

Editors' Introduction: Undoing Devolution by the Back Door? The Implications of the United Kingdom Internal Market Act 2020

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Public awareness of tensions between the constituent governments of the United Kingdom has been raised in recent years by high profile issues such as the varying responses to the Covid pandemic. However, what is likely to prove by far the most significant site of contention between the Westminster and devolved governments is rather more mundane and has failed to gain much attention at all outside of professional legal and political circles.¹ The blandly titled United Kingdom Internal Market Act 2020 (UKIMA) – enacted ostensibly to maintain the fluidity of the UK's internal market post-Brexit – has, despite its failure to capture sustained media and popular attention, been a reliable source of political and legal controversy since its introduction as a Bill in September 2020.² During the Bill's passage, the most attention-grabbing³ controversy concerned the government's ultimately defeated attempt to absolve the UK of its international legal obligations, albeit in a 'very specific and limited way'.⁴ Motivated primarily by the aim of ensuring that the newly established UK internal market would extend to Northern Ireland, the Bill as introduced would have both violated the terms of the UK-EU Withdrawal Agreement⁵ and empowered UK government Ministers to subsequently disapply parts of the Northern Ireland Protocol to that Agreement.⁶ The prominence of this debate to a large degree over-shadowed other concerns with the Bill, especially the serious misgivings about the impact on the UK's devolution arrangements. Whilst the abortive attempt to evade international law was subject to robust criticism for the damage it stood to incur on the UK's external standing, the internal threat posed by UKIMA's central provisions to the devolution settlement was not subject to criticism of comparable prominence, and so proceeded largely as the Westminster government intended.

To anyone with an interest in constitutional law and politics, the profound implications of UKIMA for devolved government and what it signals about the devolved administrations' future relationship with the Westminster government raised considerable disquiet. We initially discussed our concerns in Swansea Law School's Governance and Human Rights Research

¹ Philip Sim: 'What is the row over UK 'internal markets' all about?' 22 December 2020

<<https://www.bbc.co.uk/news/uk-scotland-54065391>> (accessed 23 September 2022) provides a rare example of coverage in the mainstream press.

² For an overview of the main controversies during UKIMA's passage, see: J Deans, 'The Internal Market Bill: a specific and limited controversy?' [2021] *Juridical Review* 48-58

³ Indeed, this aspect of the Bill was sufficiently controversial that it led to front page headlines in four national newspapers – all 'broadsheets' – on 9th September 2020.

⁴ HC Deb 8 September 2020, vol 679, col 509

⁵ Specifically Article 4, under which the Withdrawal Agreement must be given direct effect and supremacy over conflicting domestic law.

⁶ For an analysis of the Bill to this effect, see: House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (HL 2019–21, 151) Chapter 4.

Group and, recognising the broader reach of the issues, successfully applied for funding from the Society of Legal Scholars to host a conference entitled 'Undoing Devolution by the Back Door? The Implications of the United Kingdom Internal Market Act 2020'. This event held at Swansea University in July 2022, focused squarely on UKIMA's impact on devolution. The conference – and this special issue drawing on it – consciously sought contributions drawn from across the United Kingdom, with particular emphasis on the devolved administrations, and, recognising, the generational significance of what is at stake, encouraged participation across a range of established and early career authors.

UKIMA came into force in January 2021. Scholarship on its impact is growing and this special issue contributes meaningfully to the crucial analysis and debate in this area. Initial coverage saw two major surveys of the architecture of the Act.⁷ These invaluable contributions provide a bird's eye perspective of its main features and functions. A major focus of these articles is comparing – and to a large degree distinguishing – the provisions of UKIMA from the European Union and other approaches to internal market governance.⁸ The potential impact of UKIMA on devolution is also brought into focus at a general level. It should be noted that parliamentary committees across the UK have undertaken significant work assessing the impact of UKIMA, both during the passage of the Bill⁹ and in relation to its implementation.¹⁰ This special issue builds upon that invaluable groundwork and adds a novel dimension to scholarship in the area with articles, commentaries and notes that consider specific questions about the impact of UKIMA on different aspects of devolution.¹¹

⁷ Kenneth Armstrong, 'The governance of economic unionism after the United Kingdom Internal Market Act' (2022) 85(3) *Modern Law Review* 635-660; Michael Dougan, Jo Hunt, Nicola McEwen and Aileen McHarg, 'Sleeping with an elephant: devolution and the United Kingdom Internal Market Act 2020' (2022) 138 *Law Quarterly Review* 650-676.

⁸ For similarly general perspectives, see: Thomas Horsley, 'Constitutional Reform by Legal Transplantation: The United Kingdom Internal Market Act 2020' (2022) 42(4) *Oxford Journal of Legal Studies* 1143; Jan Zglinksi, 'The UK Internal Market: A Global Outlier?' (2023) 82(3) *Cambridge Law Journal* 530.

⁹ For examples, see: above (n 6); Welsh Parliament External Affairs and Additional Legislation Committee, *UK Internal Market Bill Legislative Consent* (Welsh Parliament, 2020); Welsh Parliament Legislation, Justice and Constitution Committee, *The Welsh Government's Legislative Consent Memorandum on the United Kingdom Internal Market Bill* (Welsh Parliament, 2020); Scottish Parliament Finance and Constitution Committee, *Response to the UK Internal Market White Paper* (Scottish Parliament, 2020)

¹⁰ For example, Committees have reported on the impact of UKIMA on proposed devolved legislation (e.g. Welsh Parliament Legislation, Justice and Constitution Committee, *Report on the Environmental Protection (Single-use Plastic Products) (Wales) Bill* (Welsh Parliament, 2022); Welsh Parliament Economy, Trade and Rural Affairs Committee, *Agriculture (Wales) Bill Committee Stage 1 Report* (Welsh Parliament, 2023)); the potential impact of new England-only legislation on devolved competences in light of UKIMA (e.g. Welsh Parliament Legislation, Justice and Constitution Committee, *The Welsh Government's Legislative Consent Memorandum on the Genetic Technology (Precision Breeding) Bill* (Welsh Parliament, 2023)), and reported– or commissioned research – on the continuing impact of UKIMA on devolved governance more generally (e.g. Scottish Parliament Constitution, Europe, External Affairs and Culture Committee, *UK Internal Market Inquiry* (SP 2022, 113-I); Aidan Stennett, with Eileen Regan and Emma Dellow Perry, *Internal Market Act 2020 and the Protocol on Ireland/Northern Ireland* (NIAR 64-21, Northern Ireland Assembly Research and Information Service 2021)). Committees have also undertaken valuable work concerning the utilisation of common frameworks (e.g. House of Lords Common Frameworks Scrutiny Committee, *Common frameworks: an unfulfilled opportunity?* (HL 2022-23, 41-I)).

¹¹ A less general article, albeit one which does not substantively overlap with any of the pieces in the special issue, considers the impact of the Act in the area of food law: Emily Lydgate and Chloe Anthony, 'Brexit, food law and the UK's search for a post EU identity' (2022) 85(5) *Modern Law Review* 1168-1190

Each of the articles, commentaries, and notes in this issue contributes an original perspective on some matter of controversy arising from UKIMA in relation to devolution. The papers that follow are varied but at the same time coalesce around a number of crucial themes and dialogues. One important theme is the tension between centralisation and consent. Thomas Horsley and Jo Hunt's article considers the balance between negative and positive harmonisation mechanisms in the post-Brexit UK internal market, demonstrating that the negative (and frequently centralising) tendency of the UKIMA Market Access Principles is in tension with – perhaps even undermines – a more positive, consensual and potentially productive approach to managing the UK internal market through common frameworks.¹² Chris McCorkindale also considers the importance of consent in devolution, but in more general terms, arguing that the heavy-handed, top-down approach taken by the UK government in relation to UKIMA provides further evidence that existing consent mechanisms – vital tools in managing the relations between devolved institutions and Westminster – are not fit for purpose and that the constitutional principle of devolved autonomy which these mechanisms serve to secure is at grave risk.¹³ Gareth Evans, in his commentary, addresses one of the consequences of the UK government's top-down, heavy-handed approach,¹⁴ discussing the Counsel General for Wales's unprecedented – but ultimately ill-fated – attempt to secure through the courts what the Senedd had been unable to achieve by refusing legislative consent to the UK Internal Market Bill. Lisa Claire Whitten considers the unique circumstances of Northern Ireland, where issues of centralisation and consent have a long and contentious resonance that once again comes to the fore, in new guises, in relation both to UKIMA and a number of related post-Brexit trade matters, including the UK Withdrawal Agreement, the Northern Ireland Protocol, and the recent Windsor Framework.¹⁵

A second key theme is the concept of legislative competence. Nicholas Kilford¹⁶ and Anurag Deb¹⁷ confront this issue directly in their articles. Kilford considers the matter conceptually, drawing attention to the lack of a settled and cohesive notion of legislative competence in the UK constitution. In so doing he contrasts the highly formal notion of devolved legislative competence implicit in UKIMA with the far more expansive notion of competence applied in relation to the Westminster Parliament. Deb's article sheds historical and comparative light on these distinct notions of competence by charting the meaning of the idea in imperial constitutional history and contrasting these understandings with that reflected in UKIMA. Other articles contribute indirectly to this same theme. Horsley and Hunt, demonstrate the way in which the very design of UKIMA poses threats to the practical extent

¹² Thomas Horsley & Jo Hunt, 'Internal Market Governance by Consensus rather than Conflict? Common Frameworks and the Potential for Positive Harmonisation' [citation tbc]

¹³ Chris McCorkindale, 'UKIMA as Red Flag Symptom of Constitutional Ill-Health: Devolved Autonomy and Legislative Consent' [citation tbc]

¹⁴ Gareth Evans, 'Devolution and Declaratory Judgements: The Counsel General's Reference on the UK Internal Market Act 2020' [citation tbc]

¹⁵ Lisa Claire Whitten, 'Northern Ireland and the UK Internal Market: the Exception that Disproves the Rules?' [citation tbc]

¹⁶ Nicholas Kilford, 'The Market Access Principles and the Subordination of Devolved Competence' [citation tbc]

¹⁷ Anurag Deb, 'Lessons from the Age of Empire: The UK Internal Market Act as a Rupture in the Understanding of Competence' [citation tbc]

of devolved competence. McCorkindale's article shows how the erosion of consent mechanisms undermines the principle of devolved autonomy in significant areas of competence. Evans articulates and evaluates the Welsh government's contention that UKIMA impliedly amends the competence provisions of the Government of Wales Act 2006 and – consequently – ought to be read-down under the doctrine that the UK Parliament itself lacks competence to impliedly repeal or amend a constitutional statute.

A final – and in our view vital – contribution of the issue is the collection and connection of perspectives from all constituent parts of the UK. It goes without saying that UKIMA has impacts across the UK. But these impacts, and perceptions of them, undoubtedly differ: concern about UKIMA may vary markedly, both in terms of the substance of that concern and its severity, depending on whether one is sat in London, Cardiff, Edinburgh, or Belfast. And yet, a great deal of concern is also shared across the UK. The assembled papers, with their roots in the concerns of the UK's constituent nations, bring attention both to what is shared and to that which differs. The differences in perception and impact are brought out throughout the special issue: sometimes implicitly – by the authors' choice of focus – and sometimes explicitly – especially in the genuinely exceptional case of Northern Ireland.¹⁸ But perhaps the overwhelming theme of the papers is one of shared *unease*. Unease, in particular, about the experience of UKIMA in the context of an increasingly top-down, confrontational approach of the UK government to devolution in general. In this regard, the papers collectively demonstrate latent – arguably now realised and growing – tensions within the constitution of devolution and the deep irony that the talismanic but ultimately notional issue of the UK 'taking back control' from the EU has simultaneously, though with little fanfare, seen Westminster actually achieve this in an entirely different way, at the expense of the devolved administrations. This special issue exposes the undermining nature of UKIMA and also demonstrates the importance of an inclusive dialogue, bringing together different perspectives on particular issues of concern across the devolved nations and finding not just difference but also common ground.

The wider applications of these themes are considered in a short afterword, co-authored by members of the Governance and Human Rights Group at Swansea University.¹⁹ This commentary sketches how the themes of the issue apply to devolution-focused research relating to a wider range of policy areas, specifically: constitutional reform, human rights, and environmental protection.

¹⁸ See especially: Whitten (n 15)

¹⁹ Gareth P. Evans, Tom Hannant, Simon Hoffman, Karen Morrow, and Victoria Jenkins, 'After UKIMA: Challenges for Devolved Policy-Making in the Post-Brexit Era' [citation TBC]