REVIEW OF THE UK INTERNAL MARKET ACT

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Written Evidence

The benefits and challenges of the UK Internal Market Act 2020

Benefits:

The UK Internal Market Act (UKIMA) provides a framework for products and services lawfully made or imported into one part of the UK to be able to be sold in any other part. Particular beneficiaries therefore include businesses operating across the UK, including those located outside the UK, who should have a degree of certainty about their access to the whole of the UK market.

Challenges:

UKIMA is a solution to the challenges of market management that is inherently antagonistic to devolution. The legislation was made at pace, and without the buy-in of all constituent parts of the UK. The collaborative, shared governance approach offered by Common Frameworks was not given opportunity to effectively develop and bed-in before it was overtaken by the imposition of the top-down discipline of the UKIMA. A number of key elements were not properly worked out at the time the legislation was made, and these first five years of its operation have seen ongoing attempts to find solutions to challenges raised by the legislation.

These include determining the relationship between UKIMA and the common frameworks process (the latter now presented as 'the most important tool for the UK government and devolved governments to find shared approaches or agree how to manage where one or more parties wish to take a different approach'[1]), and defining a process for granting exclusions from the scope of operation of the market access principles.

The devolved Parliaments and Governments especially have been confronted with the challenge of factoring the reach of UKIMA into their policy processes. As a result of the mutual recognition principle, legislation made in any of the devolved parts of the UK will potentially have effect only for locally produced or imported goods and services. The cost and benefits of legislating under these conditions will now need consideration. The implications of legislating 'only' for England are less problematic, given the relative size of that market, and the ability to use Westminster legislation to displace the operation of the MAPs, an option not open to the devolved legislatures.

Procedurally, challenges arise in the opportunity for scrutiny of measures which are made in London, within the scope of devolved competence, and which will have

[1] UK Government, UKIMA Review, para 11

indirect impact on the local market through the operation of the MAPS. The usual legislative consent mechanism would appear not to operate in these circumstances.

These substantive and procedural challenges affect the ability of the devolved legislatures to exercise their democratic mandate. UKIMA, it should be recalled, operates across areas of devolved competence, beyond the core market related policy areas which are otherwise reserved to Westminster and the UK Government. Whilst the precursor to UKIMA, EU internal market law, adopted a progressively expansive concept of areas falling within the scope of the EU internal market provisions,[2] it did so with a correspondingly expansive set of grounds of justification allowing local laws to operate over all products and services present within their jurisdiction.[3] It also operated in an open and transparent manner, with proposed measures being notified to the European Commission in advance of their introduction, and a standstill period operate during which any market inhibiting impacts are determined, with other states and stakeholders able to make representations.[4]

The current review should therefore seek to mitigate as many of the challenges posed by the legislation as possible, to enable the benefits to be appropriately maintained. Specifically it is submitted that:

1. **The preference for UK wide alignment should be rebalanced to permit greater local regulatory innovations in line with devolved competence**

It would certainly appear that the UKIMA regime has had a chilling effect, constraining local regulatory innovations, with policies not being advanced due to uncertainty over whether exclusions from the scope of the Act would be granted. Governments and legislatures are now operating the shadow of UKIMA, and without any guarantee that their regulations will be excluded from the scope of the Act. The risks this presents might lead to a more shared, collaborative approach to policy making (eg as seen on issues such as tobacco and vaping regulation), however, there is evidence too of a lowest common denominator drag on regulatory measures approached collaboratively (eg Wales' frustration with a GB wide approach in favour of a more demanding Deposit Return System, in keeping with its more advanced starting point in recycling).

The UK Internal Market Act places the goal of freedom of movement for economic operators and the integrity of the UKs internal market above all else. The market

[2] Expanding to include not just measures which discriminate, directly or indirectly, against products and services from other states, but also those which otherwise hinder market access.

[3] The list of treaty based exceptions being expanded to include a wider, open, public policy justification, subject to the proportionality principle (be appropriate to achieve relevant policy aims, and go no further than is necessary than to achieve those aims).

[4] Under Directive 2015/1535, of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification) (Text with EEA relevance)
OJ L 241, 17.9.2015, p. 1–15

access principles are cast in much more absolute terms than seen in any corresponding market legislation. The grounds for justification under UKIMA are more narrowly drawn than those provided for under the previous EU system. This is all the more remarkable given that the EU's very foundational purpose is to create a common, internal market. In such a system, the general constitutional priority of free movement rights over other interests (albeit one that can be overturned for good cause) may be viewed as conceptually coherent. UKIMA suggests an attempt to translate the same constitutional priority to free movement and a unified market into the UK – though this has not been done with the agreement of all participants to that union. The prioritising of a unified, uniform UK wide market pays insufficient notice to the commitments to devolution, and carries over only a partial account of the EU system. It does not bring with it the commitment to subsidiarity or recognition of the wider grounds for justification apparent in that system. The review of the legislation should permit a considered review of the balance between the commitment to devolution and subsidiarity, and the commitment to an internal, unified market.

2. The exclusions contained in the Act should be revised

At present, the Act provides a very limited set of defined grounds that can be relied on to exclude new legislation from the effects of the mutual recognition principle. A wider set of grounds is available for indirectly discriminatory measures ('legitimate aims' of local measures cover the protection of the life of humans, animals, or plants, the protection of public safety or security'), though it is of course an open question how broadly these terms can be interpreted (eg it is unlikely that 'protection of animal life' might extend to issues of animal welfare. A broader 'health, life or wellbeing' may be necessary to achieve that). At the very least, the same set of grounds applying to indirectly discriminatory measures should be confirmed as applying to the mutual recognition principle. Conceptually, under EU internal market law, the introduction of the market access principle of mutual recognition in *Cassis de Dijon* was seen as a broadening out of the reach of EU rules into national regulatory choices, beyond directly and indirectly discriminatory measures. With this extension in reach, came an extension in the grounds potentially available to justify local laws.

Under EU law, the consideration of whether something is compatible with the internal market rules can operate both ex ante, through the notification procedure of proposed measures to an independent third party (see further below), or ex post, through the involvement of the Commission, and administrative market initiatives such as SOLVIT, and ultimately through judicial consideration.

The choice in UKIMA was to introduce very limited specific grounds to justify local measures in the legislation, but allow for further exclusions to be added, under the control of the UK government. This is provided for goods in section 10, and for services in section 18. Effectively, this could be seen as corresponding with the general 'public interest justification' operating in respect of non-discriminatory measures in EU law. However, experience to date of the UK system is of a piecemeal, ad hoc, highly politicised approach, controlled by UK government, and without clearly articulated guiding principles.

3. **There should be more robust requirements to share proposed legislation within the scope of the legislation, operated through an independent third party, building in the exclusions process ex ante**

Currently, the UK Government, acting for Northern Ireland, is required to notify the European Commission of new regulatory standards affecting goods and some services, proposed for NI.[5] This is as a result of the EU's Technical Regulations Directive, which requires draft legislation (including secondary legislation and wider administrative action) that has the potential to create new barriers to trade to be shared, through the Commission, with other Member States and stakeholders. The draft legislation is then subject to a standstill of at least 3 months[6] before it can be adopted. During that time, the Commission, and other Member States and others could raise concerns about the measure creating a possible barrier to trade. If no evidenced market concerns are identified, the legislation can be adopted at the end of the stand still period.

Consideration should be given to reintroducing a variation of this notification requirement for the participants in the UK's internal market, and giving it a statutory footing in the legislation. The advance notification could ensure appropriate and effective scrutiny of proposed measures, as well as providing for an ex ante operation of the Sections 10 and 18 exclusions process, which could operate though the independent Office for the Internal Market. The OIM would need to factor in other matters than purely economic, which is its current focus. Should an exclusion not be granted, this would not preclude the adoption of the legislation, but will affect its applicability under the mutual recognition principle.

Formalising intergovernmental communications and cooperation in this way is of particular importance to carry forward the system in times where more informal arrangements are not operating effectively. Certainly (intergovernmental) sharing of proposed legislation would be expected to take place under the relevant common frameworks, this requirement could overlay their operation and capture proposals which are outside any extant framework (eg Gene Editing legislation).

Jo Hunt, Cardiff, March 2025.

[5] See eg notification of the text of the Deposit Scheme for Drinks containers (England and Northern Ireland) Regulations 2024, 2024/7004/XI (UK/Northern Ireland), Notification Detail | TRIS - European Commission.

[6] Extendable to 6 months in cases of detailed concerns being raised.