly fragile. In part this is because of its calculatedly evasive drafting. It is an exercise in ambiguity, and, given the sensitivities in play in Northern Ireland, probably that should be celebrated, not criticized, as a means to reduce tensions. The ambiguities all lean in the same direction: they under-state the extent to which the UK's internal market is fractured by the regulatory and customs border the UK has accepted between Northern Ireland and Great Britain. This was probably an attempt to soften the dismay felt on the Unionist side of the

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<sup>15</sup> European Commission (2021) 'Withdrawal Agreement: Commission sends letter of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland' [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_1132](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1132) accessed: 27/04/2021

community in Northern Ireland, and a concession which the EU felt able to make in order to broker a compromise deal, but this in turn then required the UK government to take seriously the obligations it has accepted. This is missing. It seems increasingly and alarmingly plain that the UK government does not take the Protocol seriously.

The Protocol is also fragile because no one chose it. Those - the majority in Northern Ireland - who voted for the UK to remain in the EU do not want it. The EU does not want it. Those who voted for the UK to leave the EU do not want it. But what they would prefer - no Brexit or at least tight EU-UK regulatory alignment for the first two constituencies, a border-free UK internal market for the third - is not politically available. So the Protocol exists as a sullen compromise. The original sin was committed in 2016. At no stage did the Leave campaign in the referendum suggest any remotely realistic plan designed to address the consequences of Brexit for the island of Ireland, and the Protocol is an attempt to make the best of a very bad job. The Protocol cannot heal the wounds caused by Brexit. The question is whether the bandage will hold.

What if it doesn't?

Article 18 of the Protocol, entitled *Democratic Consent in Northern Ireland*, provides for the possibility that political processes in the province may decide to bring Articles 5 - 10 of the Protocol to an end. Section 55 of the UK Internal Market Act makes the necessary arrangements for the falling away of relevant provisions of domestic law, should that decision be taken in Northern Ireland. It is unhelpful to speculate on the pressures and tensions that may emerge as Northern Ireland tries to live with the Protocol, but it is important to appreciate that simply discarding the Protocol does not eliminate the problem to which it is the current answer. The abandonment of the Protocol would break the connection between EU rules and the market in Northern Ireland, but that then requires *either* the UK generally to align with those EU rules *or* it requires the installation of a visible border between Northern Ireland and Ireland. That is an uncomfortable choice, but one that is unavoidable. One may be dissatisfied with the Protocol, but the problems that explain its existence go deeper than the Protocol.

In the background lies another route to changing the current arrangements. The Good Friday - or Belfast - Agreement recognises a process to bring about a united

Ireland, but subjects it to the need to demonstrate the consent of the population of both Northern Ireland and Ireland. One possible consequence of the partial economic integration of Northern Ireland into the EU's customs union and internal market (for goods) could be radical political change on the island of Ireland.

### **Northern Ireland, in conclusion.**

The shape of the Protocol is dictated by concern to keep the border between Ireland and Northern Ireland soft or invisible while also granting Great Britain the regulatory autonomy coveted by Brexiters. But it is an uncomfortable compromise. The Protocol separates the UK's internal market, and it calls into question the durability of consent for the current shape of UK itself.

## SCOTLAND AND WALES

The status of Scotland and Wales played no role in the negotiation of the Withdrawal Agreement to which the Protocol is attached, and so, in contrast to the situation prevailing in Northern Ireland, the implications of the UK's withdrawal from the EU for the allocation of powers within Great Britain fell to be decided exclusively through internal processes. This is precisely the role of the United Kingdom Internal Market Act.

The fractious issue in Northern Ireland is *exclusion* from the UK internal market. For Scotland and Wales it is *inclusion*.

### The tensions caused by the Act in Scotland and Wales

The most politically inflammatory application of the Act will occur when the legislative institutions in Scotland and/ or Wales adopt measures which fall within the scope of the Act and are in violation of the mutual recognition principle. The result is that they will be of no effect in application to imported goods or services arriving from England, unless exceptionally they pass through one of the narrowly drawn windows of justification considered above.

This is not simply the most politically sensitive case study one can feasibly imagine, it is also by far the most likely to arise in practice. The party in power in Scotland is the SNP, while in Wales Labour dominates a coalition. Both are left of centre parties. The UK government is in the grip of the centre-right Conservative Party which has a majority of over 80, and has no need to go to the polls again until 2024. So it is highly plausible that Scotland and Wales will adopt rules which intervene in the market to address failures or inequities which the Westminster government chooses not to address and that in consequence goods and services originating in England will reach the Scottish or Welsh markets where they do not comply with local rules but to which, by reliance on the mutual recognition principle, they will be entitled to gain access. Given that in most sectors of the economy English production capacity far exceeds Scottish and Welsh output, the result will be that the application of the relevant rules to Scottish and Welsh producers would be legally possible but, given the flood of non-compliant imports produced in England or

imported into England from third countries, economically and politically pointless. Or, still worse from the Scottish/Welsh perspective, it may be push such producers to re-locate to England in search of lower costs. The Act is therefore apt to subvert any Scottish or Welsh will to raise standards of market regulation.

For example, one could imagine the Scottish government pursuing a campaign against obesity which involves obligations to label foodstuffs and beverages to make clear their more harmful ingredients and to add warnings about the consequences of consumption for obesity. This would fall within the scope of the Act and it would seem to be subject to the mutual recognition principle. No exception or justification is available for such a general public health measure. So, assuming there are no rules of this type in force in England, the requirements would not apply to non-compliant goods imported from England. Given that most UK production takes place in England, this would rob the Scottish rules of any worthwhile purpose, unless the measure were targeted at a niche product which unusually is not mostly produced in England (Irn-Bru perhaps). Re-framing the rules so that they are manner of sale requirements subject to the non-discrimination principle rather than the mutual recognition principle would be possible, so that for example the obesity campaign could advanced by prohibiting sale of defined fattening items to people under the age of 18. This would, assuming no taint of discrimination, avoid conflict with the Act but would also deprive the scheme of much of its vigour.

The services sector is rich in possibilities too. Were the Welsh Senedd to introduce rules requiring the authorisation of landlords as part of promotion of a social housing policy, then a landlord based in England providing services would, if no such scheme applied in England, be able to ignore it

The friction is caused because the post-Brexit re-distribution of competences previously held at EU level undermines the existing devolution settlement in practice, if not in form. In form Scottish or Welsh measures caught by the mutual recognition principle would be permitted but only in application to locally produced goods and services. Goods and services originating in the economically dominant part of the UK, England, would be excused compliance by virtue of reliance on the relatively aggressive deregulatory model asserted by the market access principles which structure the UK internal market. In practice choosing higher standards would

become a worthless endeavour - regulatory protection would in practice be driven down to the lower level preferred by England. The point, then, is that the flow of competences back from the EU through the UK to the devolved administrations, which Michael Gove hailed as a 'power surge', a claim made in similar terms by the Prime Minister in the second reading of the Bill in the House of Commons in September 2020, is undermined by the statutory regime combined with the economic dominance of England to the point where it becomes a mere illusion.<sup>16</sup>

### The rise and fall of common frameworks

It had been thought there was a solution to the problem of diminished regulatory power in Scotland and Wales - the elaboration of common frameworks. As explained above the Act envisages the adoption of secondary legislation in order to give effect to a common framework agreement struck between central government in London and one or more of the devolved administrations as to how certain matters previously governed by EU law are to be regulated in future. This opens up a route to the adoption of common UK-wide rules which could set aside the deregulatory vigour of the market access principles and instead protect regulatory divergence in the areas subject to a negotiated common framework.

This sounds a great deal more sympathetic to local autonomy within the UK than it is in practice likely to be.

As mentioned above, in October 2017 a meeting of the Joint Ministerial Committee (EU Negotiations), attended by representatives of the UK government and the three devolved administrations, had agreed a set of principles which would guide the negotiations on the approval of common frameworks.<sup>17</sup> Work commenced on identifying areas of EU law that intersect with the devolved competences of the administrations in Scotland, Wales, and Northern Ireland with a view to choosing how, if at all, to address them after Brexit.<sup>18</sup> Detailed elaboration has continued,

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<sup>16</sup> Hansard, Internal Market Bill second reading, vol. 680 col. 41-143, 14/09/2020; Pickard, J. and Dickie, M. (2021) 'Gove defends post-Brexit plan for UK internal market', *Financial Times*, <https://www.ft.com/content/4954e969-098c-4b49-bd1c-86bd7c4edd77> accessed: 27/04/2021

<sup>17</sup> UK Government (2017) 'Joint Ministerial Committee (EU Negotiations) communiqué: 16 October 2017' <https://www.gov.uk/government/publications/joint-ministerial-committee-communiqué-16-october-2017> accessed: 27/04/2021

<sup>18</sup> UK Government, Cabinet Office (2021) 'Policy Paper: frameworks analysis' <https://www.gov.uk/government/publications/frameworks-analysis> accessed: 27/04/2021

especially at civil service level, and periodic reports suggest steady if unglamorous progress in building sector-specific frameworks in line with the October 2017 guidelines.<sup>19</sup>

But the UK government in 2020 moved to downgrade the place of common frameworks.

The White Paper on the UK Internal Market which was published in July 2020 refers to common frameworks as a means to ‘allow a common approach to continue in many areas’.<sup>20</sup> They provide a means to pursue ‘close collaboration with devolved administrations to manage regulation’. But - and of crucial significance - the common frameworks are portrayed as sector-specific and therefore inadequate to ‘guarantee the integrity of the entire internal market’.<sup>21</sup> It is clearly intended that the application of the market access principles is the rule, and common frameworks the exception.

The White Paper was published on 16 July 2020. This was high summer, yet the UK government allowed a period of just four weeks for consultation, failed to provide a draft Bill on which responses could focus, yet intended to have primary legislation in place by the end of 2020.

The White Paper was badly received by the Scottish and Welsh administrations, most of all because the proposed model of mutual recognition with only limited scope to justify measures undermines and diminishes their regulatory autonomy.<sup>22</sup> But worse was to come. The possibility of adjusting the application of the market access principles as a result of agreements struck did not appear in the Bill which was introduced in the House of Commons on 9 September 2020. It did not even mention ‘common frameworks’.

This led to further explosions of anger in London, Edinburgh and Cardiff. In the

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<sup>19</sup> UK Government, Cabinet Office (2021) ‘UK Common Frameworks: UK Government publications relating to the UK Common Frameworks programme’ <https://www.gov.uk/government/collections/uk-common-frameworks> available: 27/04/2021

<sup>20</sup> UK Government, BEIS (2021) ‘UK Internal Market’ [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/901299/uk-internal-market-white-paper-print-ready.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901299/uk-internal-market-white-paper-print-ready.pdf) accessed: 27/04/2021, p. 12, 20, 41-42, 51

<sup>21</sup> Ibid. p.20, 38

<sup>22</sup> Welsh Government, Letter from Jeremy Miles to Alok Sharma 14/08/2020, [https://business.senedd.wales/documents/s103942/Correspondence from the Counsel General 14 August 2020.pdf](https://business.senedd.wales/documents/s103942/Correspondence%20from%20the%20Counsel%20General%2014%20August%202020.pdf) accessed: 27/04/2021; Scottish Parliament, Letter from Bruce Crawford to Alok Sharma 13/08/2021, [https://www.parliament.scot/S5\\_Finance/Reports/FCC\\_Consultation\\_Response\\_to\\_the\\_UK\\_Gov\\_Internal\\_Market\\_White\\_Paper.pdf](https://www.parliament.scot/S5_Finance/Reports/FCC_Consultation_Response_to_the_UK_Gov_Internal_Market_White_Paper.pdf) accessed: 27/04/2021

second reading of the Bill in the House of Commons on 14 September 2020 the exclusion of common frameworks was angrily criticised, especially by SNP and Welsh Labour MPs.<sup>23</sup> The Third Reading, held on 29 September, included fruitless attempts to amend the Bill in order to place common frameworks on a statutory footing.<sup>24</sup>

The Finance and Constitution Committee of the Scottish Parliament criticized the demise of common frameworks and the consequent sharp teeth of the UK market access principles, objecting to the detrimental impact on the scope of powers allocated to Scotland under the devolved settlement. There was more general disquiet about the thin evidence base presented by the UK government in support of the alleged need for placing such an armlock on the practical operation of devolved powers.<sup>25</sup>

The External Affairs and Additional Legislation Committee of the Welsh Senedd published a vigorously written report in November 2020 criticising the subversion of the Senedd's powers, both existing and pertaining to future regulatory action, in a way that prioritized English interests over Welsh.<sup>26</sup> It lamented in particular the Bill's retreat from consensual solutions of the type characterized by common frameworks and protested the absence of any explanation as to why the UK government was no longer content to treat common frameworks as the primary means to secure UK-wide solutions, as had been the understanding since 2017. On the same day the Legislation, Justice and Constitution Committee published a report which expressed similar anxiety about the Bill's tendency to undermine the worth of the regulatory powers allocated to the Senedd, and advocated instead the use of common frameworks as a means to establish a floor of standards and to manage and respect regulatory divergence in the UK.<sup>27</sup>

It is politically useful to both the SNP, as the ruling party in Edinburgh, and the Welsh Labour majority in Cardiff to try to whip up indignation about the practices of a

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<sup>23</sup> Hansard, Internal Market Bill second reading, vol. 680 col. 41-143, 14/09/2020

<sup>24</sup> Hansard, Internal Market Bill third reading, vol.681. col. 183-208, 29/09/2020

<sup>25</sup> Scottish Parliament, Finance and Constitution Committee, 'United Kingdom Internal Market Bill', <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/116034.aspx> accessed: 27/04/2021

<sup>26</sup> Welsh Senedd, External Affairs and Additional Legislation Committee, 'UK Internal Market Bill Legislative Consent November 2020' <https://senedd.wales/laid%20documents/cr-ld13860/cr-ld13860-e.pdf> accessed: 27/04/2021

<sup>27</sup> Welsh Senedd, Legislation, Justice and Constitution Committee, 'The Welsh Government's Legislative Consent Memorandum on the United Kingdom Internal Market Bill' <https://senedd.wales/laid%20documents/cr-ld13861/cr-ld13861-e.pdf> accessed: 27/04/2021

Conservative government in London, but the protests were not simply for show. They carried genuine force. The Bill would have upset the devolution settlement by undermining the effective regulatory autonomy of the Scottish Parliament and the Welsh Senedd, and no attempt had been made to demonstrate why the common frameworks, regarded as the principal way to manage the internal market since the process began in October 2017, had been downgraded in the July 2020 White Paper and then excluded entirely in the September 2020 Bill. And the whole process was blisteringly fast, to the point where consultation practised from London appeared grudging at best, sham at worst.

The Act as finally adopted does include reference to the common frameworks, which, as explained, may be given the force of law by the adoption of secondary legislation, according to a procedure which equips the UK minister with a discretion. So small adjustments were made between the publication of the Bill in September 2020, which had ignored common frameworks, and the entry into force of the Act three months later. The government had moved, as late as the day before the Bill became law, to include common frameworks on the face of the legislation, although in the House of Commons it carefully explained its shift as attributable to the influence of the House of Lords, not that of the Scots or the Welsh.<sup>28</sup> There is room here to shape common frameworks which secure the management of the UK internal market in a way that mediates the tension between the promotion of unrestricted internal trade despite regulatory divergence on the one hand and, on the other, respect for local preference and tolerance of diversity. Common frameworks offer a device to soften the deregulatory cutting edge of the two UK market access principles.

But nothing that has happened so far encourages one to think this optimism is realistic. The UK government only grudgingly included in the Act any recognition of common frameworks, and its commitment is evidently thin. The Act is structured to grant priority to the market access principles, and they are displaced only if the UK government exercises that statutory discretion to pursue the making of secondary legislation under the procedures foreseen in order to give effect to a common framework. Political appetite in London is hard to identify, given the deregulatory

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<sup>28</sup> Hansard, Internal Market Bill consideration of Lords amendments, vol. 686 col. 338-350, 16/12/2020

taste of the UK government directed at internal practice and also its eagerness to be able to offer access on as unrestricted terms as possible to the entire UK market as an inducement to third countries interested in concluding trade deals (a matter reserved to the UK government).

This is why the devolved administrations in Scotland and Wales refused to grant legislative consent to the Bill.<sup>29</sup> They do not, however, possess a veto. The relevant government minister, duly notified of this withholding of consent, confirmed in London on 17 December 2020 that the UK government would nevertheless proceed. The Act therefore received royal assent that day. It provides that it is not open to the devolved administrations to legislate in a way that sets aside the UK Internal Market Act. The scene is now set for friction as the UK internal market sours Scottish and Welsh appetite for regulatory innovation.

### Scotland and Wales, in conclusion

The process was rushed. The devolved administrations were given little notice of the brutal model proposed by the UK government and given a compressed timeframe within which to object. And on substance the protests they raised were dismissed, save only for the weak and fundamentally subordinate role ultimately allowed for common frameworks under the Act. Anyone charged with devising a strategy apt to communicate to Scots and Welsh that participation in the UK demands the subversion of the regulatory independence that they might imagine their Parliament and Senedd enjoys would greet both the process and substance of the UK Internal Market Act with unconditional glee. The Act feeds a narrative of the UK as an *involuntary* Union. The case for independence is simply made: only by breaking free of the UK will regulatory choices made in Edinburgh and in Cardiff truly be respected and truly operate effectively.

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<sup>29</sup> Scottish Parliament, 'United Kingdom Internal Market Bill' 7/10/2020 col. 66-96; Welsh Senedd, 'Legislative Consent Motion on the United Kingdom Internal Market Bill' col. 251-295

## THE INSTABILITY OF THE UK'S INTERNAL MARKET (AND OF THE UK ITSELF)

There are a great many more factors propelling discontent with the United Kingdom than the United Kingdom Internal Market Act, but the Act, both in its content and the manner of its drafting and adoption, fits and feeds a narrative of the UK as an *involuntary* Union held together only by the force of laws imposed by English votes with little regard for the aspirations of Scotland, Wales or Northern Ireland.

The White Paper of July 2020 depicts the UK internal market as wonderful for all four constituent elements.<sup>30</sup> But, from the Scottish and Welsh perspectives, it is not wonderful enough to permit their autonomous regulatory preferences any operationally useful respect. The chosen model for the UK internal market is relatively intolerant of diversity in choice of regulatory values among the constituent elements of the UK. It offers relatively thin scope for justification of measures which restrict intra-UK trade and there is a deliberate avoidance of commitment to pursue common frameworks. Given England's economic dominance, the Act stands for the imposition of a deregulatory framework on the UK internal market which rejects co-operative engagement with the devolved administrations in Scotland and Wales. 'Do it the English way!' is the message of the UK Internal Market Act - as it was in the verdict of the 2016 referendum. The Act has exploited the freedom of choice consequent on Brexit in a way which risks increasing disenchantment with the political appeal of the UK itself. The decision of the UK government in April 2021 to refer questions about whether parts of two Bills fall within the scope of the Scottish Parliament's powers conveys the same impression. Whatever the merits of the argument, it combines with the UK Internal Market Act in building a narrative that London is sensitive to the protection of the devolution settlement only where it may be the loser. It is hard to detect any sense of co-operative will in London's management of this Union.

The only aspect of Brexit which involved acceptance of compromise, the Protocol on Ireland/ Northern Ireland, is in severe danger of failing to achieve its ends because it too fails to suit an agenda driven exclusively by the aspirations of

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<sup>30</sup> UK Government, BEIS (2021) 'UK Internal Market'  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/901299/uk-internal-market-white-paper-print-ready.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901299/uk-internal-market-white-paper-print-ready.pdf) accessed: 27/04/2021 p. 12, 18, 28-29

London's Brexiters. Northern Ireland, excluded rather than included in the UK internal market after voting heavily against Brexit, is in an entirely different legal position from Scotland and Wales, yet here too the message is that London will make its choices on its own self-centred terms, even if, as was clear in 2020 and re-asserted in 2021, that entails refusing to abide by the rules of an agreed international Treaty.

The Internal Market Act's entry into force in December 2020 is far from the end of the story. In March 2021 the Scottish government published a paper repeating its complaint that London has used Brexit to shift the balance of power away from the previously agreed devolution settlement, fixing with the support of detailed examples on the Internal Market Act as a source of particular and doubtless continuing grievance.<sup>31</sup> The Welsh Senedd has announced an intention to initiate litigation designed to show the capacity of the Act unlawfully to curtail its powers. In Northern Ireland litigation has been initiated complaining that the Protocol, as a source of separation within the UK, is unlawful, and wider political dissatisfaction is rife.

This is an unstable United Kingdom.

It follows from the understanding that an internal market is not a fixed immutable concept that alternative models exist, and that the UK's could be changed in future. More generous scope for justification could be granted. This would yield wider space for the practical operation of the regulatory autonomy of the devolved administrations. A strengthened commitment to common frameworks, including a reversal of the presumption so that the market access principles bite only once it has been decided that a common framework is not required, would inject a different and more co-operative dynamic.

This would deliver a UK internal market more sensitive to autonomy and diversity. But this is not what London wants.

Few are satisfied, let alone happy, with the United Kingdom Internal Market Act. The same is true of the Protocol. Tensions and dissatisfactions previously tamed by the calming effect of EU membership have been let loose. Economically and

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<sup>31</sup> Scottish Government (2021) 'After Brexit: The UK Internal Market Act and devolution' <https://www.gov.scot/publications/brexit-uk-internal-market-act-devolution> accessed: 27/04/2021

politically the United Kingdom feels less united than it has for a long time. If voters in the smaller constituent elements of the UK find they are consistently denied a voice in the re-design of the UK after the UK's withdrawal from the EU, the appeal of exit will increase.

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