



The market access principles and the subordination of devolved competence

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ABSTRACT

The United Kingdom (UK) Internal Market Act 2020's 'market access principles' are capable of disapplying devolved legislation. Because that process qualifies the effectiveness but not the validity of that legislation, the UK Government contends that it leaves devolved competences intact and, therefore, respects the devolution settlement. However, this article argues that the use of disapplication to mechanise the market access principles has a deeper subordinating effect on devolved competence. This is because it suggests that devolved legislation is second-class, even within competence, and it implies that the settlement offers no protection for the effectiveness of devolved legislation, in stark contrast to the position accorded to Westminster. Further, disapplication also points to a less autonomous model of devolution, undermines legal certainty, and conceals significant constitutional changes from view. As such, far from neutralising the Act's centralising tendencies, disapplication only exacerbates them.

Keywords: devolution; Brexit; parliamentary sovereignty; unqualified legislative power; disapplication; supremacy; competence.

INTRODUCTION

The *UK Internal Market* White Paper, introduced in July 2020, claimed that the United Kingdom (UK) Government 'values the principle of devolution and believes that the UK's exit from the EU [European Union] offers the chance to support the devolution

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settlements'.¹ It sought to provide reassurance that the UK Government's proposed approach was one 'that respects the devolution settlement',² a sentiment expressed elsewhere, too: Michael Gove, then Chancellor of the Duchy of Lancaster, spoke in similar terms following publication of the UK Internal Market Bill, saying that the devolved institutions would 'enjoy a power surge when the transition period ends in December'.³ Accordingly, the White Paper included a list of '[e]xample areas' of 'new powers transferring to the devolved administrations'.⁴

However, this characterisation of the internal market proposals was not universally accepted. In contrast, the devolved institutions made their views known 'in the strongest of terms'⁵ with the Scottish Government's Constitution Secretary calling that list 'one of the most shocking pieces of dishonesty [he had] seen from a Government'.⁶ The Welsh Government, in its legal challenge to the UK Internal Market Act 2020 (UKIMA), maintained that its provisions 'ostensibly – albeit implicitly – limit the scope of the devolved powers of the Senedd'.⁷

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- 1 Department for Business, Energy and Industrial Strategy, *UK Internal Market* (White Paper CP 278 2020) 21.
 - 2 Ibid 10.
 - 3 Scotland Office, 'UK Internal Market Bill introduced today' (9 September 2020); Library Specialists, 'The United Kingdom Internal Market Bill, 2019–21' (CBP 9003 House of Commons Library 2020) 20.
 - 4 Library Specialists (n 3 above) 20; Department for Business, Energy and Industrial Strategy (n 1 above) 17. See also Philip Sim, 'Fresh row over devolved powers after Brexit' (*BBC News Online* 16 July 2020); Cabinet Office, 'Revised frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland' (UK Government 2019).
 - 5 Thomas Horsley, 'Constitutional reform by legal transplantation: the United Kingdom Internal Market Act 2020' (2022) 42 *Oxford Journal of Legal Studies* 1143, 1156. See eg Constitution and Cabinet Directorate, 'UK Internal Market: initial assessment of UK Government proposals' (Scottish Government 2020); External Affairs and Additional Legislation Committee, 'UK Internal Market Bill: legislative consent' (Welsh Parliament 2020).
 - 6 Library Specialists (n 3 above) 20; Sim (n 4 above). He continued: 'It's a mishmash of things the Scottish Parliament already has, things they've already decided we won't have because of the frameworks, and things that could be automatically overridden by a decision by the UK government to take a power away. There aren't new powers for the Scottish Parliament, that is a lie. Nobody should be fooled by this – what is actually happening here is taking away very significant powers that will have an effect on our daily lives.'
 - 7 Counsel General for Wales, *Grounds for Judicial Review: R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* (2021) para 1; *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 950 (Admin); *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 118.

Similarly, Plaid Cymru described the White Paper as ‘nakedly taking back competencies already held in Wales’ and further claimed that ‘the Westminster Government is chipping away at two decades of devolution’.⁸ Such a feeling was not confined to the devolved parts of the UK, though. William Wragg, Chair of the House of Commons’ Public Administration and Constitutional Affairs Committee, said that ‘the Bill involves areas of devolved competence and potentially reserves new powers’. In his view, ‘the effects of the Bill as outlined in the White Paper will engage with and alter the UK’s devolved governance arrangements. This is a significant constitutional effect.’⁹

What explains such a marked difference of opinion? The fulcrum of disagreement appears to be the interpretation of the market access principles’ impact on devolved law-making power. Illustratively, Alok Sharma, Secretary of State for Business, Energy and Industrial Strategy, wrote in his foreword to the White Paper that the proposed market access principles ‘will not undermine devolution, they will simply prevent any part of the UK from blocking products or services from another part while protecting devolved powers to innovate’.¹⁰ By contrast, William Wragg was of the view that these same principles ‘will effectively create new reservations in areas of devolved competence’.¹¹

The market access principles at the core of the UKIMA invite the language of evasion: they only impact on devolved competence ‘effectively’ (according to Wragg), or ‘impliedly’ (according to the Counsel General for Wales). This may well be by design: the operation of the market access principles conceals any change in competence from a purely legal analysis, allowing the UK Government to contend that ‘[all] powers that have been devolved will remain devolved’.¹² The key is that the market access principles, rather than repealing devolved legislation, or providing any other ‘hard’ limitation on its validity, merely qualify its ‘effect’ in certain circumstances: a process captured by the term ‘disapplication’.¹³

Because devolved legislation affected in this way remains ‘valid’ in all, and enforceable in some, circumstances, it may appear that the

8 Plaid Cymru, ‘Plaid responds to consultation on Westminster “power grab” proposals’ (10 August 2020); Library Specialists (n 3 above) 21.

9 William Wragg MP to Michael Gove MP and Alok Sharma MP, ‘The White Paper on the UK Internal Market’ (10 August 2020); Library Specialists (n 3 above) 21.

10 Department for Business, Energy & Industrial Strategy (n 1 above) 8.

11 Wragg to Gove and Sharma (n 9 above).

12 Jenni Davidson, ‘UK Government proposals for post-Brexit powers “one of the most significant threats to devolution yet” [2020] *Holyrood*; David Torrance, ‘EU powers after Brexit: “power grab” or “power surge”?’ (House of Commons Library: Insight 29 July 2020).

13 This term serves as a useful shorthand for this process, given its nuances are explored in detail in the following section.

UK Government's analysis, on which competences *technically* remain unchanged, is persuasive. However, reliance on disapplication as the means for mechanising the market access principles provides a kind of camouflage, or what has previously been described as a 'smoke screen',¹⁴ concealing *de facto* changes to devolution from a *de jure* analysis, facilitated by a lack of any clear definition of 'competence' itself.

It is this smoke screen which allows the UK Government to maintain that its approach 'respects the devolution settlement'.¹⁵ However, this article argues that it does the opposite. The very mechanism used by the market access principles to give the appearance of protecting devolution – disapplication – has, in reality, the effect of constitutionally subordinating the devolved legislatures. This subordinative effect is more significant than the more conventional approach of reserving a particular policy area because, rather than merely cutting the outer limits of devolved legislative capability, it reduces the devolved legislatures to 'second-class' institutions *within* their competences, undermining the dynamism upon which much of the devolution system is predicated. Rather than protecting or empowering the devolved legislatures, the disapplication process is a core mechanism through which they are undermined.

The subordination of devolved legislation by disapplication therefore has a distinctly normative colour to it, but it is also a very practical tool. It provides the means by which the UK's central institutions can exercise a more assertive influence over, and involvement in, affairs *which they accept* remain devolved. Further, the UKIMA is an example of centralisation by stealth, allowing the UK Government to maintain that its approach is in keeping with at least the letter of devolution, while it is undermined in practice: a notably narrow interpretation of what it means to respect the settlement.

This article proceeds in three steps. First, it considers how the market access principles interact with legislation: 'the disapplication framework'. Second, it considers whether – and how – competences might be preserved under such a model, considering two approaches. One approach considers that a 'competence' does not necessarily mean the power to make *effective* legislation, and a second takes the opposite view. Third, this article will situate the subordination of devolved law-making power under the disapplication framework alongside the UKIMA's wider centralising project as, arguably, one of its core components.

14 Anurag Deb and Nicholas Kilford, 'The UK Internal Market Act: devolution minimalism and the competence smoke screen' (*UK Constitutional Law Association* 4 July 2022).

15 Department for Business, Energy & Industrial Strategy (n 1 above) 10.

THE DISAPPLICATION FRAMEWORK

How does the UKIMA interact with devolved law-making power? Perhaps its most obvious effect on devolution is found in section 54, in which the UKIMA adds itself to the list of enactments protected from modification by the devolved legislatures. Two further parts of the Act also cut across devolved law-making power: part 6 makes provision for the UK Government to fund projects throughout the UK, ‘regardless of devolved powers’¹⁶ (although the UK Government can already spend in devolved areas)¹⁷ and part 7 ‘amends the devolution statutes to reserve subsidy controls, equivalent to state aid provision under EU law’.¹⁸ This ‘resolves a dispute regarding competence over subsidy control by expressly reserving it to the central UK authorities’.¹⁹

Most important for present purposes, however, are the ‘market access principles’: mutual recognition and non-discrimination. The Explanatory Notes set these principles out in the following helpful terms:

Mutual recognition means that any good that meets relevant regulatory requirements relating to sale in the part of the UK it is produced in or imported into, can be sold in any other part of the UK without having to adhere to additional relevant regulatory requirements in that other part. For example, a bag of flour made in one part of the UK that met the relevant requirements in that part (for example on the composition of the flour) can be sold in any other part of the UK without having to meet any other relevant requirements that apply there.²⁰

The non-discrimination principle means direct or indirect discrimination based on differential treatment of local and incoming goods is prohibited.²¹

16 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, 651. See also House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (HL 2019–21, 151) paras 37–44.

17 Library Specialists (n 3 above) 22: ‘The Explanatory Notes state that Part 6 of the Bill grants the power to a UK Minister of the Crown to provide funding for economic development, infrastructure, culture, sporting activities, and international educational and training activities and exchanges. The Explanatory Notes acknowledge that these purposes “fall within wholly or partly devolved areas”. But the new powers are intended to “sit alongside the existing powers by which the UK Government can fund in relation to devolved matters across the devolved nations, in particular the Industrial Development Act 1982”.’ See also *ibid* s 6.6; Explanatory Notes to the UKIMA, para 80.

18 House of Lords Select Committee on the Constitution (n 16 above) para 45.

19 Dougan et al (n 16 above) 651; House of Lords Select Committee on the Constitution (n 16 above) para 46.

20 Explanatory Notes to the UKIMA, para 11.

21 *Ibid* para 18.

Direct discrimination is where an incoming good is disadvantaged compared to a local good because it originates from another part of the UK. For example, a requirement that incoming produce must be chilled but local produce does not.²²

Indirect discrimination is where incoming goods are not directly discriminated against, but where regulation disadvantages incoming goods and has an adverse market effect.²³

The relevant provisions are these: section 2(3) provides for the operation of the mutual recognition principle for goods. It says that '[w]here the principle applies in relation to a sale of goods in a part of the United Kingdom ... *any relevant requirements there do not apply in relation to the sale*'.²⁴ Section 5(3) makes provision for the non-discrimination principle for goods.²⁵ It says that '[a] relevant requirement ... *is of no effect in the destination part if, and to the extent that, it directly or indirectly discriminates against the incoming goods ...*'.²⁶

The role of these provisions is, therefore, to *disapply* 'relevant requirements' where the market access principles are engaged.²⁷ Devolved legislation can clearly provide, contain or consist almost entirely of provisions which are 'relevant requirements' for the purposes of the UKIMA. Such provisions would, so far as they engage the market access principles, be disapplied and produce no legal effect in the relevant circumstance. The fact that the UKIMA interacts with devolved legislation is no accident: the UKIMA expressly confines the application of the market access principles to legislation,²⁸ and expressly includes *devolved* legislation.²⁹ The market access principles apply to future Westminster legislation, too,³⁰ but are of course vulnerable to amendment or repeal by that Parliament in a way not available to the devolved legislatures.³¹

22 Ibid para 19.

23 Ibid para 21.

24 Emphasis added.

25 S 19(1) makes provision for the non-discrimination principle for services. It says that '[a]n authorisation requirement in relation to the provision of services in one part of the United Kingdom does not apply to a person who is authorised to provide those services in another part of the United Kingdom'.

26 Emphasis added.

27 It is not clear whether there is any significance in the distinction between legislation that does 'not apply' and that which 'is of no effect'.

28 See eg UKIMA, ss 3(8), 6(10) and 16(14).

29 See *ibid* ss 3 and 58; Dougan et al (n 16 above) 662.

30 See *inter alia* UKIMA, s 58.

31 An issue discussed further below.

Although there are only very limited exceptions to the market access principles and no wider, more general system of derogations,³² their operation is tempered in other ways. They are *primarily* prospective,³³ and there are contexts in which relevant legislation will remain operable, namely so far as purely *internal* regulation is concerned. For example, in a general discussion of the mutual recognition principle, Dougan et al explain that:

mutual recognition will place significant limits on the ability of any legislative or governing body to set and enforce its own distinctive policy choices across its territory: rules might apply to local producers and suppliers, but cannot be enforced in the case of importation. For example, whilst one territory might ban the production of GMOs within its borders, it cannot stop the importation of GMOs which have been lawfully produced in another participating territory within the internal market.³⁴

The key issue is this: devolved legislation that contains relevant requirements would have those provisions, so far as relevant, ‘disapplied’ by the market access principles in the UKIMA. The consequence is, therefore, that ‘the policy objective motivating the devolved regulations would be undermined’,³⁵ with certain rules being ‘rendered inapplicable’ in relevant cases.³⁶ The question at the core of the disagreement discussed above seems to be whether this process, which the UKIMA itself describes as ‘affect[ing] the operation of ... legislation’,³⁷ amounts to a limitation of ‘competence’, something which, in turn, relies on implied definitions of that concept. Different positions on this are considered next.

32 Mutual recognition can, conditionally, be denied only in response to some ‘highly specific problems’, with the consequence that it ‘offers only very limited opportunities for a host territory to insist upon applying its own standards to imports from elsewhere in the UK’: Dougan et al (n 16 above) 662. See also UKIMA, s 10(1) and sch 1, especially paras 1, 2 and 6–10.

33 UKIMA s 4, especially s 4(2)(b) and s 9. The market access principles apply primarily to new regulatory requirements, as well as existing requirements that are amended in a substantive way, although ‘[w]hat amounts to a “substantive” amendment is not expressly defined’: Dougan et al (n 16 above) 662.

34 Dougan et al (n 16 above) 655.

35 Ibid 663.

36 Ibid 663–664.

37 For example, UKIMA, sch 1, para 2(1).

COMPETENCE AND THE PROBLEM OF DISAPPLICATION

There are, broadly, two different views on whether disapplication goes to – or offends – a relevant competence. These different views hang on different notions of ‘competence’ as a concept: whether it is a ‘thin’ concept that does not provide protection against disapplication, or a ‘thick’ concept which does. Put another way, is a qualification of the practical effect of legislation, even where its validity is unaffected, sufficient to affect a competence?

The first view: a thin conception

One answer to the question of whether disapplication goes to competence is ‘no, disapplication leaves competences intact’. This view, apparently adopted by the UK Government, might be characterised as a ‘thin’, ‘narrow’ or ‘flexible’ conception of competence. Either because, on this view, a competence is a power to enact valid legislation, rather than legislation which has full legal effect – a broader notion – or because competence is flexible and accommodating enough to survive the deprivation of practical effect in many, though perhaps not all, circumstances.

This view is eminent in the EU’s own doctrine of primacy and its remedy of disapplication,³⁸ from which the UKIMA appears to draw.³⁹ In that context, Schütze notes this cognate question: ‘[i]n what way would Community law prevail over conflicting national law: would it “break” or “disapply” it?’⁴⁰ He explains that ‘[t]ransporting the doctrine of supremacy from German federalism would have put national courts under a duty to declare conflicting national laws void’.⁴¹ This approach might be characterised as ‘the non-existence’ theory, or the ‘competence reading of the doctrine of supremacy’ which Schütze argues ‘goes too far’.⁴² He notes that a different approach has prevailed in practice: ‘The Court[of Justice]’s preferred supremacy doctrine would not render existing national measures void, but only “inapplicable” to the extent to which they conflicted with Community

38 See, in particular, Robert Schütze, ‘Supremacy without pre-emption? The very slowly emergent doctrine of community pre-emption’ (2006) 43 *Common Market Law Review* 1023; Michael Dougan, ‘Primacy and the remedy of disapplication’ (2019) 56 *Common Market Law Review* 1459.

39 Horsley notes that even the language of the UKIMA (such as ‘relevant requirements’), and its definitions, appear to have been transplanted: Horsley (n 5 above) 1150.

40 Schütze (n 38 above) 1026.

41 *Ibid* 1029.

42 *Ibid* 1030.

law.’⁴³ Under that view, ‘the incompatibility of subsequently adopted rules of national law with Community law did not have the effect of rendering these rules non-existent. National courts were only under an obligation to disapply a conflicting provision of national legislation.’⁴⁴ The effect is that ‘[t]he adoption of Community legislation, however, does not negate the underlying legislative competence of the Member States ... It suspends national legislation in conflict with Community law.’⁴⁵

In that context, this idea of ‘suspension’ has certain advantages which transpose well into the UKIMA regime. First, the disapplied legislation continues to operate in contexts in which it is not disapplied: ‘A national rule, which is set aside for being inconsistent with Community law, is inoperative only to the extent of this inconsistency; the rule may continue to be applied to cases where it is not inconsistent, or to cases which are not covered by the Community norm.’⁴⁶ Accordingly, disapplied measures ‘are not rendered null or void; they are merely to be treated as inapplicable in practice, and only to the extent of their verified incompatibility’ and ‘remain entirely valid and indeed fully applicable in all other situations/for all other purposes’.⁴⁷

For the UKIMA, this is especially important given that relevant requirements – for example, devolved legislation providing for (simplistically) some higher regulatory standards – will remain applicable to producers based within the territory itself, in which context the market access principles do not bite.⁴⁸

A second advantage, captured by the ‘suspension’ analogy, is that all disapplied legislation merely sits in a state of stasis, to become effective again once the disapplying legislation is repealed or amended.⁴⁹ In the context of the UKIMA this would mean that any amendment or repeal of the market access principles, or the addition of further justified derogations or exceptions might be able to reactivate any disapplied devolved legislation. A further, perhaps more subtle advantage, is that the remedy of disapplication evades

43 Ibid 1029; *Simmenthal II* (Case C-106/77) [17].

44 Schütze (n 38 above) 1030; *Simmenthal II* (n 43) [20]–[21].

45 Schütze (n 38 above) 1031.

46 Bruno de Witte, ‘Direct effect, supremacy and the nature of the legal order’ in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 190.

47 It is also unclear who will be able to seek judicial enforcement of the market access principles or how far the courts will attempt, be able, or feel obliged to temper their application by reference to other doctrines or principles: Dougan et al (n 16 above) 668.

48 Ibid 671.

49 Schütze (n 38 above) 1032; de Witte (n 46 above).

the need to provide, explain, or justify gifting a power to the courts to *invalidate* relevant legislation.⁵⁰

On these bases, the UK Government's submission that 'competences' are not affected by the market access principles⁵¹ seems persuasive. After all, legislative provisions will be fully effective in *some* contexts, and are at worst dealt with in a way that is limited in potency and time. It appears, on this account, not right to contend that the devolved legislatures' 'power to make laws' are meaningfully affected by the market access principles.

However, this view relies on an interpretation of 'competence' which merely describes the power to make laws on paper which could have no effect in practice. As such, it implies a narrow reading of the autonomy provided by the devolution settlement, under which the possession of a legislative competence describes little more than a power which in practice may be impossible to exercise:⁵² 'in practice, [the UKIMA] constrains the ability of the devolved institutions to make effective regulatory choices for their territories in ways that do not apply to the choices made by the UK government and parliament for the English market'.⁵³

At the very least, the practical difficulty of regulating their import markets⁵⁴ means that 'it is difficult to see what other reading might be given to the Act that would leave devolved regulatory autonomy intact'.⁵⁵ To claim that disapplication, in leaving the *validity* of relevant legislation intact, leaves devolved competences intact too is to render competence a relatively illusory concept.

The House of Lords Select Committee on the Constitution, adopting a more practical lens, touched on this issue in its report on the Internal Market Bill:

Limits to the competence of the devolved legislatures are set out in the devolution statutes. The Bill does not amend those Acts to include this restriction in competence. The Government should explain why the Bill does not amend the devolution statutes explicitly to limit

50 Schütze (n 38 above) 1031.

51 'Senedd Cymru has competence to legislate in all areas which are not reserved ... The boundaries of Senedd Cymru's devolved competence set by the reservations in Schedule 7A to GOWA are ... unamended': *Counsel General for Wales* (n 7 above) para 50.

52 See Dougan et al (n 16 above) 672.

53 Ibid 671.

54 See *ibid*: 'The assumption is no longer that devolved regulation applies to all of the relevant activity within the relevant devolved territory. Instead, it applies to producers or suppliers based in the devolved territory.'

55 Ibid 672.

the competence of the devolved legislatures in respect of the non-discrimination principle.⁵⁶

The reason why the UK Government has neither accepted that the market access principles amount to a competence restriction, nor sought to amend the devolution statutes accordingly, is perhaps clear given the preceding discussion: the market access principles do not, on the UK Government's preferred, thin conception of competence, affect devolved *competences* because they leave the legal validity of impugned legislation intact.

However, this account leads to some potentially incongruous results: the UK Government's thin conception of competence appears to potentially imply that a statute depriving *any* future devolved legislation of all (or much) of its practical effect would be compatible with the competences of the devolved legislatures and would not offend the devolution statutes which set them out. This would clearly be an absurd result, yet it is not clear what limits there are to protect against it, where they might be found, or on what principles they might be based.⁵⁷

Recourse to the devolution statutes themselves does not resolve matters, either. 'Competence' is used primarily as a heading, and certain other provisions, for example section 29 of the Scotland Act 1998, merely take the concept as read or explain it in negative terms. The fundamental core of the Scottish Parliament's law-making power, section 28(1) of that Act, provides that '[s]ubject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament'. It is not clear whether 'make laws' necessarily implies that those laws are 'effective', but it is not absurd to think that it might, something which would be difficult to square with the UK Government's position.

It should at this point be noted that the market access principles also bite on Westminster as much as devolved legislation, but here important distinctions between these institutions themselves yield quite different results:

56 House of Lords Select Committee on the Constitution (n 16 above) para 86.

57 One relevant principle might be that of 'devolved autonomy'; see eg Mark Elliott, 'The principle of parliamentary sovereignty in legal, constitutional and political perspective' in Jeffrey Jowell, Dawn Oliver and Colm O'Connell (eds), *The Changing Constitution* 8th edn (Oxford University Press 2015); Mark Elliott, 'Parliamentary sovereignty in a changing constitutional landscape' in Jeffrey Jowell and Colm O'Connell (eds), *The Changing Constitution* 9th edn (Oxford University Press 2019). However, it is not clear what level of protection that principle can provide, given that the UK Government either considers that that principle is not engaged, or can be justifiably overridden, by the UKIMA.

In the first place, the fact that UKIMA was made a protected statute that the devolved institutions are unable to modify means that they are unable to set aside or override the market access principles where these are considered to have a harmful effect on devolved regulation. By contrast, the operation of Westminster parliamentary sovereignty means that this is an option which remains open to the UK parliament when legislating for England.⁵⁸

A similar point was again noted by the House of Lords Select Committee on the Constitution in its report on the Bill:

These provisions apply unequally across the UK. While clause 6 [as it was] defines a ‘relevant requirement’ as a statutory provision, the sovereignty of the UK Parliament means that it could be over-ridden implicitly or explicitly by later statute. The Government should explain whether clause 6 seeks to constrain Parliament’s law-making power. If clause 6 is not intended to constrain Parliament, the Government should explain why it is not framed more accurately as a limitation only on the devolved legislatures. The Government should explain why clause 6 treats legislation intended for England differently from that passed by the devolved legislatures.⁵⁹

This extract recognises one of the higher order impacts of the disapplication framework: it conceals the fact that the effects of the UKIMA’s market access principles are quite different for Westminster and the devolved institutions. First, it notes that the Westminster Parliament could expressly repeal the market access principles; indeed, it could also simply enact legislation ‘notwithstanding’ them.⁶⁰ Second, it also notes that it arguably remains open for Westminster to *impliedly* repeal the market access principles, potentially by enactment of legislation with which they are merely incompatible, and even upon which they appear designed to bite. The courts categorising the UKIMA as a ‘constitutional statute’ might guard against such a course, but that categorisation is not inevitable.⁶¹ Alternative routes, which might circumvent the question of implied repeal, do not (yet) appear capable

58 Dougan et al (n 16 above) 671.

59 House of Lords Select Committee on the Constitution (n 16 above) paras 87–88.

60 Horsley (n 5 above) 1162 and 1167.

61 See *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 [68]–[70] (Laws LJ); *R (HS2 Action Alliance Limited) v The Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324; Mark Elliott, ‘Reflections on the HS2 case: a hierarchy of domestic constitutional norms and the qualified primacy of EU law’ (*Public Law for Everyone* 23 January 2014); Mark Elliott and Nicholas Kilford, ‘Nothing to see here? Allister in the Supreme Court’ (2024) 28 *Edinburgh Law Review* 95.

of facilitating the market access principles' intended disapplication of *future* legislation.⁶²

That the market access principles would not go to the *validity* of future legislation does not appear to resolve matters, given, as is considered next, recent authority suggests that disapplication *would* go to Westminster's power to make laws (Westminster ostensibly benefiting from a richer account of competence than is purportedly accorded to the devolved legislatures). This view, if it has purchase, might limit the capacity of the market access principles to qualify the operation of future Westminster legislation which could impliedly repeal them.

Questions therefore remain as to whether – and how – the market access principles bite on Westminster legislation, and the extent to which that process is consistent with orthodox constitutional principle. Consequently, it is at its lowest uncertain whether the market access principles will have their desired effect on Westminster legislation and, even were they to do so, regard to the wider constitutional picture illuminates the differences in the positions of the devolved and Westminster legislatures. The latter is far freer to disregard the market access principles than the former. Thanks to the camouflage provided by disapplication, however, these differences are hidden from view, with the UKIMA purportedly treating these legislatures the same.

Ultimately, the use of disapplication under the UKIMA, especially given the differences in its interaction with the UK's different legislatures, implies that the devolution scheme provides no constitutional protection for the effectiveness of law enacted within competence. The thin conception of competence reflects a thin conception of devolution itself. To suggest that devolution is not meaningfully undermined by depriving devolved legislation of much of its practical effect is to view devolution in extremely narrow terms: as a scheme which merely provides competences that, in practice, may be little more than illusory.

62 Eg *In the Matter of an Application by James Hugh Allister and Others for Judicial Review* [2023] UKSC 5. Here the Court said that the constitutional statutes doctrine could be rendered 'academic' where the statutory language is sufficiently express to 'modify' an earlier statute, distinguished from implied repeal by way of its incompleteness and temporariness: [66]–[68] (Lord Stephens). However, it is not clear that this same logic can be applied *prospectively* such that future legislation (containing relevant requirements) would be 'modified' by earlier legislation (the UKIMA). Indeed, under that logic, future legislation might simply modify the market access principles into 'subjugation'.

The second view: a richer account

The House of Lords Constitution Committee appears to have taken a different view of disapplication's effect on competence:

If devolved legislation is to be set aside automatically by the Bill, this in effect curtails devolved competence. Such a change should be made only after consultation with the devolved institutions ... such engagement has been limited and unsatisfactory.⁶³

This explains the Committee's concern over the failure to amend the devolution statutes themselves, which might otherwise be thought to contain all the statutory limitations on devolved legislative power. The Committee's concern is rooted in a different understanding of competence, one that appeals not to a power which exists merely on paper, but also in practice. Clearly, on this view, which – as has been seen – is shared elsewhere, the UKIMA looks very much like a competence limitation.

This is a 'richer' account of competence as the power to make 'effective' law and, because it qualifies the effectiveness of legislation, on this account disapplication does affect competence. An advantage of such an approach is that its focus on practice is better able to do justice to the *real* (as opposed to hypothetical) extent of legislative power. Indeed, such a view might be motivated by a desire to render competence useful as an analytical tool, prioritising legal certainty.

There is authority for this approach more widely, particularly in the devolution context. For example, if a Bill is outwith devolved competence by virtue of the limitations provided in the relevant devolution statute, it is not simply 'disapplied'. Instead, such provisions cannot reach, or are excised from, the statute book itself.⁶⁴ Some parts of the devolution framework appear incapable of tolerating beyond-competence legislation remaining on the statute-book, even if in such a case they would not be given effect by the courts.⁶⁵ Others, however, do appear on their face capable of tolerating that alternative outcome: that

63 House of Lords Select Committee on the Constitution (n 16 above) paras 83–85.

64 See Nicholas Kilford, 'Limitation, empowerment and the value of legal certainty in the Treaty Incorporation References Case' (2021) 26 *Judicial Review* 321. Indeed, legislation beyond the competence limits in s 29 of the Scotland Act (for instance) is by definition 'a nullity': Aileen McHarg and Christopher McCorkindale, 'The Supreme Court and devolution: the Scottish Continuity Bill Reference' (2019) 2 *Juridical Review* 190, 196; *In re the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] 2 *WLR* 1 [56]; Mark Elliott, 'The Supreme Court's judgment in the Scottish Continuity Bill case' (*Public Law for Everyone* 14 December 2018).

65 *In re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 *WLR* 5106 [12]–[18].

'[a]n Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament'⁶⁶ seems to foresee provisions contained within legislation being legally ineffective (rather than being excised from that legislation). Further, the courts have interpretive obligations to, so far as possible, read devolved legislation 'down' so that it is within competence.⁶⁷ In this way, the plain terms of devolved legislation may not reflect its actual, more limited legal effect, which is provided by interpretive work on the part of the courts.

Despite this, and in pursuit of rendering devolution 'workable', the courts have been keen to ensure that devolved legislation does accurately mirror the extent of the legislatures' competences. They have, accordingly, adopted quite a narrow approach to this interpretive obligation. In *Treaty Incorporation*, a Bill was passed which made use of broad terms, 'admittedly beyond competence', and which relied on the courts, using their interpretive obligation, to give the Bill effect only to the extent that it was within competence. Such an approach, in other words, relied overtly on the courts using the competence limits to interpretively 'cookie-cut' the Bill, rather than the provisions *themselves* reflecting the limits on competence found in the devolution statutes. The Supreme Court held that such an approach was impermissible in particular on the grounds that it was incompatible with the demands – pursuant to the rule of law and European Convention on Human Rights – of legal certainty and clarity, and that it was antithetical to the coherence and workability of devolution embodied elsewhere in the legislation and case law.⁶⁸

The approach in this context, reinforced by the devolution statutes' 'pre-enactment safeguards',⁶⁹ prioritises legal certainty: rather than merely giving in-competence *effect* to relevant provisions, they must on their face *be* within competence. In this sense, the legal effect of devolved legislation and its validity are entwined. 'Competence' is thus an analytical device to accurately explain the real legal picture rather than some hypothetical one. The existence of valid but ineffective legislation would, therefore, be in tension with the courts' wider approach in this context.

There are clearly some good reasons for desiring this degree of certainty in the devolution context. It ensures, simply, that the legal effects of laws enacted by the devolved legislatures are apparent on their face, with provisions already sculpted by competence boundaries,

66 Scotland Act 1998, s 29(1).

67 For example, *ibid* s 101.

68 *Treaty Incorporation* (n 65 above) [75]–[79].

69 See Kilford (n 64 above); *Treaty Incorporation* (n 65 above) [73]–[74]. The Court here put considerable, and somewhat surprising, weight on these safeguards.

rather than needing to have these applied subsequently. The courts have not been attracted to the idea that effectiveness can be easily – or usefully – severed from validity⁷⁰ and, consonant with this view, have also provided authority that the deprivation of the practical effect of legislation *does* engage the relevant competence. In the Supreme Court’s unanimous judgment in *Continuity Bill*, the Court said this:

An enactment of the Scottish Parliament which prevented such subordinate legislation from having legal effect, unless the Scottish Ministers gave their consent, would render the effect of laws made by the UK Parliament conditional on the consent of the Scottish Ministers. *It would therefore limit the power of the UK Parliament to make laws for Scotland, since Parliament cannot meaningfully be said to ‘make laws’ if the laws which it makes are of no effect.* The imposition of such a condition on the UK Parliament’s law-making power would be inconsistent with the continued recognition, by section 28(7) of the Scotland Act, of its unqualified legislative power.⁷¹

This is an important passage. It is concerned not with legal validity, but with effectiveness, the same point on which disapplication pivots. Indeed, the relevant provision ‘would not affect the formal validity of any subordinate legislation made in the exercise of such powers, but is directed merely at the legal effect of such legislation’.⁷² This distinction was not able to save the provision, however, because the Court’s unambiguous view was that Parliament’s power to make laws is undermined by a condition on the effectiveness of its legislation in a certain context.

This ‘rich’ approach to Westminster’s legislation contrasts with the approach taken by the UKIMA. Rather than being incoherent, however, it is arguable that *Continuity Bill* provides a rich account of competence which the UKIMA, along with the UK Government’s accompanying discourse, implies simply does not extend to the devolved legislatures. But what might justify an approach that vests *only* Westminster with a rich account of competence?

One answer might be that the richness of the account of competence in *Continuity Bill* is simply attributable to parliamentary sovereignty. This principle, of course not shared by the devolved legislatures, might seem to require stauncher protection by the Court than devolved competence can be afforded. However, the Court itself accepted that

70 *Continuity Bill* (n 64 above) [49]–[53].

71 *Ibid* [52] (emphasis added).

72 *Ibid* [49].

the relevant provision did *not* affect Westminster's sovereignty.⁷³ This is a persuasive contention: that '*Parliament cannot meaningfully be said to "make laws" if the laws which it makes are of no effect*' is simply a legal analysis of what it means to 'make laws', independent of parliamentary sovereignty. Any relationship with sovereignty must be borne by the secondary question: whether the Scottish Parliament is competent to qualify Westminster's power to make laws in this way. In the Court's judgment, it is not because to do so would modify a protected enactment (section 28(7)).

Even in this second stage of the analysis, however, sovereignty is not the relevant concept. Instead, it is the distinct (and quite different) notion of unqualified legislative power, more fully explored in the Supreme Court's subsequent *Treaty Incorporation* judgment, which is engaged.⁷⁴ That concept might be connected to parliamentary sovereignty, but its distinctness is evidenced (among other things) by its incapacity to tolerate qualifications which the Court, on its own analysis in both *Continuity Bill* and *Treaty Incorporation*, suggests *can* be borne by parliamentary sovereignty.⁷⁵ Sovereignty is painted in more flexible, accommodating terms than unqualified legislative power, which is more rigid and fragile. As such, it is right that an interference with section 28(7) does not necessarily meet the threshold to interfere with parliamentary sovereignty.

This point does not need to be laboured but suffice it to say that the Supreme Court's recent jurisprudence is not evidence that parliamentary sovereignty requires a 'rich' account of competence. Instead, it suggests that parliamentary sovereignty *can accept precisely* the kinds of limitations under discussion. The account of parliamentary sovereignty adopted by the Court in these cases is one that, if anything, is more closely aligned with the 'thin' account of competence, being flexible enough to tolerate conditions on effectiveness.

73 'Nor are we persuaded that section 17 impinges upon the sovereignty of Parliament. Section 17 does not purport to alter the fundamental constitutional principle that the Crown in Parliament is the ultimate source of legal authority; nor would it have that effect. Parliament would remain sovereign even if section 17 became law. It could amend, disapply or repeal section 17 whenever it chose, acting in accordance with its ordinary procedures.': *ibid* [63]; McHarg and McCorkindale (n 64 above) 194. See also Anurag Deb's contribution to this special edition.

74 *Treaty Incorporation* (n 65 above). Mark Elliott and Nicholas Kilford, '[Devolution in the Supreme Court: legislative supremacy, Parliament's "unqualified" power, and "modifying" the Scotland Act](#)' (*UK Constitutional Law Association* 15 October 2021); Mark Elliott and Nicholas Kilford, 'The Supreme Court's defence of unqualified lawmaking power: parliamentary sovereignty, Devolution and the Scotland Act 1998' (2022) 81 *Cambridge Law Journal* 4.

75 *Continuity Bill* (n 64 above) [63]; McHarg and McCorkindale (n 64 above) 194.

The answer might then be that whatever the relevant principle – whether parliamentary sovereignty or unqualified legislative power – protection is provided to Westminster’s legislation through a mechanism that the devolved institutions cannot draw upon, and so the distinction between their conceptions of competence is justified. Yet, this still does not provide a complete answer. That ‘Parliament cannot meaningfully be said to “make laws” if the laws which it makes are of no effect’ does not appear to be the product of section 28(7), and neither is it clear that it is confined to the context of *unlimited* legislative power. Instead, this statement suggests that a qualification of the legal effect of legislation goes to the power to make laws, *whatever its scope*, whether infinite or infinitesimal. It does not appear that the presence of a limit on the scope of legislative competences would deprive that reasoning of its resonance. Indeed, other legislatures in the UK are empowered to ‘make laws’⁷⁶ and, even though they have limited competence, they might, therefore, be justified in seeking to rely on this reasoning, and its normative foundations, as much as a legislature with legally unlimited competence. That the attribution of the richer account to the devolved legislatures is endorsed by the Constitution Committee (among others) demonstrates that this view *does* have purchase in contexts where the relevant legislature *does* have limited law-making power.

Continuity Bill and *Treaty Incorporation*, far from explaining why different rules might – or should – apply to Westminster, simply highlight that the rich account of competence has purchase, and that attempts to limit that account to Westminster require solid, yet absent, reasoning.

A MOMENT OF DEPARTURE: COMPETENCE AS A COMPONENT OF CENTRALISATION UNDER THE UKIMA

The use of disapplication by the UKIMA’s market access principles is a double-edged sword. Because it leaves the legal validity – if not the effect – of devolved legislation intact, it facilitates what Plaid Cymru has described as ‘Westminster double-speak’.⁷⁷ Competences undermined in practice, appear untouched on paper. Disapplication therefore provides the strongest case, endorsed by the UK Government through its preferred account of competence, that the UKIMA is not in fact an entirely centralising project. However, it is argued that rather than disguising or deflating the centralising tendencies of the UKIMA,

⁷⁶ Eg Scotland Act, s 28(1).

⁷⁷ Plaid Cymru (n 8 above).

the adoption of this mechanism enhances them. This is for two reasons, one normative and one practical.

The first reason is perhaps clear already. Under the UKIMA's market access principles, devolved legislation is only effective so far as compatible with a scheme that is explicitly (supposedly) *not* a competence limitation. Rejecting that this is a competence limitation implies that the devolution scheme offers protection only to the validity and not the effectiveness of devolved legislation. Further, where the devolved legislatures must rely only on a 'thin' conception of competence which is little more than illusory, Westminster benefits from the richer account adopted by the Supreme Court.⁷⁸ As such, especially when Westminster's capacity to circumvent or alter the market access principles is recalled, the devolved legislatures are subordinated at a foundational, normative level.

This is important because the UK's devolution framework is – or at least, has been – predicated on a normative equivalence between Westminster and *intra vires* devolved legislation.⁷⁹ This is why, so far as within their competence, the devolved legislatures can amend – or even repeal – Acts of the Westminster Parliament.⁸⁰ Westminster can, of course, return the favour (a process described as 'legislative ping-pong');⁸¹ although its capacity to do so is qualified to some extent by the constitutional need (if not always the political desire) for devolved consent.⁸² In a passage mirrored by implication in the other two devolution schemes, the Northern Ireland Act 1998 expressly provides that 'an Act of the [Northern Ireland] Assembly may modify

78 This has been described elsewhere as 'bifurcation': Nicholas Kilford, 'The UK Internal Market Act and the power to make effective laws' (*Institute of Welsh Affairs* 27 September 2022).

79 See *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46, [2012] 1 868 [45]–[46] and [146]; Aileen McHarg, 'What is delegated legislation?' [2006] Public Law 539.

80 Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' (n 57 above) 36. See also Mohamed Moussa, 'The "absent word" canon and asymmetrical sovereignty' (*UK Constitutional Law Association* 20 December 2022).

81 'In short, Parliament can always assert its will against a devolved legislature such as the Assembly even in relation to a devolved matter; but, in order to avoid the prospect of legislative "ping-pong" over a contested provision, with successive amendments made by the Assembly and undone by Westminster, an intrusion into the current devolved settlement would likely be required.': *Safe Electricity A&T Ltd & Another, Re Application for Judicial Review* [2021] NIQB 93 [45] (Scofield J).

82 See, notably, Graeme Cowie, 'Brexit: devolution and legislative consent' (Briefing Paper CBP 08274, House of Commons Library 2018).

any provision made by or under an Act of [the UK] Parliament in so far as it is part of the law of Northern Ireland'.⁸³

The devolution scheme is, therefore, built on an essential foundation of 'dynamism'.⁸⁴ At its core lies the premise that neither Westminster's parliamentary sovereignty, nor its possession of a number of exclusive competences, renders the devolved legislatures themselves constitutionally insignificant, nor emasculates the normative character of their in-competence legislation.⁸⁵ It is the boundaries of competence, historically at least, which are therefore axiomatic, determinative of the freedom those legislatures possess. Within those boundaries, autonomy is considerable, outside of them it is non-existent.⁸⁶

The UKIMA, by contrast, presents a different view of devolution wherein devolved legislation – even within competence – is second-class. Rather than being the normative equivalent of Westminster's, devolved legislation *within* competence can be deprived of its practical effect by ordinary Westminster legislation, and even by lower regulatory standards in other parts of the UK.

The second reason disapplication enhances the centralising effects of the UKIMA is practical: the disapplication framework has two centralising implications which chime with the broader centralising project under the UKIMA. First, disapplication limits devolved freedom to diverge. Second, it is an essential mechanism through which Westminster's (and Whitehall's) engagement in devolved areas is emboldened. As such, it both *reduces* the outer limits of what the devolved institutions are capable of achieving, and *empowers* the central institutions even in areas where devolved institutions retain power.⁸⁷

83 Northern Ireland Act 1998, s 5(6).

84 See eg Deb and Kilford (n 14 above); Kilford (n 78 above).

85 'When acting within competence, the legislative autonomy granted to the Assembly under the Northern Ireland devolution settlement is considerable... within its sphere of competence, the Assembly is entitled to pass laws modifying any provision made by an Act of Parliament in so far as it is part of the law of Northern Ireland. By section 98(1), "modifying" is defined, in relation to an enactment, to include amendment or repeal. Thus, provided the Assembly is not acting beyond its competence as defined by sections 6–8 of the NIA, it may repeal any provision made by an Act of the Parliament of the United Kingdom as a matter of the law of Northern Ireland.': *Safe Electricity A&T Ltd & Another* (n 81 above) [43]–[44] (Scofield J).

86 'There is no limitation on the Assembly's power to legislate for transferred matters, other than those relating to legislative competence more generally.': *ibid* [48] (Scofield J). See also Anurag Deb's contribution to this special edition.

87 This second component might appear analogous to 'cooperative federalism' or 'shared rule', in which (at least) two regulatory bodies and spheres 'overlap' in the same areas. However, it is difficult to argue, given the general disregard for devolution throughout the enactment and content of the UKIMA, that it is meaningfully 'cooperative'.

The following section proceeds in two parts: first it sets out the general centralising components of the UKIMA itself. These have been explored elsewhere but are worth rehearsing here because they illuminate how disapplication fits within this broader scheme. Second, the way that disapplication both normatively and practically undermines devolution is considered.

The UKIMA as a centralising project

Because several parts of the legislation itself, and the process of enacting it ‘do betray the centralizing motivations that underpin UKIMA’,⁸⁸ it is worth devoting a little time to the broader centralising picture painted by the UKIMA to better understand how the subordination of devolved legislation fits within that context.

To take process first, the UKIMA’s enactment was notably dismissive of devolved concerns and interests,⁸⁹ compounded by its explicit departure from the less unitary approach to market regulation under the common frameworks that preceded – and continue to interact with – it:⁹⁰

... in place of a co-operative, co-owned process that embedded respect for devolution, as was the case with common frameworks, UKIMA was driven by the UK Government alone in the face of deep-seated opposition from all three devolved administrations. It was also introduced very late in the Brexit process. A White Paper was published in July 2020, allowing only four weeks for consultation[.]⁹¹

Despite this opposition, the UKIMA proceeded without devolved consent, and the principles contained in the UKIMA, bereft of devolved input, contrast with the more consensual arrangements common

88 Dougan et al (n 16 above) 651.

89 House of Lords Select Committee on the Constitution (n 16 above) paras 7–14.

90 The ‘market access principles are displaced only if the UK Government makes secondary legislation to give statutory effect to a common framework’: Seán Patrick Griffin, ‘The deposit return scheme and the UK Internal Market’ (*The Constitution Society* 7 July 2023). UKIMA, s 10; Thomas Horsley and Jo Hunt, ‘In praise of cooperation and consensus under the territorial constitution: the Second Report of the House of Lords Common Frameworks Scrutiny Committee’ (*UK Constitutional Law Association* 26 July 2022). See also Legislation, Justice and Constitution Committee, ‘Statement by the Committee: United Kingdom Internal Market Bill’ (Welsh Parliament 2020).

91 Dougan et al (n 16 above) 661. These four weeks were during the Senedd’s recess: David Rees MS to Alok Sharma MP and Simon Hart MP, ‘UK Internal Market White Paper’ (30 July 2020).

to other internal markets.⁹² Indeed, the substance of the UKIMA appears to neglect, or undervalue, the contribution that the devolved institutions might be able to offer:

Impressed throughout the UKIMA is the primacy of the UK government as UK-wide regulator ... [T]he UK government retains a significant degree of control over the scope of the mutual recognition and non-discrimination tests. This is evident, for example, through its powers to amend the definition of ‘relevant requirements’ for goods, as well as to modify the frameworks governing the justification of measures that infringe either principle. Prior to exercising those powers, the Secretary of State is required to seek the consent of the devolved administrations, but may proceed regardless after one month provided she provides a reasoned statement.⁹³

Horsley explains, for example, that the UKIMA’s emphasis is on competition rather than cooperation,⁹⁴ and it is as part of this emphasis that the UKIMA limits the capacity for devolved legislative divergence.⁹⁵ However, it also provides for, and legitimates, central engagement within devolved areas. In this sense, it ‘disrupts the basic approach to managing the co-existence of different sites of legislative power within the UK’, standing in contrast to the “devolve and forget” model, according to which the UK Parliament transferred legislative powers to the devolved administrations to exercise as they see fit and subject only to compliance with specific, predetermined limits’.⁹⁶

Arguably, then, the UKIMA ‘introduces something genuinely novel into the UK’s pre-existing territorial constitution’ by establishing a scheme which transcends the boundaries of devolution,⁹⁷ and which

92 ‘The co-option, by force of constitutional principle, of the devolved administrations into the UK internal market contrasts with the procedures governing the establishment of the EU internal market. In the latter case, the Member States freely consented to the adoption of the EU Treaties (and their subsequent amendment) as institutional partners.’: Horsley (n 5 above) 1156.

93 Ibid 1157.

94 Ibid 1153.

95 Thomas Horsley, ‘Reshaping devolution: the United Kingdom Internal Market Act 2020’ (*UK in a Changing Europe* 10 October 2022).

96 Ibid. See also Alex Wickham, ‘POLITICO London Playbook: Oxford down – New Rules – Market Day’ (*POLITICO* 9 September 2020); Library Specialists (n 3 above) 22; Stephen Weatherill, ‘Will the United Kingdom survive the United Kingdom Internal Market Act?’ (*UK in a Changing Europe* 7 May 2021).

97 Horsley (n 5 above) 1152.

mirrors the ‘muscular’ or ‘hyper-unionism’ seen elsewhere.⁹⁸ Indeed, ‘the Johnson administration’s centralising and unilateral approach to the introduction of UKIMA [was] founded on an understanding of the United Kingdom more as a “unitary” than a multi-layered, territorially complex state’.⁹⁹ Accordingly, the curtailment of both devolved input to the legislative process and devolved legislative freedom under the scheme is accompanied by a growth of powers providing for central interference within devolved matters. Indeed, convergence was expressly the intention of the legislation from at least an international perspective,¹⁰⁰ despite federal experiences suggesting that divergence is compatible with international agreements.¹⁰¹

The UK Government’s response is that, under the UKIMA ‘the devolved administrations ... retain the right to legislate in devolved policy areas that they currently enjoy’.¹⁰² Even though that right is no longer as constitutionally exclusive, the UK Government’s position, as has been seen, is that it is disapplication which *preserves* devolved competence and therefore qualifies these centralising implications. However, the opposite is true: the disapplication framework, in subordinating the devolved legislatures, is a core and potent part of centralisation under the UKIMA.

Disapplication as a component of centralisation

The broader centralising effects of the UKIMA may be well-known. They are not likely a surprise: the White Paper described the UK merely as ‘a unitary state with powerful devolved legislatures, as well as increasing devolution across England’.¹⁰³ And yet, despite the lack of emphasis placed on the constitutional significance of devolution, the White Paper also said ‘[l]egislative innovation would remain a central feature – and strength – of our Union’.¹⁰⁴

98 Ciaran Martin, ‘Can the UK survive muscular Unionism?’ [2021] Political Insight; Michael Kenny and Jack Sheldon, ‘Unionism, Conservative thinking and Brexit’ (*Centre on Constitutional Change* 27 July 2020); Michael Kenny and Jack Sheldon, ‘When planets collide: the British Conservative Party and the discordant goals of delivering Brexit and preserving the domestic union, 2016–2019’ (2020) 69 *Political Studies* 965; Henry Hill, ‘Putting muscle behind the Union’ (*The Critic* November 2021).

99 Dougan and others (n 16 above) 661.

100 Department for Business, Energy & Industrial Strategy (n 1 above) paras 123–123.

101 Library Specialists (n 3 above) 15–16; Confederation of British Industry, ‘A roaring trade: capitalising on the opportunities of a UK–US free trade agreement’ (2020) 34–5; Welsh Parliament Research Service, ‘Internal market White Paper research briefing’ (2020) 16.

102 Department for Business, Energy & Industrial Strategy (n 1 above) 22.

103 *Ibid* 12.

104 *Ibid* 22; Library Specialists (n 3 above) 13.

The cover for this claim is provided by disapplication and the implication that it, at least on one account, leaves competences intact. However, in adopting that model, the UKIMA is – perhaps inadvertently, perhaps not – normatively subordinating the devolved institutions in a way arguably far more fundamental than a simple alteration of competences. This subordination fits within, and forms part of, the wider centralising implications of the UKIMA in three ways. First, it undermines devolution’s dynamism. This is because it establishes what might tentatively be described as a kind of ‘supremacy clause’ through which *in-competence* devolved legislation is unequal to, and disappplied by, purportedly non-competence limitations in ordinary but normatively superior Westminster legislation. Second, it undermines legal certainty by creating a complex scheme through which valid legislation is in some cases – and depending on a complex analysis – of no practical effect. This is particularly jarring given the courts’ attempts – historic and recent – to ensure that devolved legislation does not need to be interpretively ‘trimmed’ by competence limitations but should be able to be read on its face as providing an accurate picture of the law. Third, the use of disapplication means that constitutional change is disguised, and that the discourse itself is obfuscated as the different institutions are encouraged to talk past one-another.

Undermining dynamism

Perhaps its most significant impact is the UKIMA’s influence on the dynamism of devolution, which captures both (i) the normative equivalence between *intra vires* devolved and Westminster legislation, and (ii) the autonomy enjoyed within devolved competence.

As to the first, the UKIMA appears to operate as an *in-competence* restriction on the devolved legislatures. A protected enactment, like the UKIMA, cannot be ‘modified’ by the devolved legislatures. However, rather than merely being incapable of modifying the UKIMA, the devolved legislatures *must legislate compatibly with* the market access principles. Because this qualification does not take the form of a ‘hard’ competence limit it appears to act as a kind of supremacy clause: Westminster has provided, in ordinary legislation, a framework within which the devolved institutions must operate for their law to be effective *even within their competence limits*.¹⁰⁵ Put another way, devolved legislation may only make effective provision so far as compatible with the market access principles. The subordinating effect of this framework is amplified by the ease with which Westminster might be able to amend the UKIMA to tighten these restrictions further

105 See eg Australian Constitutions Act 1850, s 14.

or alter their effect, and by the power of the Secretary of State to alter the exemptions to the market access principles.¹⁰⁶

Consequently, the UKIMA places Westminster and devolved legislation on different normative planes. It is true that the Westminster Parliament always has the legal power to amend the competences of the devolved institutions and to protect its enactments from modification but, in taking the form of ‘hard’ limitations, these changes are both exposed to high levels of accountability and form the boundaries of competence itself. The UKIMA presents a quite different picture wherein, even *within* those boundaries, devolved legislation is ‘second-class’. Rather than the legislative ‘ping-pong’ implied by devolution, the UKIMA framework is far more hierarchical.

Another problem for the dynamism of the settlement is that the UKIMA imposes additional complex requirements with which the devolved institutions are themselves relatively powerless to engage. For example, sometimes the application of the market access principles will require a complex, perhaps unfamiliar, economic analysis. However, unlike competence limits, where there are a number of avenues open to the devolved legislatures to engage with, test and ultimately challenge their application, no similar mechanism exists for a devolved legislature to challenge the disapplication of its legislation by the UKIMA.¹⁰⁷ As such, an essential mechanism through which the devolved institutions can attempt to defend their legislation on competence grounds is absent in the context of the UKIMA. The consequence of this approach is that devolved freedom to diverge is deeply qualified, with limited opportunities for that qualification to be challenged (even if such a challenge *would* ultimately be successful).

The UKIMA therefore appears to present a new, albeit relatively nascent, approach to the management of devolution. Rather than an assumption that devolved power can be exercised freely within competence, this new approach is to permit autonomy only where central institutions are satisfied that that is appropriate in a particular case.

Evidence for this can be found in statutory instruments which qualify the operation of the market access principles. One of the earliest sources of the Welsh Government’s concerns about the UKIMA was in the context of single-use plastics. Put simply, the Welsh Government

106 Explanatory Notes to the UKIMA, para 26.

107 Dougan et al (n 16 above) 671. The closest mechanism contained in the Act is that the Office for the Internal Market ‘may also issue non-binding advice on the compatibility with the UKIMA of proposed regulations’: Horsley (n 5 above) 1149; UKIMA, ss 34–35. Dougan et al (n 16 above) 667: ‘UKIMA does not go as far (say) as mimicking the EU’s long-established model of mandatory prior notification of draft standards.’

was seeking to regulate their use in legislation, the operation of which would be cut down by the market access principles in the UKIMA. To the extent that this legislation regulated imports into Wales, it would have no effect at all, seriously undermining its policy ambitions.

In July 2022, using the powers under section 10(2) UKIMA, the Secretary of State made regulations exempting single-use plastics from the market access principles.¹⁰⁸ These regulations came into force in August 2022 and follow an agreement reached under the common frameworks mechanism, through which the devolved institutions sought an exemption.¹⁰⁹ Not only does this instrument appear to imply that devolved concerns about the UKIMA were well-founded, it also points to a new relationship between the institutions wherein the devolved institutions seek permission to make effective law in a certain area, and Whitehall and Westminster – if inclined – acquiesce. Similarly, the Scottish Government has proposed a deposit return scheme pursuant to which it has sought an exemption from the UKIMA’s market access principles. However, the UK Government has not agreed a *full* exemption (only agreeing an exemption to the extent that it would align the scheme with its own proposed UK-wide one). The Scottish Government announced, after failing to secure the UK Government’s reconsideration, that the scheme would be delayed.¹¹⁰ Recently, the Scottish Parliament has passed the Wildlife Management and Muirburn (Scotland) Bill, but no exemption to the market access principles pursuant to banning the sale of glue traps has been secured. Thus, under this model, the UK Government occupies a dominant position: it has the discretion to determine whether certain devolved policies otherwise within competence will be effective. This is a noticeable shift away from a position wherein the devolved institutions did not require consent for legislation within their competences to be effective.

In fact, this system represents a regression to one analogous to that abandoned in Wales in 2011. Under that system, set out in part 3 of the Government of Wales Act 2006, the Welsh National Assembly only received competence following legislative competence orders which needed to be negotiated with the UK Parliament. Not only was this system complex and often unworkable, but it also made it clear that, in practical and symbolic terms, the Welsh institutions were junior partners.

108 UKIMA (Exclusions from Market Access Principles: Single-Use Plastics) Regulations 2022.

109 Department for Levelling Up and Housing and Communities and Cabinet Office, ‘[Process for considering UKIM Act exclusions in Common Framework Areas](#)’.

110 The Scottish Parliament has also subsequently voted in favour of repealing the UKIMA: Scottish Government, ‘[Protecting the powers of the Scottish Parliament](#)’ (*Scottish Government News* 3 October 2023).

Undermining legal certainty

The courts have, as explored above, sought to ensure that legal certainty is a core component of the devolution scheme, especially given that the UK's internal market has already provided some of the competence limitations under that scheme.¹¹¹ However, the UKIMA enables the devolved legislatures to enact provisions which may, in relevant circumstances, have no – or much more limited – legal effect. As noted, the UKIMA requires a complex analysis, part of which is overlaying the market access principles on top of legislation, and part of which may be a complex economic analysis (for example, in order to deduce if there is indirect discrimination).¹¹² Both of these qualities are antithetical to the Supreme Court's recent unanimous position that a legislature's enactments should accurately mirror the scope of its powers, rather than those limitations being implied into their operation by the courts *ex post*.¹¹³

Concealing constitutional change and obscuring the discourse

Inter-institutional discussions are important, as are agreed concepts. However, one of the reasons that the UK Government and the devolved institutions have been, effectively, talking past one another is because they appear to disagree about what competence actually means, and what it takes to change it. In this way disapplication – in contrast to invalidity – becomes a useful device to conceal or disguise significant constitutional changes:

On paper, devolution might continue to look the same. Indeed, it might even look more extensive, given the repatriation of powers previously exercised at EU level to the devolved authorities under the EU (Withdrawal) Act 2018. But in practice, the operation of UKIMA has real potential to limit the capacity of the devolved institutions to pursue different economic or social choices from those made in London.¹¹⁴

Accordingly, disapplication allows the UK Government to contend – using a legalistic analysis – that devolved powers have grown, whereas the devolved legislatures' more practical analysis yields the opposite results.

111 'As Lord Hope noted in *Imperial Tobacco*, a common theme of the reservations is that they "are designed to ensure that there is a single market within the United Kingdom for the free movement of goods and services".': Dougan et al (n 16 above) 657; *Imperial Tobacco Ltd v The Lord Advocate* [2012] UKSC 61, [2013] 1 AC 792 at [29] (Lord Hope).

112 Dougan and et al (n 16 above) 669.

113 *Treaty Incorporation* (n 65 above) [17], [59] and [62].

114 Dougan et al (n 16 above) 674.

It is not necessarily clear that the UKIMA impliedly repeals relevant provisions of the devolution statutes.¹¹⁵ However, by characterising its effects in terms of disapplication, it simply does not need to. Yet this approach adds to the ‘smoke screen’, making significant adjustments to the territorial constitution via ordinary legislation without proper oversight, accountability and transparency; even more concerning when the limited engagement with the devolved institutions throughout its enactment is considered.

Put another way, the UKIMA ‘de-constitutionalises’ competences, suggesting that the practical effect of devolved legislation is not a major constitutional concern, certainly not in comparison to the *de jure* competences set out in the devolution statutes themselves. This may be the product of a narrow legalistic analysis, or it may be an attempt to insulate significant constitutional changes from proper scrutiny and accountability. In either case, it is difficult to argue – even if *de jure* competences are unchanged – that the UKIMA is consistent with the terms and spirit of the devolution settlement, let alone any wider principle of devolved autonomy, a broader idea surely concerned with the effectiveness of devolved legislation, rather than being satisfied merely by the capacity of the devolved legislatures to enact valid but ineffective legislation. Further, they are features of the constitution which might be undermined by attempts to conceal real changes to the devolution settlement by devices like disapplication, through which a centralising project is disguised, dressed in the camouflage of further decentralisation.

CONCLUSION

The UKIMA’s market access principles do not admittedly alter the competences of the devolved legislatures. Consonant with the UK Government’s position, this is because disapplication – the process by which they affect the ‘operation’ but not the validity of devolved legislation – arguably does not go to ‘competence’ *per se*. However, this account is predicated on a narrow view of that concept, which does not appear to apply with the same force to Westminster. The result of this process is the creation of a new ‘in competence’ limit on devolved law-making power which undermines several core components of the devolution settlement, including its dynamism and emphasis on legal

115 See *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* EWHC (n 7 above); *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* (n 7) EWCA. Nicholas Kilford, ‘The UK Internal Market Act’s interaction with Senedd competences: the Welsh Government’s challenge’ (*UK Constitutional Law Association* 23 February 2021).

certainty. Rather than merely adding to the list of ‘hard’ limits on devolved power, the disapplication system employed by the UKIMA undermines the status of devolved legislation, rendering it subordinate – and vulnerable – to ordinary Westminster legislation, all while effectively concealing the reality of this change. However, rather than disguising the UKIMA’s centralising implications, the disapplication process *is* itself their core component.

It may seem like this case is being overstated: the UKIMA is one piece of legislation operating within quite a limited context. However, not only is the UKIMA illustrative of a broader centralising trajectory, it is also a striking case of *déjà vu*. The UKIMA is a prime piece of post-Brexit regulation and, as Horsley and others have noted, bears an intriguing resemblance to the system it replaces, being modelled on – or at least borrowing from – the EU’s own internal market architecture. This is perhaps ironic in itself. However, the UKIMA also reopens questions, all too familiar in the EU context, about ‘competence creep’ and the overriding of local policy ambitions by distant political institutions. As in that context, it is not clear that limiting the UKIMA to the practical effect of legislation rather than its validity will provide much consolation to those seeking to ‘take back control’.

Indeed, the narrower view of competence is defined by the claim that the disapplication of devolved legislation is constitutionally tolerable and compatible with the devolution settlement. As such, narrow and rich views of devolved competence – especially so far as they contrast with accounts of Westminster’s – are microcosms for narrow and rich accounts of devolution itself, and its place within the UK’s contemporary constitution. Which path is taken on competence might be instructive as to exactly what position devolution itself is thought to occupy.