The Internal Market

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1. Internal Market

An internal market (also known as single market) is an economic concept rather than a precise legal category and can be interpreted in different ways. It is usually seen as a stage in economic integration of territories, beyond a free trade area and a customs union. The main feature is the removal of regulatory barriers to the free movement of goods, services, capital and workers. This may be achieved by deregulation, harmonization of regulations, or mutual recognition of regulatory standards.

The scope of an internal market will vary from one case to another as a result of political judgements about the boundaries between matters that should be subject to market competition and those that should be managed according to social, cultural, environmental or other criteria. Decisions about which items should be in the latter categories and so exempt from internal market rules are often contentious and depend on individual beliefs about the scope of public action.

It has sometimes been said (as in the UK Government's Internal Market White Paper) that a UK internal market has existed since the Acts of Union.[1] This is misleading, for three reasons:

a) The concept of an internal market is only relevant in a modern, regulatory state or union;
b) Such regulatory differences as existed were not all removed by the unions;
c) The unions abolished the parliaments in Scotland and Ireland[2], which would have been the main sources of regulatory divergence.

Devolution in 1999 established legislatures in Scotland, Northern Ireland and Wales but only the Northern Ireland Act stipulated that there should be an internal market. Instead, Scotland and Northern Ireland were granted competences on the 'reserved powers' model, according to which they can exercise any powers not expressly reserved; this has since been extended to Wales. In addition, all three legislatures and governments were obliged to operate within the constraints of EU law. This includes the laws and judgements arising from the EU Internal Market, which itself evolves over time. It is thus the EU Internal Market that, in many fields, secures an internal market within the UK.

2. The EU Internal Market

The original Treaty of Rome committed the (then) European Economic Community to a common market. The Single European Act (1986) committed to completing the internal market, following a White Paper proposing a 'single market'. The term now used is 'internal

[1] Laws in Wales Acts, 1535 and 1542, Acts of Union between England and Scotland, 1707, and between Great Britain and Ireland, 1800.

[2] As well, to be accurate, as that of England

market', which has generally replaced references to common market and single market in the treaties. This is a broad concept, aimed at covering matters not included in the old common market formulation. It has steadily extended from goods to cover services, financial services in particular and, more recently, the digital economy. There have been regular reviews and action plans. A Single Market II Act was proposed in 2012 as a further series of measures to be taken forward.

The internal market is developed over time in directives and regulations of the EU and by judicial interpretation. Directives require member states to take action, while regulations are directly effective. Directives and regulations are formulated by the 'community method', in which the Commission takes the initiative, the Council of the European Union approves and the European Parliament gives or withholds consent. In order to facilitate internal market legislation in the 1980s, the EU adopted Qualified Majority Voting. Measures must gain the support of 55 per cent of member states covering 65 per cent of the population. There are also decisions taken by the Commission in individual cases, within the scope of EU law. Directives and regulations are subject to the principles of subsidiarity (decisions must be taken at the lowest level possible) and proportionality (must be only as detailed as necessary). This is to safeguard the interests of member states and, since the Lisbon Treaty, sub-state governments.

Judicial interpretation is ultimately the responsibility of the Court of Justice of the European Union. Some of the most important decisions on the internal market have come from the Court, including the landmark *Cassis de Dijon* case on mutual recognition. There is a large body of jurisprudence.

Regulatory differences that might hinder trade are addressed in two ways. One is harmonization of regulations and the EU level. The second is mutual recognition, by which, if a good, service or professional qualification is approved for one member state, the good or service can be marketed in any other member state. The aim is to avoid the need for excessive and time-consuming harmonization of regulations at the EU level. Mutual recognition is not universally applicable and there are exceptions including public safety, health or the environment. It can be invoked by businesses denied access to markets because of domestic rules.

Internal market rules and their interpretation can be politically sensitive and controversial. There may be political disagreement over the scope of application of market competition as opposed to public regulation. The minimum pricing of alcohol in Scotland, introduced as a public health measure, was appealed all the way to the Court of Justice of the EU on the grounds that it violated internal market principles, but was ultimately upheld. Matters that have gone to the Court of Justice of the EU include higher education and health services.

3. The UK internal market after Brexit

After the end of the transition ('implementation') period, there will be no internal market provision for Great Britain.[3] It is widely agreed that there may be a need for some regulatory harmonization, hence the current discussions about frameworks in key policy fields including agriculture/ food standards and the environment. These might not cover all the matters which could be seen as part of an internal market. In the EU, the internal market is a living principle, interpreted over time in relation to current ideas and circumstances. New issues

[3] Northern Ireland raises other issues which I do not address here.

might also arise from international trade agreements, in which partners expect access for their products to all parts of the United Kingdom, irrespective of local regulations, including those set in Scotland in pursuit of dynamic regulatory alignment with the EU.

The UK Government's Bill on the internal market addresses these issues. The key elements are non-discrimination and mutual recognition in goods, services and professional qualifications. Discrimination could be direct (banning goods, services and professionals from other parts of the UK) or indirect (making rules which in practice could not be met by producers or professionals elsewhere. Mutual recognition means that if a good, service or professional qualification is accepted in one part of the United Kingdom it must be accepted in the other parts. The Scottish and Welsh Governments have raised concerns that this could undermine devolution because, while they could still set their own rules, they could not apply them to incoming goods and services.

4. Who defines the internal market?

The EU internal market is not a static provision but is developed by the European Commission in fulfilment of treaty provisions. The aim is progressively to reduce barriers to trade. The Court of Justice also plays a key role in interpreting the provisions.

The aim of the UK Internal Market Bill is not to create an internal market but to preserve one that purportedly exists. It is striking that nowhere in the White Paper, the Bill or the explanatory notes is the concept of an internal market defined. Instead, there are references to trade, movement of people and general economic integration.

The UK Government will define the scope and content of the internal market. It will be assisted in this by the Competition and Markets Authority (CMA), which is appointed by, and responsible to, the UK Government. It might have been expected that such an advisory body would jointly appointed by the UK and devolved governments.

The White Paper states that 'Certain social policy measures with little Internal Market impacts, and pre-existing differences and policies, will not be affected.' The Bill expands on this to include existing provisions and measures aimed at:

(a) The protection of the life or health of humans, animals or plants:
(b) The protection of public safety and security.

This looks like a rather limited set of considerations. The environment is not included.
UK ministers can add or remove exemptions from the list, through a statutory instrument with affirmative resolution of Parliament. A schedule to the Bill lists areas that will be exempt from non-discrimination, mutual recognition or both. Most of these are, in fact, reserved. Exemptions among devolved matters include the health and social services and the practice of law. One item that is included in mutual recognition is labelling of products, so any such regulation would have to be justified under the narrow terms of (a) or (b) above. Thus, devolved governments would not only be unable to ban products not conforming to their standards (but meeting those elsewhere in the UK); they would not be able to require warnings to be displayed.

The relevant provision for exemptions in the EU is much wider, drawing on the clause in the European Treaties referring to:
grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN

5. Who legislates for the internal market?
European internal market rules are set by intergovernmental negotiation and qualified majority voting. There is a large role for judicial interpretation.

The UK internal market rules will be set by the UK Government and Parliament. Before making regulations the Secretary of State must consult the devolved administrations but there is no consent requirement or mechanism.

The Act will be a protected enactment, meaning that devolved legislatures cannot alter its provisions in relation to devolved matters.

6. How are the rules applied, adjudicated?
EU single market rules are interpreted and enforced by the EU Commission, which is independent of member states and can bring legal proceedings against member states. There is no equivalent in the UK constitution or the Internal Market Bill.

The UK internal market rules will be monitored by the Competition and Markets Authority (CMA). Either the UK or a devolved government may request that the CMA investigate any alleged breach of the principles. The subsequent report must be laid before the two Houses of Parliament and the three devolved legislatures. The CMA will not have authority itself to order a change in regulations or bring legal proceedings. It is unlikely that the CMA will be as active as the European Commission in interpreting the internal market principles but we really do not know.

Ultimately, EU internal market rules are decided by the courts, culminating in the Court of Justice of the EU (CJEU). The CJEU is a specialised body, with a lot of experience in this field and is very pro-active in developing the Internal Market programme. It has been criticized for over-zealous interpretation and enforcement of competition requirements, against other public policy considerations. Enforcement of the UK internal market will fall to the courts, although they have little experience in this field, apart from cases arising under EU law. If the UK courts were given the brief to develop and enforce the internal market without a corresponding brief to defend social or environmental brief, this could similarly bias the system.

7. What are the principles for regulation?
The EU operates according to the precautionary principle, meaning that goods have to be demonstrated to be safe. Other jurisdictions reverse this and require objectors to prove harm. If the precautionary principle were to be relaxed at UK level and for England, this could pose problems for other UK countries wishing to retain it.

8. Implications of mutual recognition
EU mutual recognition rules apply in principle to cross-border trade and do not stop countries regulating their own producers. In practice, it has proved difficult to make a distinction with domestic trade. There are, however, exceptions. As Stephen Weatherill writes: *A State is not inevitably obliged to open up its market to a product or service which does not conform with local laws. It may appeal to its tougher standards of health protection, its more assiduous concern for consumer protection or its particular fastidiousness in the area of environmental protection – and it will need to be judged, ultimately by a Court, whether the State has a*

strong enough justification of this type to place obstructions in the way of the impulse towards market integration. National rules, practices and standards that impede inter-state trade are in this way routinely put to the test.
http://eulawanalysis.blogspot.com/2018/03/what-mutual-recognition-really-entails.html

The mutual recognition provisions in the UK Internal Market Bill would not stop the devolved legislatures from imposing their own regulations, binding on their own producers. These could, however, be undermined if producers from other parts of the UK could sell goods produced to lower standards. Given the size or the respective markets, it is likely that producers based in England would adopt English standards for goods sold across Great Britain.

Mutual recognition would also mean that goods approved for importation from outside the UK would have to meet the rules of only part of Great Britain. As the UK Government will negotiate future trade deals, it could also agree on English standards as the benchmark for these.

The White Paper states that the UK has, and will continue to have, high regulatory standards. This cannot be binding on future UK parliaments or governments. In the EU, by contrast, regulatory standards are embodied in EU law and individual governments cannot derogate from them or change them unilaterally.

9. Constitutional Implications
The UK devolution settlement has always been open to two interpretations. One is that the United Kingdom remains a unitary state in which Westminster has merely 'lent' powers to Scotland, Wales and Northern Ireland and can take them back any time. Evidence for this is the declarations in the devolution statutes that Westminster's ability to legislate is unaffected and the Supreme Court Ruling in the *Miller* case that the Sewel Convention, that it would normally do this only with the consent of the relevant devolved legislature, is merely a 'political' convention with no binding force The other interpretation the UK is not a unitary state but a union of nations. In this interpretation, devolution builds on that and represents a major constitutional reform, taking the UK in federalizing direction, if not quite creating a federation. Evidence for this is the rather clear division of powers, with Westminster only having reserved powers and everything else being devolved. Provisions in the revised Scotland and Wales Acts, which recognize the Sewel Convention in statute and pledge their parliaments are permanent features which can be abolished only by referendums in those nations, give further credence to this interpretation.

The Internal Marker Bill follows the former logic. Indeed, White paper declares that 'The UK is a unitary state with powerful devolved legislatures as well as increasing devolution across England.'

The Bill introduces a new principle into the devolution settlement by providing broad, transversal powers for UK ministers to enforce internal market provisions, cutting across devolved fields. This is how the EU Internal Market provisions work, but the constitutional context there is different, involving a range of actors, including the Commission, the Council of the EU representing states and the European Parliament in which no one state has a majority of members. The wide potential scope of internal market provisions in the EU is balanced by the principles of subsidiarity and proportionality. There is no equivalent in the UK devolution legislation.

Two other items represent a return to a unitary conception of the state .'Subsidy control' (I the White Paper) or 'Regulation of distortive or harmful subsidies' (in the Bill) is reserved to Westminster after a dispute as to whether it was already reserved or devolved. This is defined broadly to cover payments in any form which *distort competition between, or otherwise causes harm of injury to, persons supplying goods or services in the course of a business, whether or not those persons are established in the United Kingdom.*

At the same time, UK ministers are given wide powers to spend in devolved fields. This changes the previous assumption that they would spend only in reserved fields and that, with a few exceptions, financial transfers to the devolved administrations would go through the Block allocation governed by the Barnett Formula.

10. Costs and Benefits

The EU has done extensive studies on the economic gains of the Internal Market. The White Paper attempts to calculate the economic benefits of the UK internal market and costs of leaving. As the internal market is currently assured by EU these should perhaps be expressed as the cost of leaving the EU.

There is also a calculation of internal market costs in Germany. This suggests that the UK Government is aiming for less regulatory divergence than is found in Germany, which in turn suggests a curtailment of devolution.

Economic costs are not the only factors to be taken into account when appraising internal market provisions. Regulatory measures may be justified on social, environmental or cultural grounds even when they do have an economic cost.

11. Internal Market Provisions Elsewhere

The same types of issues have arisen in other federal or decentralized countries, although the terminology differs. Internal market provisions exist in several federal and devolved countries. Typically, these are agreed in intergovernmental negotiations. There is no case where a central government can unilaterally determine what constitutes the internal market and how it should be interpreted.

In 2017 a Canada Free Trade Agreement was negotiated between the federal government and the provinces, building on earlier agreements. It provides for provinces to agree on mutual recognition of standards but allows exceptions and specifies that provinces can legislate to protect legitimate public policy objectives including public health, social services, safety, consumer protection, cultural diversity, the environment and workers' rights. There is a dispute resolution procedure, including arbitration.

Switzerland comes closest to the EU model as it adopted an Internal Market Act to allow compliance with the EU Single Market. It is based on non-discrimination and mutual recognition but in practice is developed in intergovernmental negotiations. It is monitored by the Competition Commission and can, in the last instance, be enforced by the courts. Measures are subject to a subsidiarity test.

The United States does not have an internal market act but relies on the Interstate Commerce clause in the Constitution, as interpreted by the courts.

Spain’s Law on the Unity of the Market act was introduced in 2013 but the Catalan government took it to the Constitutional Court, which ruled that a mutual recognition clause was unconstitutional as it allowed autonomous communities to legislate for things happening in other regions (extraterritorial jurisdiction). It establishes a Council for the Internal Market, nominated by the central and regional governments, with an independent secretariat. Matters of dispute may be referred to the intergovernmental Sectoral Conferences and, only in the last resort, to the courts.