Yearbook of European Law, Vol. 40, No. 1 (2021), pp. 431–474
doi:10.1093/yel/yeab008
Advance Access published 25 October 2021

Comparative Internal Market Law: The UK and the EU

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Abstract: The United Kingdom Internal Market Act 2020 introduces a new field of enquiry for scholars. It allows reflection on the model of an internal market chosen by the United Kingdom to regulate relations between its four constituent elements now that, after Brexit, the authority of the EU's common rules has come to an end. It allows comparison and contrasts between the UK's chosen model and the longer established patterns of the EU internal market. It is an invitation to develop a comparative study of the law of internal markets.

The overall structure of the UK internal market envisaged by the 2020 Act is readily compared to that which exists in the EU, but there are also points of contrast. The most significant is that the UK model is *less* tolerant of regulatory diversity among its constituent elements than applies under EU free movement law. The scope to justify rules that obstruct trade within the UK is less generous than in the EU, with the consequence that the UK's internal market has a more deregulatory flavour than the EU's. This model of limited availability to protect local regulatory autonomy over unrestricted intra-UK trade pays little regard to sensitivities in Scotland and Wales, while the position of Northern Ireland, locked into the Protocol attached to the EU–UK Withdrawal Agreement, is different but also fragile. Internal markets possess economic motivations and they are built on legal rules, but they involve political choices and they have political implications. The UK Internal Market Act presents challenges to the stability of the United Kingdom itself.

Accordingly the ambition of this paper is to explain the shape of the UK internal market and to compare and contrast it with the EU's internal market. It also aims to demonstrate the political sensitivity of the choices that need to be made in designing an internal market against the background competing tensions of unhindered market access, on the one hand, and, on the other, respect for the regulatory autonomy enjoyed by the constituent units.

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I. The concept of an internal market

Internal markets come in different shapes and sizes. They are distinguished by choices about the extent to which the constituent units are permitted to pursue different regulatory policies. They differ according to the scope of lawmaking competence and powers allocated to the central authority. They differ according to the governing institutional arrangements, which typically include dispute resolution, perhaps but not necessarily involving courts, or political processes, perhaps but not necessarily involving legislative activity—or both. The quality and intensity of the regulated environment differs according to the choices made. There is a broad band of possible internal markets, ranging from one which is radically decentralized as a result of a choice in favour of unrestricted interjurisdictional competition to, at the other extreme, one which is radically centralized in the sense that lawmaking competence has been completely stripped away from the constituent units in favour of the central authority. Within that spectrum there is a huge range of options which are politically, economically, and constitutionally distinct.

The EU is committed to its internal market. Article 3(3) TEU declares that the Union 'shall establish an internal market'. It is defined by Article 26 TFEU as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'. This reflects the aspiration to convert markets historically fragmented along national lines into a single economic space spanning the entire territory of the EU. Article 26's formula is elegant but at the same time ambiguous. It reveals nothing about the intended relationship between EU-level market regulation, on the one hand, and, on the other, market deregulation promoted by the subjection of national regulatory choices to the discipline of the free movement rules. The shaping of the EU internal market has therefore been heavily influenced by the choices made by the Court, asked to interpret the sparsely written Treaty provisions on free movement.

The entry into force of the United Kingdom Internal Market Act in December 2020 means that the UK too is committed to its internal market. The concept of a UK internal market is novel. No doubt it has long been assumed that it exists in some form, but it 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 centralized 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 has 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 States 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.

It is therefore a post-Brexit problem. The EU's internal market reflects the aspiration to convert markets historically fragmented along national lines into a single economic space. The UK Internal Market Act 2020 comes from exactly the opposite direction. The Act reflects the aspiration to prevent a historically unified market from becoming fragmented according to different regulatory choices made within the UK post-Brexit, to the detriment of a single economic space spanning the entire territory of the UK.

The 2020 Act does not provide a broad definition of the internal market envisaged, nor does it contain anything as elegantly simple as the EU Treaty's short provisions on free movement and competition. Instead, in three distinct and laboriously written Parts, the Act addresses markets for goods, for services, and for qualified professionals, and it seeks to promote the functioning of the United Kingdom's internal market by establishing the United Kingdom *market access principles*. It is plainly motivated by a concern to provide statutorily defined answers and to reduce the scope for judicial creativity. And, as will be explained, it envisages a more deregulatory model in the UK than is to be found in the EU.

How similar is the UK internal market to the EU internal market? That is the question which this paper addresses, against the background understanding that there is no fixed concept of an internal market. Managing regulatory diversity in a system committed to achieving trade integration will always raise similar structural *questions*, but the chosen *answers* may differ. The paper proceeds step-by-step to examine the building blocks of an internal market in order to expose the comparisons and contracts between the UK's choices and those preferred by the EU. This covers market access (Section III), exceptions and justification (Section IV), common frameworks (Section V) and enforcement (Section VI). In each case the discussion begins with the UK, since it offers the newer and less familiar model, and then reflects comparatively on the EU experience. The paper uses this account as a basis on which to explain why different approaches have been chosen, and what impact this has on the preferred model of an internal market. It is in the matter of justification especially that there are differences, and the result is that the UK internal market is more deregulatory than the EU's. Otherwise put, the UK model is less respectful of the virtue of local autonomy in so far as it may impede trade within the internal market.

In short, internal markets differ (Section VII). The paper concludes with reflections on future possibilities. It maintains a thematic insistence on the

intimate relationship between legal, economic, and political choices. It is unavoidably gloomy in its depiction of the road travelled so far, which is marked by the UK government's stubborn refusal to admit the salience of the EU dimension. However, there is room to re-shape the UK internal market in future and, whatever happens, the intellectual interest in comparative study of internal market law will continue to beckon.

II. A note on geography: the United Kingdom of Great Britain and Northern Ireland

A geographical reservation is required. The full name of the state known as the United Kingdom is the United Kingdom of Great Britain and Northern Ireland. The tensions to be explored in this paper predominantly concern the relationship between England, Scotland, and Wales—that is, Great Britain. The position of Northern Ireland is different. Northern Ireland is the fourth of the UK's four constituent elements. It is the only one which does not form part of Great Britain, it is the only one with a land border with another state, Ireland, and it is also the only one which is the subject of an international agreement between the UK and another country, Ireland: the 'Good Friday' or 'Belfast' Agreement, agreed in 1998. This acknowledges that the majority of the population of Northern Ireland wishes to remain part of the UK but also that a substantial minority of that population wish instead for a single state on the island of Ireland, and it puts in place a process, underpinned by institutional support, within which to manage these tensions peacefully.

This unique status is recognized by the arrangements agreed under the Protocol on Ireland/Northern Ireland 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. The UK Internal Market Act's market access principles govern trade in services between all four parts of the UK, but although they also apply to the movement of goods covered by the Protocol from Northern Ireland to Great Britain, they do not apply to the movement of goods covered by the Protocol from Great Britain to Northern Ireland. This is because the Protocol requires that a substantial body of EU internal market rules covering the regulation of goods and other associated matters including customs and VAT law and state aid shall be applied by the UK in Northern Ireland,[1] backed by an enforcement regime modelled closely on that applicable within the EU rather than the arbitration-based process found in the Withdrawal Agreement

[1] Arts 5, 7–10 Protocol, spelled out in several Annexes. On the detail see C McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge: Cambridge University Press, 2021). See also S Weatherill, 'The Protocol on Ireland/Northern Ireland: Protecting the EU's internal market at the expense of the UK's' (2020) 45 *ELR*, 222.

generally[2] and insisting too on interpretation in conformity with the relevant case law of the Court of Justice.[3]

Therefore, since the regulation of goods in Northern Ireland is different from the regulation of goods in Great Britain, the Act's market access principles are inapplicable to goods moving from Great Britain across the Irish Sea to Northern Ireland.

This means that, 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 European Union (Withdrawal Agreement) Act 2020, which carried over the Withdrawal Agreement into domestic law in the UK, as the place to go to understand the regulation of goods in Northern Ireland. Part 5 of the Internal Market Act, comprising sections 46–49, is entitled *Northern Ireland Protocol* and takes as its sub-title *Northern Ireland's place in the UK internal market and customs territory*. 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. And those obligations insist on a partition in the UK's internal market between Great Britain and Northern Ireland. In order to ensure that the land border between Ireland and Northern Ireland shall remain 'soft' or invisible, unchanged despite its new post-Brexit status as the external frontier of the EU, the Protocol entails the creation of a new regulatory and customs border between Great Britain (that is, England, Scotland, and Wales) and Northern Ireland—that is, *within* the UK. That new border in turn becomes the de facto external frontier of the EU, albeit that it is located in the territory of a third country.[4] The Protocol itself records that there are 'unique circumstances on the island of Ireland'.[5]

For current purposes it is simply noted that the very title *United Kingdom Internal Market Act 2020* exaggerates the scale of the economic project. The Act covers services and trade in goods from Northern Ireland to Great Britain, but trade in goods from Great Britain to Northern Ireland looks much more like

[2] Art. 12 Protocol.

[3] Art. 13 Protocol.

[4] Little attention has been paid to whether this is compatible with EU law: arguing (I think correctly) that it is, provided that the GB/NI border is properly policed, see P Schäper, 'Kontrollen des grenzüberschreitenden Wirtschaftsverkehrs an den EU-Aussengrenzen im Lichte des Brexit—Rechtsrahmen und Gestaltungsspielräume' (2020) 55 *Europarecht*, 165.

[5] Art. 1(3) Protocol. On Brexit's collision with the historical background, see K Hayward, P Leary, and M Komarova, 'The Irish border as sign and source of British-Irish tensions' in N Ribas-Mateos and T Dunn (eds), *Handbook on Human Security, Borders and Migration* (Cheltenham: Elgar Publishing, 2021); also P Teague, 'Brexit, the Belfast Agreement and Northern Ireland: Imperilling a Fragile Political Bargain' (2019) 90 *The Political Quarterly*, 690. On the sensitivities of the Protocol itself see K Hayward, 'Flexible and Imaginative: The EU's Accommodation of Northern Ireland in the UK–EU Withdrawal Agreement' (2021) 58 *International Studies*, 201 and on the deliberate ambiguity of the Protocol see S Weatherill, 'The Protocol on Ireland/Northern Ireland: What it says is not what it does', Blogpost on EU Law Analysis, 17 March 2020, http://eulawanalysis.blogspot.com/2020/03/.

trade in goods from Great Britain to France than trade in goods within Great Britain. The statute would accordingly be more accurately entitled the *Great Britain Internal Market Act (with some additional application to Northern Ireland)*.

III. Promoting market access in an internal market

The UK Act establishes two *market access principles*. They are a mutual recognition principle and a non-discrimination principle. They are designed to prevent the fragmentation of the UK's internal market. In the EU neither the Treaties nor secondary legislation make any such explicit provision. However, the Court of Justice has over time shaped its own distinctive market access principles applicable within the EU internal market, albeit without employing exactly those terms. So what the UK achieves by statutory design the EU has pursued through judicial interpretation. This section explores the UK Act before considering the similarities and differences between the two regimes in establishing the terms of market access within their internal markets.

A. Mutual recognition under the UK Internal Market Act

The mutual recognition principle for goods is elucidated in Section 2 of the Act. It provides that goods which have been produced in[6] or imported into[7] one part of the UK—the 'originating part'—and which can be sold there without contravening any applicable relevant requirement (as defined in Section 3, explained below) are entitled to be sold in any other part of the UK, free from any relevant requirement that would otherwise be applicable in that other part.

Section 19 covers mutual recognition of authorization requirements applicable to services. An authorization requirement in relation to the provision of services in one part of the UK does not apply to a person who is authorized to provide those services in another part of the UK. So here too mutual recognition prevails. If one part of the UK is willing to authorize the supply of services then that is enough to impose an obligation on the other parts to open up their markets for services without insisting on conformity with their local requirements.

The detailed threshold to be crossed in order to trigger the application of the mutual recognition principle is set out in intricate and frankly exhausting detail in the Act, and it is explained below. 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

[6] Section 16(3) defines 'produced in'.
[7] Sections 16(8)–(10) define 'imported into'.

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.

The Act seeks, in the familiar Westminster style, to pin down in detail what the obligation entails. Section 2(2) clarifies that the principle of mutual recognition is triggered only with regard to the particular way in which the product is sold. So—to use the example given in Section 2(2)—where sale is by auction in the target market the principle applies to facilitate trade within the UK market only where sale by auction in allowed in the originating part. Something similarly detailed appears in Section 19(3) in application to services. Authorization to provide services does not trigger the general application of the mutual recognition principle where the authorization is limited to service provision in relation to particular premises or to a particular place or piece of infrastructure. So, for example, this means that holding a licence to provide a particular service from particular premises in the originating part would not entitle someone to provide that service from any premises in the target part.

Section 3 addresses the definition of 'relevant requirements'. The mutual recognition principle applies where the product faces a 'relevant requirement' in its target territory which would not have been contravened in the originating part. Section 3(2) does the heavy lifting. What is at stake in the notion of a 'relevant requirement' 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 is amplified by Section 3(3) which sets out the range of matters to which a statutory requirement may relate for these purposes, such as characteristics of the goods, matters connected with presentation, any matter connected with production, inspection, and certification, documentation that must be kept or information that must be recorded, and—emphasizing that this is an attempt to provide a wide definition of a phenomenon that cannot be exhaustively defined—anything not listed 'which must (or must not) be done to, or in relation to, the goods before they are allowed to be sold'.

This would readily cover rules associated with the composition, packaging, or labelling of products.

The Act makes a key distinction between such relevant requirements, which attract the application of the mutual recognition principle, and what is termed a 'manner of sale requirement', which does not. The manner of sale requirement is defined by Section 3(5) as a statutory requirement governing 'any aspect of the circumstances or manner in which the goods are sold'. The scheme of the Act is to demarcate the limits of practices subjected to the discipline of the mutual recognition principle from those instead subject to the second of the two market access principles, which is the non-discrimination principle. Manner of sale requirements are disciplined only by the less intrusive non-discrimination norm. This invites deceptive drafting. So Section 3(6) cautions that this division applies unless the requirement is presented as a manner of sale requirement in an artificial manner, so that it is in truth properly disciplined by the mutual recognition

principle. The Act is largely form-based, but here it looks to substance and effect. Section 3(6) gives as an example 'an unusually restrictive condition such that it would be impossible to comply with the condition and have a practical chance of selling the goods'. A rule that imposes conditions on the manner of sale which are so onerous that they are tantamount to a ban would be treated as a 'relevant requirement' of the type disciplined by the mutual recognition principle, not a manner of sale requirement subject only to the non-discrimination norm.

This 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 (discussed below) applies, whereas the regulator will aim to define it as a manner of sale requirement, 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.

Price controls would have been an interesting test case. Consider a minimum price requirement introduced in one part of the UK. In so far as it prevents a cheaper product from another part of the UK from benefiting from its competitive advantage on price in the target market it seems capable of falling within the scope of Section 3's 'relevant requirements', with the result that it would be inapplicable to such products. But here an explicit proviso in Section 3(5) directs that a measure which governs price counts as a manner of sale requirement. It is therefore subject only to the non-discrimination principle.

Section 19 contains a similarly motivated and structured scheme applicable to authorization requirements governing the provision of services. An authorization requirement is defined in Section 17(3) as a 'legislative requirement that a service provider must have the permission of a regulator before carrying on a business of providing particular services'. So this covers an *ex ante* approval scheme, and here too mutual recognition prevails. If one part of the UK is willing to authorize the supply of services then that is enough to impose an obligation on the other parts to open up their markets for services without expecting conformity with their local requirements. The authorization requirement is distinct from a 'regulatory requirement' which, according to Section 17(4), if not satisfied would so prevent the activities of a service provider, which is disciplined not by the mutual recognition principle but rather by the non-discrimination principle.

The requirement must be imposed by legislation. This is specified in application to both goods and services, and attaches to both the mutual recognition principle and the non-discrimination principle.[8] Section 58 makes clear that

[8] Sections 3(8), 6(10), 17(3), and 17(4).

legislation in this sense 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. Therefore the Act's scope contains a public/private divide. Section 15(2) also makes clear that 'sale' under the Act does not include a sale not made in the course of a business. Nor does it cover a sale made in the course of a business but only for the purpose of performing a function of a public nature, so here the scope of application to public services is similarly curtailed.

Part 3 of the Act, comprising its Sections 24–29, puts in place a special set of rules dedicated to professional qualifications. It is in its forbidding detail different from the regime applicable to services, and it is a further reason why the Act is a tough grind to read, since it avoids embrace of an overarching principle. But the core idea of two types of control is visible in application to professional qualifications as it is in the case of goods and services. Access to professions on grounds of qualifications or experience is governed by Section 24 and, although sections 25–27 amplify in detail what and who is covered, the basic thrust of the treatment corresponds to the mutual recognition principle. Section 28 requires equal treatment in areas that lie beyond Section 24, and the shape of its control is recognizably that of the non-discrimination principle.

Section 17(5)(b) establishes a demarcation between services and professional qualifications, and the latter are defined in Section 29.

B. Non-discrimination under the UK Internal Market Act

Section 5 of the Act lays down the non-discrimination principle for goods. This is defined by Section 5(1) as the principle that the sale of goods in one part of the United Kingdom should not be affected by relevant requirements that directly or indirectly discriminate against goods that have a 'relevant connection' with another part of the United Kingdom. This 'relevant connection' is defined by Sections 5(4) and 5(5). Goods possess that triggering relevant connection if they or any of their components are produced in[9] that other part, are produced by a business based in that part, or come from or pass through that part before reaching the part which is their destination.

Relevant requirements are elaborated in Section 6. 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

[9] Section 16(3) defines 'produced in'.

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.

The list of 'relevant requirements' to which Section 3 applies the mutual recognition principle is not open to amendment other than by amending the Act itself, but this is not true of the list of relevant requirements to which Section 6 applies the non-discrimination principle. The list may be amended subsequently by secondary legislation, adopted according to procedures set out in Section 6(5)–(9) involving the affirmative resolution procedure which here includes consultation of, but no power of veto granted to, the three devolved administrations in the UK.[10] There are several instances of this open-ended power to amend by secondary legislation scattered across the Act.[11] They are far from uncontroversial: their advantage is that they facilitate the flexible re-shaping of the regime, but they do so by empowering the relevant Minister in the UK government to plot a course unconstrained by the primary legislation and its associated mechanisms of control and accountability.[12]

As already mentioned above in connection with the mutual recognition principle, it is only legislative provisions which are covered.

The question then is when will a relevant requirement offend against the non-discrimination norm, with the consequence that according to Section 5(3) it is 'of no effect' in the target or destination part of the UK to which the goods are moved.

Section 7 of the Act addresses direct discrimination, Section 8 indirect discrimination.

Direct discrimination is the subject of an intricately drawn definition contained in Section 7, but the core concept holds that it occurs when incoming goods are put at a disadvantage compared to local goods which are materially the same, as defined in Section 7(3).

Indirect discrimination is—as ever—more awkward. According to Section 8 it arises where incoming goods are put at a disadvantage in circumstances where there is no direct discrimination but where 'it has 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.

[10] Section 57 explains the affirmative resolution procedure.

[11] Apart from Section 6, see also Sections 8 (amending the list of legitimate aims in connection with indirect discrimination), 10 (amending the list of exclusions from the market access principles in Schedule 1), 18 (amending the list of exclusions in Schedule 2), and 21 (amending the list of legitimate aims in connection with indirect discrimination), and 47 (amending the special provisions made for Northern Ireland). An overview of the amendment powers is also envisaged by Section 13 for Part 1, Section 22 for Part 2.

[12] For a sustained criticism of these powers in this Act see the Report of the House of Lords Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill*, HL Paper 130, published 17 September 2020, https://committees.parliament.uk/publications/2628/documents/26219/default; for the government's response see the Report of the same Committee, HL 171, published 17 November 2020, https://committees.parliament.uk/publications/3458/documents/33192/default.

The elaboration of an 'adverse market effect' generated by a requirement is found in Section 8(3). The search is for 'a significant adverse effect on competition' in the UK market arising because the requirement puts incoming goods at a disadvantage but does not put at that disadvantage comparable goods 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 which are not materially the same (because that would be covered by Section 7 as an instance of direct discrimination) but are 'comparable', which is explained by Section 8(4) to mean like goods or interchangeable goods.

The issue, then, is discrimination which does not operate between like products but between products 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.[13] 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. The notion of a 'legitimate aim' is defined by Section 8(6) 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. This list may be adjusted according to the familiar device found in the Act,[14] involving the making of secondary legislation, adopted according to procedures set out in Section 8(7)–(11) involving the affirmative resolution procedure which here includes consultation of, but no power of veto granted to, the three devolved administrations.

The control of services runs along similar lines, although the Act characteristically avoids precise alignment between goods and services. Section 20 addresses direct discrimination, Section 21 indirect discrimination.

In the case of services, the control asserted by the non-discrimination principle is exercised over regulatory requirements, defined by Section 17(4) as a legislative requirement which, if not satisfied, would prevent the provision of services. Such a requirement is envisaged as less specific and direct in impact than the type of *ex*

[13] See eg T Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015).
[14] Note 11 above.

ante authorization requirement to which the mutual recognition principle applies pursuant to Section 19. Section 20 prohibits direct discrimination in such matters, and specifies that a regulatory requirement which offends against the non-discrimination norm is 'of no effect' in relation to that service provider. Section 20(2) defines direct discrimination with reference to less favourable treatment, in similar fashion to the treatment of direct discrimination in application to goods covered by Section 7.

Indirect discrimination affecting the provision of services is covered by Section 21. Here too a regulatory requirement that offends against it is 'of no effect'. The governing criteria map closely the parallel provision for goods in Section 8, and so raise similar conundrums associated with identification of the necessary significant adverse effect in the market for services in the UK, and the scope of the necessary means to achieve a legitimate aim, which, as with Section 8(6), is amplified by Section 21(7) to cover the protection of the life of health of humans, animals, or plants and the protection of public safety and security, but also, missing from Section 8 but of particular significance to services, the efficient administration of justice.

The list of legitimate aims may be amended subsequently by secondary legislation according to procedures set out in Section 21(8)–(12) which involve use of the affirmative resolution procedure and here include consultation of, but no power of veto granted to, the three devolved administrations.[15]

As already mentioned, Part 3 of the Act, comprising its Sections 24–29, puts in place a special set of rules dedicated to professional qualifications. Section 28 requires equal treatment in areas that lie beyond requirements addressing access to professions on grounds of qualifications or experience which, pursuant to Section 24, are governed by the mutual recognition principle. The shape of Section 28's control is recognizably that of the non-discrimination principle. Section 17(5)(b) establishes a demarcation between services and professional qualifications, and the latter are defined in Section 29.

So, and as already mentioned, there will be important questions about the demarcation of manner of sale requirements (for goods) and regulatory requirements (for services), which are subject to the non-discrimination principle, from relevant requirements (for goods) and authorization requirements (for services) which attract the more aggressive control of the mutual recognition principle. The trader has an incentive to want to subject an obstructive measure to the control exercised by the mutual recognition principle because that renders it inapplicable unless one of the very narrow exceptions applies (discussed below), whereas the regulator will aim to define the measure as subject only to the non-discrimination principle, which will permit its continued application provided only that it is not tainted by direct or indirect discrimination.

[15] Cf note 11 above.

Moreover, an operationally significant margin separates direct from indirect discrimination. This, as explained, involves a separation between like products and comparable products. Traders will typically try to generate the protection against direct discrimination rather than that against indirect discrimination, because the former does not allow the 'legitimate aim' justification which is available in the case of the latter, whereas regulators will have an incentive to claim the regime is indirectly rather than directly discriminatory, in order to allow themselves the regulatory breathing space afforded by reliance on a 'legitimate aim'.

And, to complete the picture of the fine margins at stake, there will be a need to discuss when a measure is indirectly discriminatory and when it is not discriminatory at all. To give a concrete example, a ban on advertising a particular product might appear to be non-discriminatory but the adverse market effect required to bring indirect discrimination into play might arise if the product is not well known in the regulating market so that the ban suppresses its opportunity to penetrate a new market in circumstances where a comparable local product, for which advertising is equally banned, will not suffer any such disadvantage thanks to its familiarity to local consumers. If the ban is indirectly discriminatory in this sense, it can be saved only if shown to pursue a legitimate aim according to the statutory scheme. In the absence of demonstrated indirect discrimination, the ban, as an expression of local regulatory autonomy, is untouched by the Act.

In similar vein a prohibition against internet sales would be capable of being treated as indirectly discriminatory even if it applied to all products, in so far as it would confer an advantage on local suppliers with fixed premises from which consumers can buy directly. If so, a legitimate aim would need to be demonstrated.

Beyond the outer limits of the Act's reach there must be general measures of market regulation which are insufficiently closely connected to the sale of goods and services to fall within the scope of the Act. The Act goes some way to head off ingenious litigants aiming to exploit the regime in order to propel (even more) deregulation. Section 17(5)(d) states that it does not cover a requirement applicable to a service provider but also to persons not providing services, and offers as an example 'a requirement imposing duties on employers'. There may emerge other attempts to exploit the Act to attack labour market rules or other types of regulatory intervention, and it will be necessary to separate out measures that are capable of harming the UK internal market from those that are not, in accordance with the statutory scheme. Imagine the Scottish government decided to place restrictions on the use of jetskis on its majestic lochs and rivers or on the use of four-wheel drive vehicles on its lonely moorland tracks. Suppliers of jetskis and vehicles would have an incentive to rely on the Act. The first question would be whether such a restriction on use, not on sale, is a relevant requirement at all. If it is, one would need to consider whether it exerts an indirectly discriminatory effect.

In conclusion 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.

C. Market access in the EU

(i) Mutual recognition and non-discrimination

The mutual recognition principle and the non-discrimination principle, the two market access principles which shape the UK's internal market, are structurally close cousins of EU law's separation of obstacles to inter-State trade from restrictions on commercial freedom. The former attract a conditional mutual recognition principle, the latter no more than a non-discrimination norm. This makes it important—for those attacking and for those defending the measure—to patrol the boundary.

The terminology used is not the same, but is the outcome the same in EU law as in UK law? In short, the answer is that much more is the same than is different, but the patterns are not identical.

There is plentiful case law of the Court of Justice dealing with national measures which obstruct trade because they impose standards on matters of or associated with product composition which are different from those applicable in the State in which the product was made or marketed. *Cassis de Dijon* itself was of this type,[16] so too, to pick at random from over forty years of litigation, were rules on the packaging of margarine,[17] the composition of beer,[18] and the labelling of video cassettes.[19] Such measures would easily be treated as 'relevant requirements' within the meaning of Section 3 of the UK's Act, provided they are of a legislative character, and so in the UK they would be subject to the Act's mutual recognition principle. The Court of Justice was a little clumsy in the 1980s in its separation of such measures from measures which instead address only the way in which products are sold. The *Sunday Trading* cases threatened to reconceptualize free movement law as a basis for a general review of State economic

[16] Case 120/78 ECLI : EU : C : 1979:42.
[17] Case 261/81 *Walter Rau v De Smedt* ECLI : EU : C : 1982:382.
[18] Case 178/84 *Commission v Germany* ECLI : EU : C : 1987:126.
[19] Case C-244/06 *Dynamic Medien Vertriebs GmbH* ECLI : EU : C : 2008:85.

policy,[20] which the Court failed to grasp was a major and ill-advised extension of *Cassis de Dijon*.[21] Its *Keck and Mithouard* decision, a sheepish retreat, groped for a category of rules that may affect commercial freedom but are not treated as obstacles to inter-State trade provided they apply equally in law and in fact to all products.[22] The ruling remains contested at the level of detail, but its thematic ambition to restrain the reach of Article 34 is clear.[23] So, after *Keck*, the Court quickly found that rules on the opening hours of petrol stations and shops did not fall within the scope of Article 34 Treaty on the Functioning of the (TFEU) provided they applied equally in law and in fact to all products and all producers.[24] They affected commercial freedom but had no particular attachment to cross-border trade patterns. Such rules would readily be treated as 'manner of sale' requirements under the UK Internal Market Act, and so subject to the non-discrimination principle. The same separation would be readily visible in application to services. UK law is here closely aligned with EU law and acknowledging comparisons would enrich the discussion.[25]

Price controls were suggested in Section III.A above as an interesting test case. They deserve re-visiting in comparative perspective. In so far as the setting of a minimum price prevents a cheaper product from another part of the internal market from benefiting from its competitive advantage on price in the target market they seem capable of falling within the scope of measures which restrict a product's access to the market. This is how EU law understands such price controls,[26] with the consequence that they must be justified, typically with reference to public health since most of the case law involves price controls on tobacco products or alcohol. Were the same approach to apply in the UK, price controls would fall within Section 3 as 'relevant requirements', with the result that, given the very narrow scope of possible justifications, none of which would apply, they would be inapplicable to products imported from another part of the UK where price controls are not imposed. But an explicit proviso in Section 3(5) of the Act directs that a measure which governs price counts as a manner of sale requirement. It is therefore subject only to the non-discrimination principle. This was not in the original Bill but was added to the Act, and it is both a concession to local regulatory autonomy and a distinction from EU law. Scotland's minimum pricing rules applied to alcohol, which were challenged under EU law,[27] would

[20] Case 145/88 *Torfaen BC v B&Q plc* ECLI : EU : C : 1989:593; Case C-169/91 *Stoke on Trent and Norwich City Councils v B&Q plc* ECLI : EU : C : 1992:519.
[21] Case 120/78 (n 16).
[22] Joined Cases C-267/91 and C-268/91 ECLI : EU : C : 1993:905.
[23] See S Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press, 2016), ch. 6.
[24] Joined Cases C-401 & C-402/92 *Tankstation 't Heukste & JBE Boermans* ECLI : EU : C : 1994:220; Joined Cases C-69/93 & C-258/93 *Punto Casa and PPV* ECLI : EU : C : 1994:226.
[25] See Section VII.A below on the UK government's determination *not* to pursue such comparisons in the drafting and negotiation of the Act.
[26] Eg Case 82/77 *Van Tiggele* ECLI : EU : C : 1978:10; Case C-333/14 *Scotch Whisky Association* ECLI : EU : C : 2015:845.
[27] Case C-333/14 (n 26).

not fall within the scope of the Act thanks to Section 4's preservation of measures already existing when the Act came into force (see further Section IV.A below), but if they were subsequently adjusted in such a way as to fall outside that exclusion they would under UK law, unlike under EU law, need only to be shown to be non-discriminatory and would not require justification as a means to protect public health.

In the matter of price controls the UK Act has chosen an explicit governing statutory formula, but in other respects the Act is marked by a degree of ambiguity which will need to be addressed as practice develops, and EU law experience is capable of providing help.

The advertising ban was discussed above in Section III.B as a helpful illustration of where an apparently equally applicable measure may on closer inspection be shown to exert discriminatory effects. The specialist in EU law will have immediately recognized this as a real-life line of case law in EU free movement law.[28] The Court abjures a formalist interpretation and assesses the impact of an advertising ban, even if generally applicable on its own terms, as a means to prevent dynamic change in the market and thereby to consolidate the existing pattern in a way that operates in favour of incumbent products and producers. The Court insists on an analysis of the effect on the market of restrictions on marketing techniques:[29] this, following *Keck and Mithouard*,[30] is to require not simply legal but also factual equality of application as the route to escape the grip of Article 34.

In similar vein it was suggested in Section III.B that a prohibition against internet sales would be capable of being treated as indirectly discriminatory even if it applied to all products, in so far as it would confer an advantage on local suppliers with fixed premises from which consumers can buy directly. This too finds express recognition in the Court's free movement case law.[31] Suppressing internet sales could impede access to the market for products from other Member States more than it impedes access for domestic products. It would lack factual equality of application.

The inquiry into discrimination foreseen by the UK's Act is structurally close to that found in EU law. EU law asks what is the comparator, and then, if differential treatment is identified, it asks what is allowed as justification, and examines too the means used to check their aptitude and compliance with the principle of proportionality. EU lawyers are familiar with intricacies of the type mentioned in Section III.B associated with the need to identify the proper scope of comparison in cases of alleged tax discrimination[32] and market definition in competition

[28] Eg Case C-405/98 *Konsumentenombudsmannen v Gourmet International Products* ECLI : EU : C : 2001:135.
[29] See also eg Case C-441/04 *A-Punkt Schmuckhandels GmbH v Claudia Schmidt* ECLI : EU : C : 2006:141; Case C-239/02 *Douwe Egberts* EU : C : 2004:445.
[30] Joined Cases C-267/91 and C-268/91 (n 22).
[31] Eg Case C-322/01 *DocMorris* ECLI : EU : C : 2003:664.
[32] Eg Case 170/78 *Commission v UK* ECLI : EU : C : 1983:202.

law[33] as well as in broader equality law,[34] and they encounter it too in the cases concerning advertising bans and suppression of internet sales. However, the detail of the indirect discrimination test, in particular its inquiry into the adverse market effect, seems more cumbersome and convoluted in the UK than under EU law; and the permitted scope of justification recognized by the UK statute is narrower. So a ban on advertising or internet sales might fall within the scope of the UK's Act as indirectly discriminatory; if it does, its chances of surviving are slimmer than would be the case under EU law.

It was also discussed above (Section III.B) how the UK Act would treat a restriction not on sale, but on use. This too is drawn directly from practice under EU law. In *Åklagaren v Mickelsson, Roos*, which involved restrictions on the use of jetskis on navigable waterways in Sweden, the Court adopted a test which requires a case-by-case examination of such rules in order to discover their effect on the market.[35] Such a restriction on use which is untainted by discrimination falls within the scope of Article 34 TFEU, and will require justification if it is to stand in application to imports, where it has a considerable influence on the behaviour of consumers, which may affect the access of the product to the market of the regulating Member State. The mischief at which the test is aimed is the fragmentation of the internal market along national lines. If such a restriction has an effect which is in effect close to a ban on the product—that is, if consumer demand is largely suppressed in the regulated territory—then EU law bites.

Once again, in comparing EU and UK internal market law, the question is the same—is this restriction enough to trigger review?—but the answer may not be the same. Under UK law a restriction on use does not seem to fall within the statutory definition at all. It does not seem to be a 'relevant requirement' within the meaning of Section 6 and even if it is, or even if the list in Section 6 were to be expanded by secondary legislation to cover it,[36] it does not seem to generate an adverse market effect of the type required for the prohibition against indirect discrimination to bite unless an effect favouring local producers in the regulating unit is identified. By contrast, the Court's test in *Åklagaren v Mickelsson, Roos* was concerned only with fragmentation of the internal market along national lines as a result of consumer reaction, not with any economic advantage accruing to Swedish producers or suppliers. So UK law seems to have a narrower reach than EU law. The only way to connect the two more closely might be to rely on Section 3(6) of the UK's Act which provides for an effect-based inquiry. Section 3(6) gives as an example 'an unusually restrictive condition such that it would be

[33] Eg Commission Notice on the Definition of Relevant Market [1997] OJ C372/5.
[34] For an overview of EU practice see M Bell, 'EU Anti-Discrimination Law: Navigating Sameness and Difference' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford: Oxford University Press, 2021); E Muir, 'Pursuing Equality in the EU' in D Chalmers and A Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015).
[35] Case C-142/05 ECLI : EU : C : 2009:336.
[36] Note 11 above.

impossible to comply with the condition and have a practical chance of selling the goods': this would be treated as a 'relevant requirement' of the type disciplined by the mutual recognition principle. It is possible that this might catch a restriction on use that is so onerous that it largely destroys demand for the product the use of which is restricted.

In summary, the UK and the EU approaches to the type of obstacle to market access which generates review are similar, but there are clear differences, for example in application to price controls, and also points of ambiguity, for example in the matter of restrictions on use. There will be much to watch as practice develops in the UK.

(ii) The nature of a controlled measure

A clear difference between UK and EU lies in the nature and source of a measure which is subject to review.

Under the UK's Act it is only requirements imposed by legislation which are subject to control. This is specified in application to both goods and to services, and attaches to both the mutual recognition principle and the non-discrimination principle.[37] Section 58 makes clear that legislation in this sense covers not only an Act of the UK Parliament but also acts promulgated by the three devolved jurisdictions. It also covers both primary and secondary legislation.

This is considerably narrower than EU free movement law, which has been granted a very broad scope of application as a result of the Court's interpretation of the relevant Treaty provisions in a way apt to promote the effective operation of the internal market.

EU law covers not only legislative but also administrative measures.[38] Non-binding measures have been subjected to review.[39] It is even apt to catch statements made by a public official which give the impression that they count as an official position taken by the State.[40] This is backed by a logic which assumes that any such intervention may reduce legal certainty and serve to deter the taking advantage of the full opportunities of the internal market. EU free movement law covers too practices at a regional or municipal level within the public sector of a Member State[41] as well as practices of parties that are in legal form private in nature but which have been granted some degree of State backing so that they have become quasi-public entities.[42]

[37] Sections 3(8), 6(10), 17(3), and 17(4).
[38] Eg Case C-21/84 *Commission v France* ECLI : EU : C : 1985:184; Case C-192/01 *Commission v Denmark* ECLI : EU : C : 2003:492.
[39] Eg Case 249/81 *Commission v Ireland* ECLI : EU : C : 1982:402.
[40] Case C-470/03 *AGM-Cosmet* ECLI : EU : C : 2007:213.
[41] Eg Case C-1/90 *Aragonesa de Publicidad v Departamento de Sanidad de Catalunya* ECLI : EU : C : 1991:327; Case C-2/90 *Commission v Belgium* ECLI : EU : C : 1992:310.
[42] Case 249/81 *Commission v Ireland* ECLI : EU : C : 1982:402; Case C-171/11 *Fra.bo SpA* ECLI : EU : C : 2012:453.

The Court long ago ruled that even genuinely private parties may be subject to the prohibitions contained in the Treaty where they obstruct inter-State trade through their collective action. This applies to, for example, governing bodies in sport[43] and to trade unions,[44] according to a logic that such an extension in the binding effect of EU free movement law maximizes its vigour and avoids variation between Member States as a result of different local approaches to the divide between public and private law. The only reservation is that the Court has adopted this approach in the application of the free movement rules on persons and services, but it has always refused to subject private parties to the Treaty rules governing the free movement of goods.[45]

There is much to say about why one might (or might not) choose to extend legal controls of this nature to the outer reaches of bodies exercising public functions and even beyond, but here is not the place to pursue that exploration.[46] It is enough to conclude that the UK internal market, by focusing on legislative acts, takes a relatively narrow approach to the type of practice which is disciplined by the market access principles, whereas the EU internal market is considerably more intrusive on this point.

(iii) Institutional choice

What is strikingly different between the UK's Act and EU law is that in EU law detailed understanding of the scope of free movement law is not much driven by reference to the primary Treaty provisions, which are written in skeletal fashion and echo the terminology of 1950s international economic law. The Court in Luxembourg is little helped (or constrained) by the terms of the Treaty and there is no useful generally applicable secondary legislation either. The distant Directive 70/50 apart, the EU legislature has left it to the Court to get on with the job of shaping free movement law. This is not a common law system but the Court's case law has to be reckoned with to understand the intricacies of a great many areas of EU law.[47] Free movement is prominent among them, and the Commission Notice published in 2021 under the title 'Guide on Articles 34–36 of the Treaty on the Functioning of the European Union' groans under the

[43] Case 36/74 *Walrave and Koch v UCI* ECLI : EU : C : 1974:140.
[44] Case C-438/05 *Viking Line* ECLI : EU : C : 2007:772.
[45] Case C-573/12 *Ålands Vinkraft AB* ECLI : EU : C : 2014:2037; Case C-159/00 *Sapod Audic* ECLI : EU : C : 2002:343.
[46] See eg S Prechal and S De Vries, 'Seamless web of judicial protection in the internal market' (2009) 34 *ELR* 5; H Schepel, 'Freedom of Contract in Free Movement Law: Balancing Rights and Principles in European Public and Private Law' (2013) 21 *European Review of Private Law* 1211; S Enchelmaier, 'Horizontality: the application of the four freedoms to restrictions imposed by private parties' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Cheltenham: Elgar Publishing, 2017).
[47] See eg M Derlén and J Lindholm, 'Peek-a-Boo, It's a Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective' (2017) 18 *German Law Journal* 647.

weight of hundreds of judicial decisions.[48] By contrast in the UK the Act goes into much more detail in the legislative text. Statutory language elaborates the reach of the UK's regime, and answers questions, such as how to review price controls (Section III.A) or how to define discrimination (Section III.B), which have been developed by the Court of Justice in the EU. Nevertheless, it has been explained that the Act does not cover every possible eventuality, and teasing questions about its intended impact will certainly emerge. Looking ahead, it will be intriguing to see how far, if at all, practice and dispute settlement under the Act is driven by new problems which emerge in the practical management of the UK internal market to explore beyond the statutory language and how far, if at all, the EU experience is drawn on in the UK. There is, for sure, plenty to learn.

IV. Exclusions and justification

Condemnation of measures which offend against either of the two UK market access principles is not unconditional. However, it is a feature of the Act that the restraints placed upon the application of the two market access principles are carefully limited. There are two routes envisaged by the Act to save a measure: exclusions from the scope of the Act's control, and justification for practices which fall within its scope and offend against one of the market access principles. Both, as will be explained, have their structural counterparts in the EU system, but on terms which are different in detail.

A. Exclusions in the UK Internal Market Act

Only newly introduced measures are caught by the UK Internal Market Act, not measures already in effect on the entry into force of the Act. Section 4 does this job in intricate detail for the mutual recognition principle applicable to goods; Section 9 does the same for the non-discrimination principle in application to goods; and Section 17(5)(c) does the same job for services. 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.

The sections of the Act dealing with goods are of general application, but this is not true of those addressing services. Section 18 is entitled *Services: exclusions*. It refers to Schedule 2 to the Act which contains a set of exclusions.

Part 1 of Schedule 2 to the Act contains a list of services to which the mutual recognition principle contained in Section 19 does not apply. It is in full audiovisual services, debt collection services, electronic communications services and

[48] [2021] OJ C100/38.

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.

Part 3 of Schedule 2 provides that any authorization requirement in connection with taxation is untouched by Section 19. Nothing else is mentioned.

Part 2 of Schedule 2 to the Act contains a list of services to which the non-discrimination principle contained in Sections 20 and 21 does not apply. It covers all those excluded from the mutual recognition principle, as mentioned above, but adds also postal services, services connected with the supply of gas and electricity, services of a statutory auditor, waste services, and water supply and sewerage services

Part 4 of Schedule 2 provides that any regulatory requirement in connection with taxation is untouched by Sections 20 or 21. Nothing else is mentioned.

These lists may be amended subsequently by secondary legislation according to procedures set out in Section 18(7)–(11) which involve the affirmative resolution procedure and here include consultation of, but no power of veto granted to, the three devolved administrations.[49]

B. Exclusions in EU law

EU law contains significantly fewer exclusions.

EU law applies not only to newly introduced measures but also to any measure which has the effect of impeding cross-border trade, however old it may be. The *Reinheitsgebot* was centuries old, but its age was a matter of irrelevance under EU law.[50]

Nor do the EU Treaties contain any detailed sectoral exclusions of the type found in the UK Act. To the contrary, the free movement rules have long been applied to all forms of economic activity taking place within the EU. As a famous example, the free movement rules apply to sport even though until 2009 sport was not even mentioned in the Treaties, provided only that an economic activity is involved.[51] In fact, EU law operates in more-or-less the opposite way from the UK Act: EU law covers sectors even where they are not explicitly listed in the Treaties, whereas the UK Act lists areas which are excluded from (parts of) its reach.

There is, however, one small point of comparison which deserves mention. As explained, Schedule 2 to the UK Act contains a list of services to which the mutual recognition principle contained in Section 19 does not apply, and a further slightly longer list to which the non-discrimination principle contained

[49] Cf note 11 above.
[50] Case 178/84 (n 18).
[51] Eg Case 36/74 *Walrave and Koch v UCI* ECLI : EU : C : 1974:140; Case C-415/93 *Bosman* ECLI : EU : C : 1995:463.

in Sections 20 and 21 does not apply. The list includes among others audiovisual services, electronic communications services and networks, financial services, gambling services, healthcare services, and private security services. The alignment with exclusions from the EU's own Services Directive, Directive 2006/123,[52] is astonishingly close. Moreover, Schedule 2 provides that any authorization requirement and any regulatory requirement in connection with taxation is untouched by Sections 19, 20, or 21. The exact same exclusion is found in Article 2(3) of the EU's Directive. The parallel is not exact, because although these matters are excluded from the UK statute, their exclusion from the EU Directive does not entail that they are also excluded from primary EU law, and in fact some high-profile and controversial rulings of the Court apply the Treaty provisions on free movement to some of these sectors.[53] But there is a thematically consistent narrative which reveals the political sensitivity of these services sectors.

C. Justification in the UK Internal Market Act

Section 10 of the UK Internal Market Act covers *Further exclusions from market access principles*. It operates in application to both the mutual recognition and the non-discrimination principle in relation to the regulation of markets for goods.

Section 10's first sub-section refers to Schedule 1, which, it is stated in Section 10, contains provision excluding the application of the United Kingdom market access principles in certain cases. No hint of what is involved appears in Section 10, and one may suppose it will engage matters of marginal significance. Not so! This is where scope to justify measures which otherwise offend against the market access principles is spelled out. Schedule 1 excludes the application of the market access principles 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. However, this scope to prefer local regulatory autonomy over UK-wide market access is written in Schedule 1 to the Act with conspicuous care. 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

[52] [2006] OJ L376/76.
[53] Eg Case C-372/04 *ex parte Watts* ECLI : EU : C : 2006:325 (health care); Case C-446/03 *Marks & Spencer plc* ECLI : EU : C : 2005:763 (taxation). See S Weatherill, *The Internal Market as a Legal Concept* (Oxford: Oxford University Press, 2016), ch. 9.

effectiveness of the measures in addressing the threat must be provided; and the action taken must reasonably be justified as necessary.

This, then, is to offer room to justify practices required for sanitary or phytosanitary exigency. It is *not* a general public health exception to market access across the UK.

The public health emergency also secures special attention. A public health emergency is defined as 'an event or a situation that is reasonably considered to pose an extraordinary threat to human health'.[54] In application to goods, Part 5(1) of Schedule 1 provides that a relevant requirement is not to be taken to directly discriminate against incoming goods for the purposes of Section 7 of the Act to the extent that it can reasonably be justified as a response to such an emergency. Section 19(4) excludes authorization requirements applicable to services from the mutual recognition principle where they can reasonably be justified as a response to a public health emergency. Article 20(3) directs that a regulatory requirement is not to be taken to be directly discriminatory where it can reasonably be justified as a response to a public health emergency.

The available resort to public health is therefore written with conspicuous care to ensure that market access prevails over all but these closely defined and doubtless rare circumstances. 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.[55]

Section 10(2) envisages a power, familiar under the Act,[56] to amend the Schedule by the adoption of secondary legislation. So the lists may be adjusted according to procedures set out in Section 10(8)–(12) which involve use of the affirmative resolution procedure and here include consultation of, but no power of veto granted to, the three devolved administrations. Sections 8(7) and 21(8) envisage that the list of legitimate aims which may excuse indirectly discriminatory measures may similarly be adjusted.[57]

As it stands this is a relatively limited list of justified restrictions on intra-UK trade in goods and services. The Act contains a strong bias in favour of market access.

D. Justification in EU free movement law

The most intriguing of the several differences in approach between EU and UK internal market law concerns the scope to justify measures which obstruct trade between the constituent elements.

[54] Part 5(2) Schedule 1 (goods) and Section 23 (services).
[55] Sections 8(6), 21(7).
[56] Note 11 above.
[57] Sections 8(7), 21(8).

Any system of trade regulation, national or transnational, which establishes a general control over the regulatory autonomy of constituent elements within a wider economic space must choose how tolerant it will be of local practices which deviate from the pursuit of trade integration. On this point the EU is strikingly more tolerant than the UK. Put another way, through the market access principles, the UK drives its internal market project more aggressively than does the EU.

As explained in Section IV.C the UK's Act operates to exclude the application of the market access principles where threats to human, animal, or plant health are at stake, but according to a very narrowly drawn set of provisos. It is sanitary and phytosanitary risks that are recognized, not public health generally. There are also exceptions foreseen in particular limited contexts in the case of chemicals, fertilizers, and pesticides, and more broadly for taxation. Special treatment is made under the Act for regulatory responses to the (doubtless rare) case of a public health emergency. There is also a specific legitimate objective exception applicable to indirect discrimination, found in relation to both goods and services, which covers health concerns understood in a slightly broader sense. There is no apparent scope for this cramped list to be extended by judicial interpretation. Any change would need to come from the political process, and, as explained in Section IV.C, the Act envisages that secondary legislation could be made to add extra heads of justification to the list. However, there is no evident political appetite to make any such addition.

There is no general public health exception to market access across the UK, nor is there any wider or richer recognition of other types of values which might provoke intervention in the market by one or more of the devolved administrations in the UK. This stands in stark contrast to EU law.

In the EU the Court of Justice plays a central role in shaping the scope to justify national measures which restrict inter-State trade. It has been hugely creative and unwilling to confine itself to the matters recognized by the Treaty as legitimate reasons to protect national regulatory choices from the deregulatory energy of free movement law.[58] *Cassis de Dijon* was famously the launchpad,[59] and today it is well understood that, other than in cases of direct discrimination, national measures which impede inter-State are in principle capable of being justified according to a broad public interest test, within which the Court insists on a balance between the worth of trade integration, served by finding obstructive national measures incompatible with free movement law, and the value of national-level market regulation, preserved by treating obstructive measures as justified. So the Court's case law is rich and varied. It pits free movement against national initiatives designed to conserve biodiversity,[60] to protect media

[58] See S Weatherill, *The Internal Market as a Legal Concept* (Oxford: Oxford University Press, 2016), ch. 8.
[59] Case 120/78 (n 16).
[60] Case C-67/97 *Ditlev Bluhme* ECLI : EU : C : 1998:584.

diversity,[61] to promote concern for animal welfare,[62] to ensure respect for the deceased,[63] to preserve sporting specificity,[64] and so on and so on. Much insightful scholarship in recent years has explored the Court's techniques and choice of priorities when asked to apply internal market law to socially, culturally, and politically sensitive policies pursued at national level. The qualitative conclusions vary, from findings that the Court is astute to embed a deferential margin of appreciation into its standard of review[65] to condemnation of the Court's imposition of a rigid market-driven interpretation of the Treaty provisions,[66] and the choice of perspective generates sharp variation in views about what, if anything, should be done. I find the condemnatory strain largely (though not entirely) unpersuasive because it is based on an unrepresentative selection among the Court's decisions.[67] That debate does not need to be pursued here. For present purposes it is enough to note that no commentator doubts the centrality of the Court's role and none doubts (though some energetically criticize) how much responsibility it has assumed for matters that might be thought to belong in the domain of political contestation. The UK wants to take a different course. A great many matters shaped by the Court in the EU's internal market have been nailed down with textual rigour through the political process in the Internal Market Act. And, with particular reference to the scope of available justification for trade-restrictive measures, UK law seems far less rich and pluralist. This appears to be a striking

[61] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* ECLI : EU : C : 1997:325.
[62] Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers* ECLI : EU : C : 2008:353.
[63] Case C-342/17 *Memoria Srl and Dall'Antonia v Comune di Padova* ECLI : EU : C : 2018:906.
[64] Case C-415/93 *Bosman* ECLI : EU : C : 1995:463.
[65] See eg recent book-length treatment by J Zglinski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford: Oxford University Press, 2020); J Mulder, *Social Legitimacy in the Internal Market: A Dialogue of Mutual Responsiveness* (Oxford: Hart Publishing, 2018). See also eg D Damjanovic, 'The EU Market Rules as Social Market Rules: Why the EU can be a social market economy' (2013) 50 *CML Rev*, 1685; J Schwarze, 'Die Abwägung von Zielen der europäischen Integration und mitgliedstaatlichen Interessen in der Rechtsprechung des EuGH' (2013) 48 *Europarecht*, 253; S Garben, 'The constitutional (im)balance between the market and the social in the European Union' (2017) 13 *European Constitutional Law Review*, 23; B Van Leeuwen, 'Euthanasia and the Ethics of Free Movement Law: The Principle of Recognition in the Internal Market' (2018) 19 *German Law Journal*, 1417.
[66] See especially F Scharpf, 'De-constitutionalisation of European Law: The Re-empowerment of Democratic Political Choice' in S Garben and I Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Oxford: Hart Publishing, 2017); D Grimm, 'Europe's Legitimacy Problem and the Courts' in D Chalmers, M Jachtenfuchs, and C Joerges (eds), *The End of the Eurocrats' Dream*: *Adjusting to European Diversity* (Cambridge: Cambridge University Press, 2016). See also L Niglia, 'Eclipse of the Constitution' (2016) 22 *European Law Journal*, 132.
[67] Most of all it is driven by antipathy to Case C-438/05 *Viking Line* (n 44) which, though distasteful, is atypical. See S Weatherill, 'The Beauty and the Beast: is EU internal market law "over-constitutionalised"?' in T Capeta, I Goldner Lang, and T Perišin (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (London: Bloomsbury, 2021). For a critical literature review (covering problems and solutions) see M Höpner and S Schmidt, 'Can we make the European Fundamental Freedoms less constraining?' (2020) 22 *Cambridge Yearbook of European Legal Studies*, 182.

difference with EU law, and it is, but it is not quite as radical as may first appear. The difference needs to be assessed with awareness of the competence to regulate which is available to the devolved administrations in the UK. They do not have a general competence, but rather a number of matters are reserved to London.

So in EU law there is a well developed case law of the Court which sets out the principles which apply to the justification of national measures which obstruct inter-state interactions in the EU on the basis that they contribute to the protection of the economic interests of consumers.[68] In the UK there is no scope at all under the Act to justify rules on the basis that they protect the economic interests of consumers. One might therefore think that were the Scottish Parliament to introduce a measure which counted as a relevant requirement within the scope of the mutual recognition principle designed to achieve such a regulatory objective, it would be inapplicable to goods imported from another part of the UK where there is no such legal requirement, and that the perceived advantages of consumer protection, ignored by the Act, would not even figure in the assessment. This sounds savagely deregulatory. However, the point is that the Scottish Parliament would not have the competence in the first place to adopt such a measure. Consumer protection is a matter reserved to the UK Parliament.

Other matters which are reserved to the UK government include data protection, gambling, intellectual property, regulation of companies, and product standards and product safety other than in application to food and pesticides. So it does not matter that the Act offers no justifications relevant to these areas because the devolved administrations in Scotland and Wales are not permitted to introduce regulations in these areas in any event. (To remind, Northern Ireland, locked into the Protocol, is different again: see Section II above).

So the narrow range of exceptions in the UK Act is in part explained by the narrow range of competences enjoyed by the devolved administrations, which clearly do not compare to the general regulatory competence enjoyed by an EU Member State.

But this does not tell the complete story. There certainly are areas which fall within the competences of the devolved administrations which are marked by regulatory concerns which would not permissibly be advanced to defend rules which fall within the Act's market access principles. In these areas the point of the Act is to limit justification advanced by the devolved administrations to the narrow areas identified by it, and certainly to a narrower band than is allowed under EU free movement law.

Product standards and safety generally are matters reserved to the UK Parliament, but matters associated with standards and safety applicable to food and drink are not. One could imagine the Scottish government pursuing a

[68] Eg Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars GmbH* EU : C : 1995:224; Case C-441/04 (n 29); Case C-265/12 *Citroën Belux NV* EU : C : 2013:498. See S Weatherill, *The Internal Market as a Legal Concept* (Oxford: Oxford University Press, 2016), 115–21; also S Weatherill, *EU Consumer Law and Policy* (2nd edn, Cheltenham: Elgar Publishing, 2013), ch. 2.

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, as a relevant requirement within the meaning of Section 3, it would seem to be subject to the mutual recognition principle. No exception or justification is available for such a general public health measure subject to mutual recognition. 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.[69] 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 be advanced by prohibiting the sale of defined fattening items to people under the age of 18. This would, assuming no taint of discrimination, avoid conflict with the Act. However, it would also deprive the scheme of much of its vigour.

Were schemes of this type to be prepared in the EU's internal market by a Member State, it would plainly be possible in principle to defend them as a measure in the general public interest notwithstanding the disruptive effect on inter-state trade. A detailed examination, including in the light of the demands of the proportionality principle, would need to be conducted to decide whether the particular scheme deserved to be treated as justified. In free movement law many measures judged worthwhile in principle fail to satisfy the test when examined in their practical detail.[70] But in the UK the practical stage of the inquiry would not be reached, because in principle the purported justification is simply not recognized by the statutory scheme.

The services sector is rich in possibilities too. Were the Welsh *Senedd* to introduce rules requiring the authorization of landlords as part of their 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 any such requirement. Once again, the key comparative point is that EU law would in principle leave space for justification of such regulatory choices within the internal market even where they obstruct inter-state trade in services.[71]

So whereas under EU free movement law, as developed energetically by the Court, any kind of objective in the public interest may be advanced, save only a

[69] Perhaps Irn-Bru, perhaps in other circumstances whisky.
[70] See eg S Weatherill, 'Proportionality and Consumer Protection' in P Koutrakos, N NicShuibhne, and P Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Oxford: Hart Publishing, 2016); T Marzal, 'From Hercules to Pareto: Of Bathos, Proportionality, and EU law' (2017) 15 *International Journal of Constitutional Law*, 621.
[71] Eg Joined Cases C-197/11 and C-203/11 *Eric Libert* ECLI : EU : C : 2013:288.

purely economic concern,[72] the statutory scheme of the UK's internal market is much less tolerant of such open-ended assessment. The differences are stark, both in the scope of justification and in the prevailing institutional arrangements, where the EU's broad-brush Treaty scheme elaborated by the Court contrasts with the UK Act's painstaking concern to set relatively precise statutory limits within which adjudication shall take place.

V. Replacing market access with common standards

A typical and centrally important feature of an internal market is the scope to replace market access principles with common rules. This is to replace adjudication as to whether practices adopted by a constituent unit are compatible with the governing market access principles with a political choice in favour of agreed rules. It is to move away from the deregulatory bite of a market access rule to embrace instead the re-regulatory energy of centralized rule-making. It is to shift from regulatory heterogeneity within an internal market disciplined by market access principles to an internal market characterized by regulatory homogeneity. Typically, internal markets employ a mix of both approaches, but vary in the weighting attached to each.

The UK and the EU internal markets are open to the employment of both approaches. Their choices are structurally similar, but they are not identical.

A. The UK: Common frameworks

As explained in Section IV.C the power envisaged by Section 10(2) of the Act may be used to adjust the list of exclusions and justifications contained in Schedule 1. It may also be used to give effect to an agreement that forms part of a *common framework*. This, as explained in Section 10(4) of the Act, 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 certain matters concerning goods which were previously governed by EU law are to be regulated in future. Section 18(3) makes comparable provision for the elaboration of common framework agreements applicable to the regulation of services.

The idea, in short, is that rather than checking diverse practices against the dictates of the market access principles, instead dialogue among the administrations in the constituent elements of the UK shall produce a common framework approach within which an accommodation between regulatory difference and uninhibited trade is achieved.

[72] Case 7/61 *Commission v Italy* ECLI : EU : C : 1961:31. This is in any event a very narrow notion, see S Weatherill, *The Internal Market as a Legal Concept* (Oxford: Oxford University Press, 2016), 104–5.

This, then, opens up a route to the adoption of common UK-wide rules which could place limits on the deregulatory vigour of the market access principles which go further than the exceptions and justifications examined above in Section IV. As envisaged by Sections 10(3) and 18(3) of the Act, such a common framework agreement could be given effect as secondary legislation which would provide for fresh exclusions from the application of the market access principles. There is room here for fruitful engagement between the several interested regulators with a view to developing through dialogue a framework for the management of the UK internal market which promotes unrestricted internal trade to the greatest extent possible for which inter-governmental consensus can be assembled yet which also allows room for expression of local preference and tolerance of diversity in circumstances where genuine contestation deserves to be placed as a value above unrestricted trade.

However, this may be to expect too much.

B. The tortured progress of common frameworks

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.[73] A generously flexible range of possibilities was envisaged, including agreement on minimum or maximum standards, harmonization, limits on action, or 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 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'.[74] They provide a means to pursue 'close collaboration with devolved administrations to manage regulation'.[75] But—and of crucial significance—the common frameworks are portrayed in the White Paper as sector-specific and therefore inadequate to 'guarantee the integrity of the entire internal market'.[76] It was clearly intended that the application of the market access principles would be the rule, and common frameworks the exception.

The White Paper was soon followed by an Internal Market Bill which was introduced in the House of Commons on 9 September 2020. It did not even

[73] https://www.gov.uk/government/publications/joint-ministerial-committee-communique-16-october-2017.
[74] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901299/uk-internal-market-white-paper-print-ready.pdf, page 12.
[75] Page 20; also on the value of dialogue 41–2, 51.
[76] Pages 20, 38.

mention 'common frameworks'. This strengthened still further the intent to prioritize the primacy of the market access principles.

The Scottish and Welsh administrations objected with fury to this proposed model. It would, they complained, permit them only limited scope to justify measures and would accordingly undermine and diminish the regulatory autonomy promised under the pre-existing devolution settlements.[77] Their concerns were clearly genuine, as the example of the obesity campaign which would be inapplicable to goods imported from England considered in Section IV.D above demonstrates.[78] The expectation in the Scottish Parliament and the Welsh *Senedd* that the elaboration of common frameworks would protect their regulatory ambitions from the deregulatory bite of the market access principles was dashed. At no stage had any attempt 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, 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 devolved administrations in Wales and Scotland duly refused to grant legislative consent to the Bill[79] and, although this did not prevent it becoming law, since no veto over statutes is granted to the devolved administrations under the UK's asymmetric and relatively unstructured constitutional settlement,[80] it revealed a high degree of dissatisfaction with the aptitude of common frameworks to meet the sensitivities of the devolved administrations.

The Internal Market Act as finally adopted does include reference to the common frameworks, which, as explained in Section V, may be given the force of law by the adoption of secondary legislation. 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 in London 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

[77] For Wales see https://business.senedd.wales/documents/s103942/Correspondence from the Counsel General 14 August 2020.pdf (14 August 2020); for Scotland see https://www.parliament.scot/S5_Finance/Reports/FCC_Consultation_Response_to_the_UK_Gov_Internal_Market_White_Paper.pdf (13 August 2020).

[78] See House of Lords Common Frameworks Scrutiny Committee, 'Common frameworks: building a cooperative Union' HL Paper 259 2019-2021, which explicitly confirms the Act's 'undercutting' effect on devolved competences.

[79] https://record.assembly.wales/Plenary/11041#A62923; https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12878&mode=pdf.

[80] For the UK government's decision to proceed, see https://questions-statements.parliament.uk/written-statements/detail/2020-12-17/hcws665. See generally J Khushal Murkens, 'Preservative or Transformative? Theorizing the U.K. Constitution using Comparative Method' (2020) 68 *American Journal of Comparative Law*, 412; A McHarg, 'Unity and Diversity in the United Kingdom's Territorial Constitution' in M Elliott, J Varuhas, and S Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford: Hart Publishing, 2018).

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.[81]

C. The uncertain future of common frameworks

Common frameworks offer a device to soften the deregulatory cutting edge of the two UK market access principles and thereby to manage the UK internal market in a way that shows respect for local preference and tolerance of diversity. But the erratic progress of the Internal Market Bill, later Act, in 2020 offers no encouragement that 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 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 Section 54 of the Act provides that it is not open to the devolved administrations to legislate in a way that sets aside the Internal Market Act. Therefore 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. Any such political appetite in London is hard to identify, given the deregulatory taste of the UK government directed at internal practice and also its eagerness to be able to offer access on unfragmented terms to the entire UK market as an inducement to third countries interested in concluding trade deals (a matter reserved to the UK government). Scottish and Welsh resentment is entirely understandable.[82]

D. Harmonization in the EU

As explained, common frameworks as foreseen by Sections 10 and 18 of the UK Act open up a route to the adoption of common UK-wide rules which could arrest the deregulatory vigour of the market access principles. But, as explained, the UK government's political will to pursue the route of common frameworks seems thin and the power is merely discretionary. Absent such agreement 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 the market access principles, unless they fall within one of the currently applicable and very narrow exceptions.

[81] https://hansard.parliament.uk/commons/2020-12-16/debates/0345D537-1535-4E8F-9106-82A7057C30E3/UnitedKingdomInternalMarketBill.

[82] See further S Weatherill, 'Will the United Kingdom Survive the United Kingdom Internal Market Act?' UKICE Working Paper 03/2021, *United Kingdom in a Changing Europe*, https://ukandeu.ac.uk/working-paper/will-the-united-kingdom-survive-the-uk-internal-market-act/, May 2021.

The model is structurally the same in the EU. Harmonized rules, if adopted, displace the free movement rules in whole or in part, depending on their terms, in a structurally similar way to that envisaged for common frameworks which in the UK are capable of being given an effect backed by secondary legislation. In practice the EU internal market, like most if not all internal markets, is based on a combination of non-harmonized and harmonized sectors, but the precise contours of that relationship are neither pre-defined nor static. It is the product of an incrementally developed process of legislative activity serving as a supplement to application of the free movement rules. But in principle the EU rules on free movement prevail in the absence of legislative displacement of primary law.

In fact, key early decisions of the Court emphasize the priority of primary law. *Reyners*,[83] *Cassis de Dijon* itself,[84] and more recently *Centros* carry the same mark.[85] The free movement rules were not put on ice pending agreement through the political process on common rules. The Court instead applied them directly to control the challenged national measures, which would survive only if shown to be justified. It is here that a difference between EU and UK law emerges—not a structural difference, but one related to content. Whereas in the EU if there is no agreement on a legislative solution achieved through the political process, the Court-fed wide justifications remain available to protect state regulatory autonomy, in the UK the justifications available to the devolved administrations are far more cramped. This, as explained above in Section V.B, was the source of profound resentment in Scotland and Wales during 2020 and already in 2021 it is clear that the less generous scope allowed for justification under UK law in contrast to EU law will provide a persisting focus of contention.[86]

Where the EU adopts a measure of legislative harmonization which fully regulates the matter at hand and excludes scope for national action which departs from the EU standard, it is no longer possible for a Member State to invoke the Treaty-based justifications for practices which obstruct inter-state trade.[87] The balance between deregulation and national autonomy envisaged by primary EU law is transformed into a legislative consensus which absorbs, reflects and combines at EU level the interests in opening up the market and securing its regulation in the public interest. The EU, by legislating, has 'occupied the field': it has 'pre-empted' national measures. The same model could feasibly be pursued via the UK Act's common frameworks. An agreed common framework could

[83] Case 2/74 ECLI : EU : C : 1974:68.
[84] Case 120/78 (n 16).
[85] Case C-212/97 ECLI : EU : C : 1999:126.
[86] See Scottish Government, *After Brexit: The UK Internal Market Act and Devolution*, March 2021, https://www.gov.scot/publications/brexit-uk-internal-market-act-devolution, especially pages 23–5.
[87] Eg Case 35/76 *Simmenthal* EU : C : 1976:180; Case 190/87 *Oberkreisdirektor v Moormann* EU : C : 1988:424; Case 148/78, *Ratti* EU : C : 1979:110; Case C-44/01 *Pippig Augenoptik* v *Hartlauer* EU : C : 2003:205; Case 246/80 *Broekmeulen* v *Huisarts Registratie Commissie* EU : C : 1981:218; Case C-261/07 *VTB-VAB NV* EU : C : 2009:244; Case C-206/11 *Georg Köck* EU : C : 2013:14.

fully regulate the matter at hand across the territories of two or more of the constituent elements of the UK and displace the deregulatory vigour of the market access principles. More broadly the power to adopt common frameworks is described in very flexible terms under the UK's Act, and could go much further than this model. This seems to contrast with the EU competence to adopt harmonized rules, which is granted by Articles 53, 62, and 114 TFEU and is subject to the limits dictated by those provisions, in line with the overall demands of the principle of conferral contained in Article 5 TEU. The EU shall not do more than its Treaty allows. However, this distinction is less significant in practice than in principle. The flexibility of the common frameworks seems unlikely to be much used in the UK, for the reason given in Section V.C, and the political likelihood is that their availability will do little to dampen the intrusive strength of the Act's market access principles. Moreover, the flexibility of EU law is greater than one might first assume. The limits imposed by the Treaty, most of all that a measure of harmonization must make an adequate contribution to the functioning of the internal market, are interpreted generously by the Court and it is almost unknown for the EU legislature to be found to have stepped beyond them.[88]

Both common frameworks in the UK and legislative harmonization in the EU are defined by law but much room is allowed for their elaboration through the exercise of political discretion. The political context in which the UK internal market law is currently taking shape seems much less likely than the EU's to lead to its market access principles being accompanied by a strong commitment to common rule-making.

VI. Enforcement

A. The UK Internal Market Act before the courts

Section 1(3) of the Act declares that the two market access principles 'have no direct legal effect' except as provided by Part 1 of the Act, which covers UK market access for goods, but offers no further information on the consequences of violation of the market access principles. So one must plod through the Act to find out more. Section 2(3) states that relevant requirements which are not in compliance with the mutual recognition principle 'do not apply' to the sale. Article 19(1) provides that an authorization requirement relating to the provision

[88] Eg Case C-380/03 *Germany v Parliament and Council* ECLI : EU : C : 2006:11573; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Nutri-Link UK* ECLI : EU : C : 2005:449; Case C-58/08 *Vodafone, O2 et al v Secretary of State* ECLI : EU : C : 2010:321; Case C-358/14 *Poland v Parliament and Council* ECLI : EU : C : 2016:213; Case C-547/14 *Philip Morris Brands* ECLI : EU : C : 2016:325; Case C-482/17 *Czech Republic v Parliament and Council* ECLI : EU : C : 2019:1035. See S Weatherill, 'The function and limits of legislative harmonization in making the internal market' in T Tridimas and R Schütze (eds), *Oxford Principles of European Union Law: Volume II* (Oxford: Oxford University Press, 2021).

of services 'does not apply' where it offends against the mutual recognition principle. Rules that offend against the non-discrimination norm are 'of no effect'.[89]

Presumably the difference in language—'do not apply', 'of no effect'—conveys that rules that offend against the mutual recognition principle live on beyond the circumstances that arise covered by the Act, and may be applied to local goods which do not trigger the protection provided by the Act, whereas rules that offend against the non-discrimination norm are not applicable in any circumstances against anyone. More broadly it appears that a supplier of goods or a provider of services can defeat any action taken against it by relying on these provisions, if necessary by raising the matter before a court before which it finds itself the subject of proceedings. This does not seem satisfactory, because there are clearly circumstances in which it will not be possible to predict in advance precisely what impact the Act exerts—for example where it is not clear which of the two market access principles is engaged or, in a case of possible indirect discrimination, where there are tricky questions about adverse market effect or available legitimate aim (Section III). But the Act does not spell out how and where such disputes fall for resolution. Presumably they will ultimately—perhaps many years after a measure's adoption—finish up in court in litigation between a public authority charged with enforcing the rules of market regulation and a trader. Smaller traders are likely to be deterred by this prospect, which may weaken the intended effect of the Act: conversely larger traders may be able to pressure under-resourced enforcement authorities not to defend legitimate rules, which would also harm the intended effect of the Act. It is in this vein regrettable that there is no provision for screening proposed measures to assess compatibility with the Act before any practical consequences ensue.

B. The role of the Competition and Markets Authority (CMA)

The Act contains no mechanism for *ex ante* control of measures which may contravene the UK Act's market access principles. Therefore what is needed in order to achieve some degree of certainty is an institutional culture of living with the Act. The way the UK government has behaved so far is not conducive to this aim (see Section V above), but if there is to emerge a pattern of co-operation and dialogue around the process of regulatory choices within the UK then it is to the Competition and Markets Authority (CMA) that one should look.

Part 4 of the Act is entitled *Independent Advice on and Monitoring of UK Internal Market*. It is (by far) the longest Part of the Act. This gives the CMA a central place in the architecture, but in a way that carefully circumscribes its formal powers.

In carrying out its functions under the Act, the CMA shall follow the objective to support, through the application of economic and other technical expertise,

[89] Sections 5(3), 20(1), 21(1).

the effective operation of the internal market in the United Kingdom.[90] It is furthermore empowered to pursue reviews and prepare reports; it has a discretionary power to offer advice on proposed regulatory initiatives and on the impact of adopted regulatory initiatives; and it has conferred on it necessary information-gathering powers. Part 4 provides closely written detail on the applicable processes.

It is clear, then, that the CMA does not possess a direct enforcement capacity. It is not a regulator, a decision-maker, or an enforcer. Instead it plays a much softer role of review, monitoring, and guidance. It is possible that it will come to play an active role in gathering empirical evidence on the operation of the UK internal market and in the development of good practice on the management of the Act, bringing together relevant regulators, trading interests, and affected groups such as consumers and those concerned about the environmental implications of trade, but the prevailing political bitterness explained in Section V may need to dissipate before such a constructive model can bed down.

In 2021 the CMA initiated a consultation on the shaping of its role.[91] This is obviously welcome but one cannot help thinking this should have been done earlier and with greater urgency.

C. Enforcement and market management in the EU

There is no call here to offer an extended explanation of how EU law is enforced. As any reader of the *Yearbook* knows, EU law is enforced 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, embracing too the preliminary reference procedure.

This is EU law orthodoxy, and it provides a pattern of supervision and enforcement which marks out the EU as a great deal more effective in policing the faithful application of its rules by public authorities and private parties than any other international organization founded on a Treaty. It is a pattern which is sustained in the UK after Brexit in the particular case of the trade-related aspects of the Protocol governing Northern Ireland,[92] but otherwise the EU model has vanished from the methods of enforcement attached to the UK internal market. The CMA is allocated a much weaker role than the Commission; and the private enforcement which is such a well-established feature of the EU system is in the UK confined to the assumption that a private party faced by a measure which offends against the Act's market access principles may refuse to comply with it.

[90] Section 31(2).
[91] https://www.gov.uk/government/consultations/draft-guidance-on-the-operation-of-the-cmas-uk-internal-market-functions.
[92] Article 12 Protocol. See Section II above.

But there are also other less well-known aspects of EU practice which are missing from the UK regime, but which could usefully be added to improve its operation. These are a group of measures best summarized as tools of 'market management'.

As explained, the UK Internal Market Act contains no formal mechanism for testing whether or not measures comply with the market access principles in advance of their entry into force. The control is ex post facto, when damage may already have been done. Lessons could be learned from the EU. It has a relatively well-developed set of techniques which aim to screen national measures that may contravene the Treaty rules on free movement before they are brought into force in a Member State, so avoiding the need for costly litigation. Prevention is after all better than cure. Instruments include obligatory advance notification to the Commission of draft technical standards,[93] procedures to be followed by national authorities where restrictions are to be placed on products lawfully marketed in another Member State,[94] identification of designated contact points within the Member States,[95] legislative obligations to evaluate existing standards in a proactive manner[96] and services such as 'SOLVIT' which seek solutions to problems encountered in the internal market through administrative co-ordination without the need for litigation.[97]

The UK internal market would be improved by adoption of this type of supportive infrastructure. Such additions would not alter the basic allocation of competence to which the market access principles are directed. They would simply make the Act operate more smoothly. At EU level, however, the purpose of these procedures is not simply to root out unlawful barriers to trade but also to assess and show respect for legitimate measures of local market regulation. The UK internal market would be better able to reflect that balance were it to be reshaped in a way more generous to the possibility to justify rules which conflict with the market access principles and if the potential for dialogue and learning offered by the common frameworks were taken more seriously. That change would of course alter the force of the market access principles. It would weaken them, in order to achieve a better reflection of the value of autonomy and diversity within the UK internal market. It has already been suggested that this is desirable, and the remainder of this paper develops the case that the UK can and

[93] Originally mandated by Directive 83/189 [1983] OJ L109/8, now Directive 2015/1535 [2015] OJ L241/1.
[94] Originally mandated by Dec 3052/95 [1995] OJ L321/1, then Regulation 764/2008 [2008] OJ L218/21, now Regulation 2019/515 [2019] L91/1. For guidance on the application of the Regulation see Commission Notice [2021] OJ C100/16.
[95] Regulation 2015/1535 (n 93) Arts 9-11; also visible in sector-specific measures, eg the 'Services Directive', Directive 2006/123 [2006] OJ L376/36 Art 6.
[96] Eg Directive 2006/123 (n 95) Art. 39.
[97] http://ec.europa.eu/solvit/index_en.htm. See M Egan and M H Guimarães, 'The Single Market: Trade Barriers and Trade Remedies' (2017) 55 *Journal of Common Market Studies*, 294; E Kokolia, 'Strengthening the Single Market through informal dispute resolution mechanisms in the EU: The case of SOLVIT' (2018) 25 *Maastricht Journal of European and Comparative Law*, 108.

should learn from the EU model and that in particular the UK should embrace a model more tolerant of internal regulatory diversity.

VII. Internal markets can be different

It is thirty years since writers of the calibre of Norbert Reich and Damian Chalmers identified the EU's internal market as a contested and dynamic concept, which is capable, depending on the guiding interpretative decisions, of generating different legal, political, and economic consequences.[98] Renewed attention has been paid more recently to the choices that dictate what sort of internal market the EU shall construct. *The Internal Market as a Legal Concept* shows there is no single model of an internal market in theory or in practice, and draws out the several points of ambiguity which demand that choices be made.[99] A presentation by Michael Dougan of the University of Liverpool, released on Youtube in 2016 under the title *What is the Single Market?* is mainly concerned with the EU, but conveys that any model of trade integration is a product of its own particular circumstances, and typically puts in place a process rather than an end-state.[100] The EU offers a wealth of experience and information on how best to design an internal market: not necessarily to mimic it, but to help focus on why one might wish to choose to adopt or to discard its principal features. But the UK government, in designing the UK internal market, went out of its way to disregard such an obviously instructive source of comparison.

A. The UK government's obstinate narrow-mindedness

In shaping its Internal Market Act the UK government refused to grasp the full and fertile range of comparators, preferring instead to pretend that internal markets exist only within states. It sulkily ignored the scope to compare and contrast the EU and the UK internal markets, and to reflect on the existence of several available national and transnational models of an internal market and to understand why particular choices are made.

The July 2020 White Paper on the UK Internal Market mentions Australia and Switzerland[101] and even the German *Zollverein*.[102] Its Annex B, entitled *International examples of Internal market systems*, begins by solemnly declaring that 'Proposing options to manage an Internal Market is not a novel idea' before proceeding to a brief survey of Australia, Australia/New Zealand, Switzerland,

[98] N Reich, 'Binnenmarkt als Rechtsbegriff' (1991) 7 EuZW 203; D Chalmers, 'The Single Market: From Prima Donna to Journeyman' in J Shaw and G More (eds), *New Legal Dynamics of European Union* (Oxford: Oxford University Press, 1995).
[99] S Weatherill, *The Internal Market as a Legal Concept* (Oxford: Oxford University Press, 2016).
[100] https://www.youtube.com/watch?v=R6F0inyJPDc.
[101] Note 74, pages 12, 42, 45.
[102] Page 28.

and Spain. The refusal even to mention the EU is comically stubborn. The landmark ruling in *Cassis de Dijon* is mentioned, but only once and indirectly, as a model for the development of the system in Switzerland.[103] That sidenote apart—'don't mention the EU! I did it once but I think I got away with it'—the EU remains invisible, even if it offers by far the richest store of comparative material.

Similarly the White Paper invites hollow laughs with stirring declarations such as 'avoiding the creation of new barriers is vital for our brilliant manufacturers, producers and service providers'[104] and 'open markets enable frictionless trade that supports efficiency and productivity, increases business certainty and facilitates better investment decisions'.[105] This from a Brexit government which has pursued as its central animating policy the deliberate creation of new barriers and the closure of markets! The White Paper's embrace of the glory of economies of scale achieved through market integration is warm throughout, and its Annex A contains 36 pages of explanations of the economic advantages of trade integration. The EU is scrupulously ignored.

The UK Internal Market White Paper is introspective but it is also ahistorical. It tries to invoke a mythical past, a centuries-old internal market long pre-dating the EU, and a source of pride and bounty to Britons.[106] But this is to impose a contemporary narrative on a very different past. There might have been an internal market *of sorts* for centuries on these islands lying off the North West coast of continental Europe but its modern form, involving a fully enfranchised population, powerful devolved administrations, socially motivated regulation including space for distributional concerns in a service-led and technologically fluid economy coupled to external trade no longer rooted in Empire and instead deeply tied into frictionless just-in-time European production and supply markets, has negligible association with the standardization of weights and measures and drovers guiding livestock from the hills of Wales to market in London.[107] The White Paper, followed by the Bill, and then the Internal Market Act, misleadingly suggest that an imagined past can be unilaterally re-created as the UK's future. In this they serve as a metaphor for the entire Brexit project.

Documentation and comment produced by the Scottish Parliament and the Welsh *Senedd* is far more open-minded and constructive. It draws heavily on the EU model, especially to argue that the cramped form of justification for trade barriers envisaged in the UK contrasts badly as a means to respect local autonomy with the EU model, but also more generally to try to provoke a debate informed by the profound experiences learned from the EU's accumulated story.

[103] Page 99.
[104] Page 10.
[105] Page 11.
[106] Pages 16, 28–9.
[107] Page 28.

The Finance and Constitution Committee of the Scottish Parliament pursued an inquiry into the UK internal market beginning in 2019 and spilling over into 2021 which generated a rich store of material, all of which is helpfully available on a dedicated website.[108] The documentation covers history, law, politics, and economics, and includes thoughtful contributions reflecting on experiences and choice of model in states such as Canada, Switzerland, and the USA but also not neglecting the EU's internal market. This includes a highly informative meeting of the Finance and Constitution Committee on 19 June 2019 which discussed the UK internal market using mostly EU touchstones (including of course *Cassis de Dijon*) to illustrate the points and the available choices.[109] The same Committee published an insightful paper in August 2020 written by Kenneth Armstrong, the Committee's Adviser and a Professor of Law at Cambridge University, which in ten sharp pages elucidates the 'Concept of an Internal Market'.[110] This was not all. In September 2020 a briefing paper published under the imprint of the Scottish Parliament *United Kingdom Internal Market Bill 2019–2021* provided a helpful examination of the Bill, and concluded with three pages of direct comparison with the EU's model.[111]

In Wales the *Senedd*'s Legislation, Justice and Constitution Committee published a report in November 2020 which included similar glances at EU law, stressing the tighter restraints placed on local autonomy under the UK Bill than apply under EU law.[112]

London refused to participate in this debate.

The UK government was doggedly determined to treat the world as comprised of only states, and its petty and obstinate attitude makes sense only when understood from within a Brexit mindset that prefers to treat the world as it would wish it to be rather than as it in truth is.

B. Comparing and contrasting (with an open mind)

In comparing UK and EU internal market law there are at the level of detail points of difference, but there are also strong similarities, in particular of a structural nature.

Both EU law, in the name of free movement law, and UK law, in the name of the market access principles, refuse to go so far as to impose an unconditional right of access to target markets enjoyed by suppliers of goods and services which

[108] https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/113300.aspx. There is a valuable hoard of material here which deserves more than burial in a footnote.
[109] https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12202.
[110] https://www.parliament.scot/S5_Finance/General%20Documents/Briefing(1).pdf.
[111] I McIver, S Wakefield, I Thom, and N. Hudson *United Kingdom Internal Market Bill 2019–2021* SPICe Briefing SB 20-63, https://sp-bpr-en-prod-cdnep.azureedge.net/published/2020/9/21/United-Kingdom-Internal-Market-Bill-2019-21/SB 20-63.pdf. It also contains a helpful Bibliography.
[112] https://senedd.wales/laid%20documents/cr-ld13861/cr-ld13861-e.pdf, pages 17–19.

do not comply with local rules, but in pursuit of integration both go a long way to circumscribing local regulatory autonomy in so far as its exercise hinders trade within the internal market. Both internal markets also envisage the possibility of common solutions adopted by agreement among the participating units—harmonization at EU level, common frameworks in the UK—but neither requires that such consensual arrangements be struck. The deregulatory thrust of free movement law and of the market access principles has independent bite.

Overall, then, there are readily visible similarities between the UK and EU internal markets. And this is no surprise. The construction of an internal market *anywhere* raises a set of familiar questions which apply in common. The aim is to create an area within which economic activity flows freely, unimpeded by blockages caused by differences between the laws of the participating units. Managing regulatory diversity in a system committed to achieving trade integration will always raise similar structural *questions*, even if the chosen *answers* differ.

Differences between the EU and the UK largely exist at the level of detail rather than structure or principle, but they lead, or at least may lead, to differently shaped internal markets.

The market access principles run largely in common, as explained in Section III. However, on certain points of detail the UK has carefully written its statute in order to depart from the EU model. Price controls are less vigorously controlled in the UK than in the EU. In EU law they are treated as measures which are capable of restricting a product's access to the market, whereas the UK Act directs that they be treated as a manner of sale requirement and so must comply only with the non-discrimination requirement.[113] The UK focus on *legislative* measures is narrower than the EU's, which embraces also administrative measures and, in some circumstances, acts of private parties.[114] The UK reviews only newly introduced measures, whereas the EU operates both retrospectively and prospectively.[115] The exclusion of certain services sectors from the UK Act is wider than that applicable under primary EU law.[116]

In some other respects the UK statutory language differs from that used at EU level, but practice will reveal whether this leads to materially different outcomes. This is for example true of the ambiguously written treatment of the concept of indirect discrimination and the awkward question as to when a restriction on the use of a product may fall within the scope of review.[117]

More generally the enforcement structure envisaged by the UK's Act is weaker and significantly less satisfactory than that which operates in the management of the EU's internal market.[118]

[113] Section 3(5) of the Act; see Section III of this paper.
[114] Sections 3(8), 6(10), 17(3), and 17(4) of the Act; see Section III of this paper.
[115] Sections 4, 9, and 17 of the Act; see Section IV of this paper.
[116] Section 18 of the Act; see Section IV of this paper.
[117] See Section III of this paper.
[118] See Section VI of this paper.

Of broadest significance, the scope for justification is strikingly less generous under the terms of the UK Act than under the Court's supple interpretation of EU free movement law. As explained fully in Section IV of this paper, the Act excludes in principle resort to a general public interest justification in the UK of the generous type which characterizes EU free movement law. The Act confines the scope to justify measures which violate the Act's market access principles to a narrowly defined set of circumstances pertaining to particular risks to public health. This means that the UK is less tolerant of regulatory diversity than the EU.

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 eligible 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.

This is not a merely abstract concern. The example of the Scottish government pursuing a campaign against obesity which involves obligations to label foodstuffs was met in Section IV.D of this paper. The point: such intervention would fall within the scope of the Act and would be subject to the mutual recognition principle, and the Act allows no exception or justification for such a general public health measure subject to mutual recognition. 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. As explained in Section IV.D and amplified in Section V this would deprive the Scottish rules of any useful practical effect, and the scheme of the Internal Market Act ensures that protection for the Scottish rules through the elaboration of common frameworks is achievable only should a Minister in London exercise discretion in that direction. This is politically improbable.

Therefore 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 the other constituent elements. The UK internal market, driven hard by its two market access principles, therefore has a strongly deregulatory flavour.

A regulator within an EU Member State concerned to develop an anti-obesity policy makes the same calculation but crucially is much more likely to be eligible to claim justification. And in so far as such intervention withstands the application of EU free movement law because it is justified, attention shifts to the legislative arena, and the possibility to adopt harmonized rules in order to deepen the integration of markets in the area in question while also addressing at EU level the concerns promoting national-level regulation.

EU internal market law knows these debates well. An important critical body of scholarship interrogates the extent to which EU law, and most of all the Court, shows adequate respect for socio-economic choices made at national level which come into collision with the demands of the EU internal market.[119] Here is not the place to take a stand on the strength of these critical accounts: here *is* the place to note that EU law, and in particular the Court, is in principle a great deal more open to and tolerant of social, cultural, and political justifications advanced in defence of national practices which have a fragmenting effect within the EU internal market. The UK Internal Market Act, which offers a relatively cramped range of justifications, is dramatically more aggressive than the EU in requiring the setting aside of trade-restrictive rules within its internal market.

VIII. Conclusion

The similarities and differences between EU and UK practice emphasize the point that internal markets can take different forms. Internal markets are built on legal rules which address economic and political anxieties about the consequences of regulatory divergences between their constituent elements. There is no fixed concept of an internal market and accordingly there is room for internal markets to differ. That is the simple story which is at the heart of this paper. Comparative study of internal market law deserves to be encouraged.

As explained, in some areas the UK government's desire to depart from EU law was explicitly identified and inserted into the legislative text. These differences—such as regulation of price controls[120] and the Act's limitation to legislative measures only[121]—are firmly embedded in the Act. But in other areas—such as managing the awkward test for indirect discrimination and fitting a restriction on the use of goods into the statutory scheme—the Act is written with a degree of ambiguity. It will be intriguing to watch the development of practice under the Act. How will such issues be addressed, how will the legislative text be interpreted? Will the—very obvious and helpful—analogies with EU law be drawn upon, notwithstanding the government's sullen refusal to refer to EU practice during the shaping of the Act in 2020?

This paper has shown how EU rules have been shaped by the Court with the Treaty in the background whereas the UK has introduced a relatively tightly-drawn statutory framework which is designed to limit the scope for judicial creativity. The UK approach delivers a higher level of predictability and moreover may be thought constitutionally appealing, for the choices at stake are deliberated openly and decision-makers may be held accountable. That supposed advantage

[119] See Section IV.D above.
[120] Section 3(5) of the Act; see Section III of this paper.
[121] Sections 3(8), 6(10), 17(3), and 17(4) of the Act; see Section III of this paper.

is reduced by the several provisions in the Act which permit changes to be made by secondary legislation,[122] adding flexibility but at the expense of effective oversight.[123] But the bigger problem is that, like the UK internal market, the UK political process is dominated by the might of the English. The Act may be more predictable and politically legitimate than the EU's judicially shaped free movement rules, but the Act chooses to impose a deregulatory framework on the UK internal market which is relatively intolerant of local diversity. 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. The Act is an expression of London's belligerent refusal to engage co-operatively with Scotland and Wales.

England's economic dominance within the UK coupled to the vigour of the Act's market access principles make it likely that the Act will exert a powerful chilling effect over new regulatory initiatives preferred by Scotland and Wales. One of the few instances of a UK government Minister engaging with the EU as a comparator during 2020 arose in answer to a Parliamentary question late in the year. Asked why the UK Bill embraced a narrower range of justifications than Article 36 TFEU the Minister replied that this reflected the lower level of diversity in the UK compared with the EU.[124] But exactly the opposite conclusion should be drawn! Given England's dominant size in the UK, a *more* tolerant model than the EU's is needed.

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. The EU offers an obvious model. Such a shift 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. Such changes would deliver a UK internal market more sensitive to autonomy and diversity. But this is not what London currently wants.

The risk lies in increasing disenchantment with the political appeal of the UK itself. The UK Internal Market Act requires Scotland and Wales to participate in a project which subverts their regulatory autonomy. Their *inclusion* in the UK internal market causes resentment, whereas as a result of the Protocol to the EU–UK Withdrawal Agreement which is recognized by the Act (see Section II above), in important respects Northern Ireland suffers *exclusion* from the UK internal market.[125] The choices made by the UK government in the wake of Brexit mean

[122] See note 11 above.
[123] See note 12 above.
[124] data.parliament.uk/DepositedPapers/Files/DEP2020-0658/Letter_from_Lord_Callanan_to_Lord_Wallace.pdf.
[125] See Weatherill (n 82).

that economically and politically the United Kingdom feels less united than it has for a long time.[126]

Market integration is an economic project pursued by reliance on legal rules and institutions, but it also pursues political objectives. The EU itself is rooted in a system of law-based trade integration which was designed in the 1950s to achieve deepened political ties and ultimately to sustain peace. The '1992 project' to complete the internal market was in some respects a re-launch of this same idea. Economic gain flows from the removal of internal borders according to a pattern of intensified EU law-making, but the background political urge came from the need to re-invigorate a project which had by the 1980s become sclerotic. The EU's internal market is *political*. So is the UK's. But the dynamic is quite different. What breeds *integration* in the EU has potential to breed *disintegration* in the UK. This is because of the choice made in the United Kingdom Internal Market Act aggressively to prioritize market access over local autonomy. If the smaller constituent elements of the UK find that they are consistently denied a voice in the re-design of the UK after the UK's withdrawal from the EU and that Brexit is used to re-assert the centralization of the UK, the appeal of exit from the UK will increase.

[126] See also D Wincott, C Murray and G Davies, 'The Anglo-British imaginary and the rebuilding of the UK's Territorial Constitution after Brexit—Unitary State or Union State?' (2021) 9 *Territory, Politics, Governance* 000; C Martin, 'Resist, Reform or Re-run?: Short- and long-term reflections on Scotland and independence referendums', Blavatnik School of Government, Oxford, April 2021, https://www.bsg.ox.ac.uk/research/publications/resist-reform-or-re-run-short-and-long-term-reflections-scotland-and; K Armstrong, 'Economic and Collaborative Unionism after the United Kingdom Internal Market Act', forthcoming.