Scottish Parliament Constitution, Europe, External Affairs and Culture Committee

Review of the United Kingdom Internal Market Act

Problems with the United Kingdom Internal Market Act (UKIMA)

The operation of the United Kingdom Internal Market Act 2020 (UKIMA) poses four major, inter-related, and mutually compounding, problems in its intersection with the UK's devolution arrangements:

1. *An unsatisfactory intersection with devolved competence*. In contrast with the EU internal market rules which they replaced, UKIMA's market access principles technically have no effect on devolved competence. The *validity* of devolved legislation (primary or secondary) is not affected by the market access principles. However, these may (depending on a range of contextual factors) have very serious implications for the *effective operation* of devolved legislation, such as to significantly constrain the scope of devolved law-making competence in practice.

   This is not merely a conceptual point. Because the market access principles do not affect the validity of devolved legislation, they are not subject to the same pre-enactment scrutiny and testing that applies to formal constraints on devolved competence under the Scotland Act 1998. This means that there may be significant uncertainty at the point that legislation is being debated and enacted as to whether and how, precisely, it is affected by the market access principles. Governments *may* seek advice from the Office of the Internal Market (OIM) (UKIMA, s.34) regarding the effect of proposed regulations on intra-UK trade, but so far this provision has only been used once (in relation to a proposed ban on the sale of horticultural peat in England).

2. *Asymmetry*. Although formally applicable to legislation passed by all four of the UK's governments and legislatures, the devolved governments and legislatures are significantly more constrained by the market access principles than the UK Government and Parliament when legislating for England. This is partly because of the inherent asymmetry of market size in the different parts of the UK. It is also partly because of the operation of parliamentary sovereignty, which means that the UK Parliament can override the market access principles in order to protect regulatory choices for England, in a way that the devolved legislatures cannot (because UKIMA is a protected/entrenched statute under the devolution statutes). And it is partly because UKIMA itself places the UK Government in a privileged position compared with the devolved governments, for instance in the exercise of secondary legislative powers to amend the list of exclusions in Schs 1 and 2 from the scope of the market access principles in relation to goods and services respectively. In the exclusions process, while the consent of the devolved governments has to be *sought* before the Schedules can be amended, only the UK Government is in the position of a veto player – i.e., amendments cannot be made unless the UK Government wishes to do so, whereas it may proceed in the absence of consent from any or all of the devolved administrations.

3. *An unsatisfactory balance between market access and regulatory divergence*. UKIMA as enacted gave significant priority to the principle of market access over protecting the ability to regulate local markets in accordance with local democratic choices. Exclusions from the market access principles for goods in particular are notoriously narrow, although

these can be extended by amending Schedule 1. Only in the case of the indirect discrimination principle is there any explicit ability to balance market access against competing aims, but again legitimate aims are defined extremely narrowly (ss. 8 and 21). At times the priority given to market access has approached the absurd, as with the last UK Government's refusal to grant an exclusion for the ban on the *supply* of rodent glue traps in Scotland,[1] notwithstanding a lawful ban on their *use*.

The heavy reliance on the exclusions process to regulate the balance between market access and regulatory divergence has a number of adverse consequences:

a. It means that the balance between market access and regulatory divergence is dealt with on an all or nothing basis – i.e., market sectors are either subject to the market access principles or they are not – rather than on a more nuanced, case-by-case basis. This may in itself encourage the narrow approach to granting exclusions that we have seen so far in practice.

b. Because of the position of the UK Government as a veto player in the exclusions process, it exposes devolved law makers to political control by UK ministers in areas of devolved policy competence. It may be unpredictable as to how the exclusions process will be used, and there is scope for abuse of power with very little opportunity for legal challenge. This has been, and is likely to continue to be, a source of considerable political tension between the UK and devolved governments.

c. It encourages decisions to be made on a UK-wide (or GB-wide) basis, so as to avoid the operation of the market access principles. While collaborative approaches to policy making may be desirable where they are voluntary, compelled collaboration is incompatible with devolved legislative autonomy. Collaborative law-making also undermine the ability of the devolved legislatures to effectively scrutinise decisions taken in inter-governmental forums and implemented by UK-wide or parallel legislation and reduces the ability of devolution to act as a policy laboratory.

4. *Uncertainty*. UKIMA has added significant uncertainty to the devolved law-making process. This comprises *legal* uncertainty, regarding the meaning of the market access principles, which have not yet been tested in court; *factual* uncertainty, regarding the practical impact of the market access principles in any particular regulatory context; and *political* uncertainty, regarding the operation of the exclusions process, particularly as it intersects with agreements on policy divergence reached via the Common Frameworks process.

   Uncertainty has adverse consequences not only for law makers, but also for policy stakeholders, who may find it difficult to predict and therefore assess the consequences of regulatory proposals, and for businesses themselves. Indeed, while OIM evidence suggests that businesses are reluctant to rely on the market access principles,[2] the

[1] Wildlife Management and Muirburn (Scotland) Act 2024, s.2.
[2] Annual report on the operation of the UK internal market 2023 to 2024 - GOV.UK.

litigation that Biffa Waste Management is pursuing against the Scottish Government arising out of the postponement of the Deposit Return Scheme demonstrates that they may be significantly adversely affected by political uncertainty in relation to the exclusions process.

Potential Reforms

Given that the UKIMA Review has ruled out repeal of UKIMA or any part of it, not all of these problems can be addressed. This applies in particular to problem 1 and elements of problem 2. However, other problems can be addressed, or at least mitigated. Approaches to reform could involve non-statutory mechanisms to improve the operation of decision-making around the Act; use of delegated legislative powers under the Act; or primary legislation to amend aspects of UKIMA. It is not clear what types or scale of reform the UK Government may be willing to contemplate. In my view, however, **the most important objective of reform should be to reduce the role of political discretion in the operation of the Act**, thereby reducing asymmetry as between the UK and devolved governments, providing a more satisfactory approach to the balance between market access and regulatory divergence, and reducing uncertainty around the effect of UKIMA on devolved law-making.

The following reform options might be considered:

1. *Improve the process for seeking UKIMA exclusions.* A procedure for seeking UKIMA exclusions was agreed under the Common Frameworks process.[3] However, there remains considerable uncertainty around the operation of that process, particularly around the timing of when exclusion requests should be made. A relatively minimal reform would be for the four governments to agree a new, more detailed exclusions process. More ambitious reforms in this space might include a role for stakeholder consultation and scrutiny by the UK and devolved legislatures before exclusions are agreed. Nevertheless, non-statutory reform would not address the underlying legal asymmetry in the exemptions process. Nor is there any guarantee that the process would be followed in practice, and it seems unlikely that it would give rise to grounds for judicial review if not.[4]

   Statutory reform of the exclusions process would be more difficult to achieve, but could be more satisfactory. For instance, UKIMA could be amended to create a formal process for requesting exclusions, subject to the agreement of all four governments, with a duty on UK ministers to lay amending regulations if agreement is reached, and duties to give reasons for failure to agree. A super-affirmative approach might be adopted for amending regulations, including consultation obligations and laying of regulations before all four legislatures in draft before approval. A more formal exclusions process would, however, be more cumbersome and time consuming to operate, opening up the potential for exclusion decisions to be challenged via judicial review. Given the general preference for non-statutory intergovernmental processes, there may be resistance to formalisation of the exclusions process.

2. *Expand UKIMA exclusions.* Regulation making powers under ss. 10 and 18 of UKIMA could be used to expand the range of exemptions from the market access principles in

[3] Process for considering UK Internal Market Act exclusions in Common Framework areas - GOV.UK.
[4] See *Scottish Ministers v Advocate General for Scotland* [2023] CSOH 89.

Schedules 1 and 2, thus reducing the need for *ad hoc* exemptions. This would significantly tilt the balance of the Act away from market access and in favour of regulatory divergence, thus reducing the constraints on devolved law makers and reducing their exposure to political control by UK ministers.

However, there are significant objections to this approach. First, a blanket approach to exclusions would arguably still fail to strike a satisfactory balance between market access and regulatory divergence. Secondly, unless accompanied by other reforms to the exclusions process, there would be nothing to stop the list of exclusions being narrowed again in future.[5]

3. *Subject the market access principles to tests of proportionality and subsidiarity*. A more fundamental reform of UKIMA, requiring primary legislation, would be to subject the application of the market access principles in any particular case to principles of proportionality and subsidiarity, thus returning to something more like the position under the EU internal market rules where the preservation of free trade is balanced against competing regulatory objectives on a case-by-case basis.[6] A proportionality principle would mean that benefits of any particular regulation would have to outweigh any adverse impacts on internal trade, while a subsidiarity principle would place the burden of proof on those seeking to challenge the application of divergent devolved regulations.[7]

   As under EU law, the courts rather than the UK Government would become the final arbiters of where the balance is to be struck between market access and regulatory divergence. This would have the benefits both of depoliticising disputes and – over time – fostering greater clarity over the meaning and application of the market access rules. A potential objection would be that this approach might increase costs to businesses, as the market access rules would no longer apply by default. However, as noted, this would be a return to the position under EU membership rather than an entirely new approach.

4. *Improve processes for considering the effects of UKIMA on proposed legislation*. A final reform option that the Committee may want to consider irrespective of the outcome of the UKIMA Review is to seek improvements in the Scottish Parliament's own processes for considering the potential effect of the market access principles when considering proposals for primary or secondary legislation. One possibility would be to require explanatory notes or impact assessments to expressly address the potential impact of the market access principles and what steps are being taken (where necessary) to secure UKIMA exclusions. Standing Orders might also place a "UKIMA reserve" on the approval of Bills or secondary legislation where significant concerns remain. In addition, the Committee may wish to encourage ministers to make greater use of the possibility of seeking advice from the OIM on the market impact of regulatory proposals.

Aileen McHarg
Professor of Public *Law and Human Rights, Durham University*
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[5] See, e.g., The United Kingdom Internal Market Act 2020 (Services Exclusions) Regulations 2023, SI 2023/1263.
[6] See, e.g., *Scotch Whisky Association v Lord Advocate* [2017] UKSC 79.
[7] See C Brown Swan *et al*, *Westminster Rules? The United Kingdom Internal Market Act and Devolution* (2024), pp 45-7 REPORT: Westminster Rules? The United Kingdom Internal Market Act and Devolution.