EVIDENCE: UK INTERNAL MARKET ACT 2020 – CONSULTATION AND REVIEW

Constitution, Europe, External Affairs and Culture Committee
Dr Coree Brown Swan, Lecturer, Politics, University of Stirling

March 2025

The following evidence originates from Westminster Rules? The United Kingdom Internal Market Act and Devolution, a 2024 report written by C. Brown Swan, T. Horsley, N. McEwen, and L.C. Whitten. The report considers the challenges of UKIMA on devolution and intergovernmental relations.

In our conclusion, we offer a range of legislative and intergovernmental options for meaningful reform that could support the resetting of relationships and begin to restore some of the authority to the devolved institutions undermined by UKIMA. I have outlined these below. This text has been edited for length and updated to reflect recent developments.

Option One: The Status Quo

At the time of publication, there was no suggestion that the new UK Government was likely to undertake significant review or reform of the Act. In our report, we examined the prospect of a "do nothing" approach, at one end of the spectrum. retaining the legislation and associated processes as they were. However, as change is likely (albeit the form unknown), for brevity, I have excluded this detailed discussion from the evidence.

Option 2: Legislative Change

UKIMA may be significantly modified in two ways: first, through the use of existing delegated powers and/or secondly, through new primary legislation at Westminster.

(i) Delegated Legislation

UK Ministers may modify aspects of the UKIMA using existing delegated powers. These extensive powers remain, however, one of the most controversial aspects of the legislation for two reasons.

First, in procedural terms, these provisions require the Secretary of State to seek the consent of devolved ministers, although there is no requirement to secure their consent: if consent is not given by any of the devolved governments after one month, the UK Government can proceed without their consent.

Second, even these limited consent procedures are designed to engage devolved ministers only. There is no Sewel-style obligation to seek the consent of the devolved parliaments. Relying on these powers alone would thus appear an insufficient mechanism for addressing the grievances and concerns that the UKIMA has posed for devolution, unless the decision to make changes via this route was the outcome of an agreed intergovernmental process, backed by the consent of the devolved legislatures.

(ii) Primary Legislation

Various aspects of the UKIMA could be amended through primary legislation, including the controversial spending powers that are, at best, only tangentially related to the internal market. But we focus here on changes that could modify the impact of the market access principles. Such modifications might include the introduction of additional principles that help to redress the balance between market access and policy-making autonomy. This could include principles similar to those embedded within the EU internal market, including the principles of proportionality and subsidiarity.

A proportionality test

Introducing a proportionality test would require decisionmakers to balance the effects of regulatory variations on trade across the UK's borders with the protection of recognised public interests. This would require the UK and devolved governments – and in the event of a challenge, the courts – to scrutinise whether:

- specified public interest requirement is sufficiently important to justify the potential limits it poses to intra-UK trade;
- the regulations are designed to address this public interest; and
- the same objective could not be achieved using a measure less restrictive of intra-UK trade.

A proportionality test could be introduced into the UKIMA framework in tandem with legislative changes to expand the set of legitimate public interest requirements justifying restrictions on intra-UK trade; for example, to recognise considerations such as environmental protection, public health and animal welfare. Taken together, this would create additional space to moderate the impact of the market access principles on a case-by-case basis through a structured, evidenced-based assessment.

A subsidiarity test

Subsidiarity protects the regulatory authority of lower-tier bodies in a system of multi-level governance from overreach by decision makers and law-makers at the centres of power. It does so typically by restricting the adoption of common or 'harmonised' standards to situations where the absence of common approaches (i) is likely to have an appreciable distorting effect on cross-border trade and (ii) where the added value of adopting harmonised regulations is clearly evidenced.

The subsidiarity principle can help to rebalance the commitments to market access alongside the principles of devolution. The presumption would be in favour of maintaining the authority of the devolved legislatures to pass laws as they see fit, removing the veto power that the UKIMA gives to the UK Government over the exercise of those law-making powers that intersect with the market access principles. It would leave open the possibility of common standards and harmonised regulations, but the burden of proof to demonstrate the necessity of these would fall to the UK Government, should they face resistance from one or more devolved governments.

Option 4: Procedural Changes

A final set of options may supplement or act as alternatives to legislative change. These concern the procedural workings of the UKIMA that have been found wanting in the early

years of the UKIMA's implementation. We offer two suggestions here, neither of which is dependent on legislative change.

(i) Reforming the Exclusion Process

The exclusion process has been a subject of significant disagreement between the UK and devolved governments. A clearer exclusion process could be developed, including the introduction of an exclusion request form, submitted to an impartial body, alongside requirements for timing and format in which the relevant parties are required to respond. This could be accompanied by an agreed evidence base required to evaluate exclusion decisions to grant or withhold an exclusion. The Office of the Internal Market could potentially expand its role to include assessing proposed exclusions, in addition to regulatory proposals.74 Alternatively, the independent secretariat established recently to support intergovernmental relations – and accountable to the UK and devolved governments – could commission evidence to support the exclusion process in a way similar to its role in resolving intergovernmental disputes. Such evidence should be published and reported to parliaments, to aid the transparency of the decision-making process.

One of the most contentious aspects of the exclusion process has been around the timing of decisions. In previous instances, the UK Government has awaited the completion of devolved legislative processes prior to making decisions, on the basis that only then can an assessment of their impact on the internal market be made. This is clearly unsatisfactory and has increased uncertainty among businesses and other stakeholders.

It is not unreasonable, in our view, to expect a decision to be made with regard to a proposed exclusion from the market access principles whilst the legislation is underway within the devolved parliaments. Indeed, it is arguably vital to enable parliamentarians, and other stakeholders, to make informed decisions on the Bill or regulations before them.

(ii) Legislative Tracking

Advanced notice where future regulatory difference is intended, either at a UK-level (legislating for England) or within the devolved legislatures, is essential to the proper functioning of the UK internal market. Yet, the present approach relies on political commitments on information sharing set out in intergovernmental agreements, rather than on any formalised framework.

A new framework for legislative tracking would support coordination and planning between the UK and devolved governments. It could provide a platform for increased intergovernmental coordination in areas of shared regulatory concern at an early stage of policy development and encourage cooperation and shared learning; for example, through agreements on joint consultations.

'We suggest a role for the Office for the Internal Market as a suitable repository for legislative tracking. The OIM operates as an independent regulatory body. Its statutory functions already include monitoring the operation of the UK internal market. Alternatively, the UK and devolved governments could charge the IGR Secretariat with responsibility for legislative tracking. The Secretariat is committed to serving the four governments equally and to act impartially in the

exercise of its functions, and legislative tracking would sit well with its mission to promote transparency and accountability in intergovernmental relations.

A further option would be to engage parliamentary mechanisms, specifically the Inter-Parliamentary Forum. The Forum's initial priorities (2022) included oversight of the UK internal market, including the UKIMA and the Common Frameworks.

Option 5: Repeal the Act

At the other end of the spectrum of possibilities, the Act can be repealed. Repealing the UKIMA is the favoured option of the Scottish Government. The UKIMA was a response to a challenge created by the UK Government's decision to leave the EU Internal Market. Repealing the Act would not remove the challenge that it was designed to address: the risk of regulatory difference between the four administrations creating barriers to trade and mobility. Instead, it would place the burden of managing those challenges on intergovernmental processes, agreements, the Common Framework process.

Whilst repeal of the Act would demonstrate a commitment to devolution and to more cooperative intergovernmental working, it would place a heavy burden on a machinery of intergovernmental relations that is, as yet, ill-equipped to cope. It could also risk destabilising the delicate balance of giving legal underpinning to Northern Ireland's role within the UK domestic market whilst implementing the access to the EU single market for goods given by the Protocol/Windsor Framework.

Repealing the Act would also raise questions for UK trade policy, and there appears little political willingness within Westminster and Whitehall to reopen contentious Brexit-era debates. In particular, repeal may necessitate a review of recently concluded trade agreements, for example, between the UK and Australia, and the UK and New Zealand. Repealing the UKIMA would also require the UK Government to give up its ultimate gatekeeping functions in relation to intra-UK trade management, and either rely on trust, goodwill and best endeavours, or find alternative mechanisms to exert its authority.

The option of repeal seems both unlikely and sub-optimal. The option of doing nothing appears equally unsatisfactory. It may be risk-free for the market, but it carries significant risks for the functioning and, ultimately, the stability of devolution. As the positions of the Welsh Labour Government – and indeed the Scottish Labour Party and Scottish Liberal Democrats – have made clear, it is not only nationalists that object to hierarchical power the UKIMA has given the UK Government over its devolved counterparts. Between these two poles there are a range of legislative and intergovernmental changes that could help to secure a more consensual approach to governing the UK Internal Market.

The underpinning research was funded by the ESRC and the UK in a Changing Europe.

Dr Coree Brown Swan is a lecturer in politics at the University of Stirling. Her work focuses on the politics of independence and union, and she has worked extensively on intergovernmental relations and internal markets.