



# Internal market governance by consensus rather than conflict? Common Frameworks and the potential for positive harmonisation\*

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## ABSTRACT

This article connects theories of positive and negative harmonisation with perspectives on self- and shared rule to examine emerging approaches to managing domestic (ie intra-United Kingdom (UK)) trade post-Brexit. Our particular focus is on a new tool of governance: the Common Frameworks – a consensus-based collaborative intergovernmental approach to policymaking in areas of devolved competence previously falling within the scope of the European Union Treaties. We explore the potential of the Frameworks as instruments of positive harmonisation with reference to emerging practice and consider their relationship with the United Kingdom Internal Market Act 2020. Our analysis unmask internal market governance post-Brexit as a contested space, reflecting deepening divisions between the UK and devolved governments regarding self- and shared rule under the UK’s territorial constitution. We identify three key drivers of contestation: a lack of consensus on the UK internal market as a regulatory object; changes in political context; and enduring structural and attitudinal imbalances favouring political control from the centre.

**Keywords:** Common Frameworks; UK Internal Market Act 2020; UK internal market; devolution; shared rule; harmonisation; Brexit; UK constitution.

## INTRODUCTION

Any multilevel governance system in which competence is distributed across different legislative sites will confront the issue of internal regulatory divergence. The extent to which this is perceived as a problem to be solved and the mechanisms available to do so will depend on the specific constitutional arrangements and political choices made

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within that system. In its five-decade exercise in market-making, the European Union (EU) has served as a test bed for the development of governance tools and theorising about internal markets in systems of multilevel governance.

Scharpf famously identified two main mechanisms for market-making and diagnosed in the EU an imbalance between the two.<sup>1</sup> The deregulatory impulse of negative harmonisation, which involves the removal of national rules violating the free movement imperative, accompanies re-regulatory positive harmonisation, which involves the joint adoption of new, common EU-wide regulatory standards.<sup>2</sup> However, as a consequence of ‘the combined impediments facing consensual intergovernmental and pluralist policy-making’,<sup>3</sup> positive harmonisation in the EU was for many years relatively underutilised and underdeveloped, in contrast to negative harmonisation.<sup>4</sup> In other multilevel systems, meanwhile, particular institutional and constitutional factors have sometimes meant that there has been less opportunity for a clear negative harmonisation dynamic to take hold.<sup>5</sup> Strong traditions of sub-state constitutional autonomy in Canada, for example, accompany narrower readings of their federal inter-state free movement clause than seen in other systems, leaving more space for local policy choices to be maintained.<sup>6</sup>

Theorising internal regulatory divergence with reference to positive and negative harmonisation (and the balance between them) intersects with ideas of self- and shared rule within systems recognising distinct layers of political authority. Self-rule references the capacity in federal, and federal-type, orders for each level to determine matters itself, whilst shared rule relates to the arrangements for the different levels of government to work together in the interests of the state

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1 F Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 2019).

2 Ibid 45.

3 Ibid 50–51.

4 Ibid 50. On negative integration and the development of the EU legal order, see eg E Stein, ‘Lawyers, judges and the making of a transnational constitution’ (1981) 75 *American Journal of International Law* 1 and J H H Weiler, ‘The transformation of Europe’ (1991) 100 *Yale Law Journal* 2403.

5 G Anderson (ed), *Internal Markets and Multi-Level Governance: The Experience of the European Union, Australia, Canada, Switzerland and the United States* (Oxford University Press 2012).

6 See W Dymond and M Moreau, ‘Canada’ in Anderson (n 5 above) and N McEwen, ‘The limits of self rule without shared rule’ in Ferran Requejo and Marc Sanjaume-Calvet (eds), *Defensive Federalism: Protecting Territorial Minorities from ‘The Tyranny of the Majority’* (Routledge 2023) 67.

overall.<sup>7</sup> Negative harmonisation, involving the removal of barriers to free movement, presents as a challenge for self-rule, requiring political institutions to justify policies against a set of recognised overriding public interest requirements. This is designed to ensure the representation of external interests within national (or sub-national) political processes.<sup>8</sup> With its focus on coordination from the centre, positive harmonisation, in contrast, speaks primarily to the dynamics of shared rule. National (or sub-national) actors are brought together at the centre to agree on common approaches (or the limits of divergence) in policy areas affecting cross-border activity.

In this contribution, we engage positive and negative harmonisation alongside discussion of self- and shared rule to examine emerging approaches to regulating domestic (ie intra-UK) trade post-Brexit. Adopting this perspective, we look beyond the enduring lawyerly concern with questions of legislative competence<sup>9</sup> and the political scientists' primary interest in the study of devolution through the prism of intergovernmental relations (IGR).<sup>10</sup> Our particular focus is on a new tool of governance for the United Kingdom (UK) – the Common Frameworks, a consensus-based collaborative intergovernmental approach to policymaking in areas of devolved competence previously falling within the scope of the EU Treaties. The Frameworks approach to managing intra-UK trade post-Brexit was introduced by intergovernmental agreement in 2017<sup>11</sup> and subsequently joined, and

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7 On self- and shared rule, see especially D J Elazar, *Exploring Federalism* (University of Alabama Press 1987) and L Hooghe, G Marks, A H Schakel, S Chapman Osterkat, S Niedzwiecki and S Shair-Rosenfield, *A Postfunctionalist Theory of Governance. Volume I: Measuring Regional Authority* (Oxford University Press 2016) 23–28.

8 See here eg D H Regan, 'Judicial review of member-state regulation of trade within a federal or quasi-federal system: protectionism and balancing, da capo' (2001) 99(8) *Michigan Law Review* 1853. See also, with respect to art 34 TFEU, M Maduro, 'Reforming the market or the state? Article 30 and the European Constitution: economic freedom and political rights' 3 *European Law Journal* (1997) 55. For criticism on limits, see eg J Jaakkola, 'Enhancing political representation through the European economic constitution? Regressive politics of democratic inclusion' (2019) 15(2) *European Constitutional Law Review* 194.

9 As Page and Batey observe, '[w]hether a problem is a Scottish one demanding a Scottish solution or a UK one demanding a UK solution cannot necessarily be worked out from whether its subject-matter is devolved or reserved under the Scotland Act'. See A Page and A Batey, 'Scotland's other parliament: Westminster legislation about devolved matters in Scotland since devolution' (2002) *Public Law* 501, 513.

10 See eg N McEwen and B Petersohn, 'The challenges of shared rule after the Scottish Referendum' (2015) 86 *Political Quarterly* 192–200; see also eg N McEwen, 'The limits of self-rule without shared-rule' in Requejo and Sanjaume-Calvet (n 6 above).

11 [Joint Ministerial Committee \(EN\) Communiqué](#), 16 October 2017.

challenged, in this governance space by the UK Internal Market Act 2020 (UKIMA). The latter Act, presented by the Johnson Government as a necessary solution to an assumed problem of potential regulatory divergence within the UK, is a stark example of market-making through negative harmonisation, and one with profound consequences for the effective policy choices available to the devolved governments at the sub-state level.

In section 1, we explore the practice of positive harmonisation in the EU context and its impact on the devolution settlements in the UK, before examining existing domestic mechanisms for positive harmonisation. Section 2 turns to explore the Common Frameworks as tools of positive harmonisation, drawing attention to their potential functioning as instruments for shared rule in areas of devolved policymaking that were previously within the scope of the EU Treaties. In section 3, we place the Frameworks alongside the UKIMA as an instrument of negative harmonisation and consider the emerging balance being struck between negative and positive harmonisation post-Brexit. Section 4 then reflects on factors conditioning the operation of the Common Frameworks as positive harmonisation tools. Here we identify three issues restricting their potential as instruments for effective substantive policy coordination between the UK and devolved governments: a lack of consensus around the UK internal market as a regulatory object; the polarising effect of changes in political context post-Brexit; and the enduring problem of structural imbalances privileging UK Government influence in mechanisms for shared rule, including the Common Frameworks. Whilst the Common Frameworks involve all four governments, the position of Northern Ireland is especially complex, given the shifting application of aspects of EU law under the Northern Ireland Protocol/Windsor Framework, and the absence of elected representatives at Stormont. Our focus in this contribution thus rests particularly on the narrower GB operation of the domestic internal market.

As a point of departure, the UK's experience of devolution is distinctive in that, pre-Brexit, it did not involve the creation of specific domestic instruments for positive or negative harmonisation.<sup>12</sup> In policy terms, the approach was essentially one of 'devolve and forget' rather than devolve and coordinate jointly. Devolution was also inherently asymmetrical, not extending to cover England as the largest

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12 On devolution and its evolution generally, see eg D Torrance, "A Process, not an Event": Devolution in Wales 1998–2020' (House of Commons Briefing Paper CBP 8318, 6 April 2020) and D Torrance, "The Settled Will?" Devolution in Scotland 1998–2020' (House of Commons Briefing Paper CBP 8441, 6 April 2020).

and economically most powerful of the four UK nations.<sup>13</sup> The space to balance self- and shared rule was instead largely occupied by EU principles and structures, including in relation to the management of intra-UK trade.<sup>14</sup> Brexit decoupled the UK's territorial constitution from this architecture, requiring the UK and devolved governments to arrive at a fresh consensus regarding the principles and structures of a newly reconstituted domestic internal market. Our analysis of the Common Frameworks and UKIMA as instruments of, respectively, positive and negative harmonisation (and their interaction) evidences the struggle to do so effectively thus far.

The space that the Common Frameworks and UKIMA now occupy remains politically contested, with Brexit exacerbating rather than reducing political tensions between the UK and devolved governments. Viewed from Cardiff and Edinburgh, the repatriation of EU powers marks the point at which regulatory control in areas of devolved competence previously governed by EU law should increase to expand the scope for democratic self-rule. Contrastingly, the UK Government appears intent, post-Brexit, on coordinating intra-UK regulatory policy prospectively as an exercise in shared not self-rule. But without the principles and structures of the EU internal market in place as constitutional guardrails, its efforts to achieve this, including through the Common Frameworks, are collapsing under the weight of its attachment to a theory of the UK's territorial constitution that, by default, prioritises control from the centre. The UK Government's controlling impulses are evident not only through its enactment of the UKIMA without the consent of the devolved governments, but also in its emerging approach to policy coordination through the Common Frameworks as instruments of shared rule. As we conclude, internal market governance will remain contested for as long as the UK remains tied to a constitutional framework that requires mechanisms for positive (and negative) harmonisation to operate under the shadow of the present constitution.

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13 On asymmetry, see eg C M G Himsworth, 'Devolution and its jurisdictional asymmetries' (2007) 70(1) *Modern Law Review* 31 and C Jeffreys, 'Devolution in the United Kingdom: problems of a piecemeal approach to constitutional change' 39(2) *Federalism and Constitutional Change* 280.

14 See here eg *R (on the application of Petsafe Ltd) v Welsh Ministers* [2010] EWHC 2908 (Admin) [2010] 11 WLUK 379 and section 3 below.

# 1 POSITIVE HARMONISATION: THE EU, DEVOLUTION AND THE UK CONSTITUTION

## 1.1 Positive harmonisation and EU integration

Writing in the context of EU market integration and drawing on Tinbergen's earlier work on economic policy,<sup>15</sup> Scharpf, explains how:

*negative* integration refers to the removal of tariffs, quantitative restrictions, and other barriers to trade or obstacles to free and undistorted competition. *Positive* integration, by contrast, refers to the reconstruction of a system of economic regulation at the level of the larger economic unit.<sup>16</sup>

Negative integration (or negative harmonisation)<sup>17</sup> is exclusively a mechanism for market-making and is inherently deregulatory. Positive harmonisation meanwhile can contribute both to the creation of a new, wider market through the harmonisation of divergent national norms, as well as to securing social protections, through market-correcting initiatives. Here, common policies may be adopted to set baseline standards for matters such as employee and environmental rights, for reasons other than the potential impact on freedom of movement created by any inter-state divergence of these rules.

The complexities in reaching intergovernmental agreement on positive harmonisation measures is the main factor explaining the relative success of negative harmonisation in the EU context, with its strong system of court-based enforcement operating at both a supranational and a national level.<sup>18</sup> This was especially the case in the first decades of the EU when decision-making in Council by the member states' government representatives required unanimity. Though those restrictions have lessened through successive treaty amendments,<sup>19</sup>

15 J Tinbergen, *International Economic Integration* 2nd edn (Elsevier 1965).

16 Scharpf (n 1 above) 45, original emphasis.

17 Positive and negative harmonisation are commonly used interchangeably with positive and negative integration, particularly in EU law and policy. In this contribution, we prefer the language of harmonisation over integration, given the absence, in the UK context, of a comparable teleological focus on integration to that outlined in the EU Treaties.

18 On judicial integration and the EU internal market, see eg T Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge University Press 2018).

19 On the present framework, see arts 289 and 294 TFEU (ordinary legislative procedures) and art 289(2) TFEU (special legislative procedures). For analysis, see eg P Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* revd edn (Oxford University Press 2013) ch 2. On subsidiarity in EU integration, see eg J Öberg, 'Subsidiarity as a limit to the exercise of EU competences' (2017) 36 *Yearbook of European Law* 391 and S Pazos-Vidal, *Subsidiarity and EU Multilevel Governance: Actors, Networks and Agendas* (Routledge 2019).

the successful adoption of harmonising legislation meanwhile still requires the measure, proposed by the European Commission, to navigate the demands of a multi-actor process with significant checks and balances. These include rules on competence, human rights considerations, proportionality and, significantly, subsidiarity – the requirement that measures should be taken at the lowest effective level within the system of multilevel governance.<sup>20</sup> To secure respect for this principle, national parliaments have formally been co-opted into the EU legislative institutional matrix, and they are directed to consult subnational representative institutions with legislative powers when taking their positions.<sup>21</sup> Legislation will ultimately rest on support from the European Parliament and a sufficient number of member state governments in the Council of the European Union – and here too the UK Government engaged with devolved governments in developing the UK's line on EU matters in devolved areas.<sup>22</sup>

The EU's regulatory outputs include measures that are both market-making and market-correcting, including a competition law regime, subsidy regulation, market organisation rules and support for agricultural products, and measures for worker, consumer and environmental protection. When legislative devolution was introduced into the UK, these EU regulations became to a greater or lesser extent prescriptive frameworks that maintained commonality in the approach of the different legislatures in the UK. Such commonality did not, however, necessarily mean uniformity.<sup>23</sup>

In an EU context, the Treaties recognise that in some policy areas (generally those where competence between the EU and its member states is shared, rather than resting exclusively with the EU; for example, social policy and environmental policy),<sup>24</sup> the EU can set minimum standards, leaving to the member states the decision whether

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20 See eg art 2 Treaty on European Union (TEU) (Union values); art 5 TEU (competence, subsidiarity and proportionality); art 6 TEU (fundamental rights). See also Protocol (No 2), on the application of the principles of subsidiarity and proportionality [2008] OJ C115, 206, and EU Charter of Fundamental Rights of the European Union [2012] OJ C 326, 391.

21 Art 6(2), Protocol (No 2) on the application of the principles of subsidiarity and proportionality [2008] OJ C115, 206.

22 See eg *Concordat on the Coordination of European Union Policy Issues*, included in the *Memorandum of Understanding concluded between the UK and Devolved Governments*, October 2013.

23 See J Hunt, 'Devolution and differentiation: regional variation in EU law' (2010) 30 *Legal Studies* 421–441, and see further section 4.2 below.

24 Art 4(2) TFEU enumerates policy areas in which competence is shared between the Union and the member states.

to offer additional regulatory protections above this level.<sup>25</sup> In others, full harmonisation is the norm. Even in these situations, however, EU legislative instruments might explicitly build in local implementation and, with it, possible variation, as seen in agricultural policy.<sup>26</sup> There is a greater tendency for maximum harmonisation and uniformity to operate in relation to product standards, and more tolerance for variation in relation to process standards – the surrounding circumstances in which economic activity takes place. Along with other regulatory activity by a member state or its constituent parts within the scope of EU law, any advance on minimum harmonisation standards is subject to the overriding negative harmonisation requirement that it does not present an unlawful restriction in free movement – however, the availability of public policy justifications assists in maintaining possible divergence.<sup>27</sup> That obligation, imposed on the UK as a matter of EU law, was reinforced domestically. The Devolution Acts mandated that devolved legislation comply with EU law as a condition of legality.<sup>28</sup>

## 1.2 Positive harmonisation and the UK constitution

On the UK's departure from the EU, the issue of how to manage the exercise of legislative power across the UK in the absence of a common EU regulator took on a significant political resonance – and urgency. In this contribution, we explore how this is being achieved, focusing on the Common Frameworks and UKIMA as new instruments for internal market governance post-Brexit. Before considering these new mechanisms (and their interaction), however, this section examines the scope for positive harmonisation under pre-existing devolution arrangements, drawing attention, in particular, to the facilitative qualities (and limits) of the Sewel Convention as a potential replacement tool for UK-wide market management post-Brexit.

By the time of Brexit, both Scotland and Wales were operating under a reserved powers model, which enumerates those powers that

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25 For discussion, see S Weatherill, 'The fundamental question of minimum or maximum harmonisation' in S Garben and I Govaere (eds), *The Internal Market 2.0* (Hart 2020).

26 See eg art 5, annex IV of Regulation (EC) No 1782/ 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers [2009] OJ L30, 16. For judicial confirmation, see the decision of the EU Court (Grand Chamber) in Case C-428/07 *Mark Horvath v Secretary of State for Environment, Food and Rural Affairs* ECLI:EU:C:2009:458, para 50, and M Cardwell and J Hunt, 'Public rights of way and level playing fields: *Horvath v Secretary of State for Environment, Food and Rural Affairs*' (2010) 12(4) *Environmental Law Review* 291–300.

27 See further section 3.2 below.

28 See eg s 29(2)(d) Scotland Act 1998 and s 108(2) Government of Wales Act 2006.



lie with Westminster, beyond devolved competence.<sup>29</sup> However, whilst reserved powers are legally protected from incursion by devolved legislatures, there is no such legal prohibition against Westminster acting in devolved areas. Instead, a constitutional convention developed that Westminster, whilst retaining sovereignty, would not normally legislate on devolved matters without the consent of the relevant devolved legislature – the Sewel Convention.<sup>30</sup> This commitment was later included in the Memorandum of Understanding reached between the Governments on IGR,<sup>31</sup> before being included in statutory (though non-legally enforceable) form in the Scotland Act 1998 and Government of Wales Act 2006.<sup>32</sup>

Very clearly then, Westminster could in theory replace the EU legislator post-Brexit as a possible source of positive harmonisation; in other words, as an institution positioned to adopt UK-wide legislative measures in areas of devolved competence.<sup>33</sup> As the EU regulator had done previously, such measures could leave more or less space for local variation. The Agriculture Act 2020 – a UK statute – provides a recent example of this. That Act established a regulatory framework on agricultural subsidies which Welsh ministers may modify so far as it operates in relation to Wales.<sup>34</sup> Significantly, in this example, the Welsh Government and Senedd were clear that this arrangement was temporary, whilst work was undertaken to develop Wales' own primary legislative Agriculture Bill.<sup>35</sup> Constitutionally, the Westminster legislation will not otherwise pre-empt the later exercise of autonomous devolved legislative activity on policy issues that are not reserved.

Of course, whilst the possibility for the adoption of UK-wide legislation across devolved areas of competence exists in the above

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29 Though there are now significant commonalities in approach across the three settlements, differences remain. In Northern Ireland, there is a three-fold categorisation, of transferred measures within devolved competence, and a category of 'excepted' matters remaining at Westminster (analogous to reserved measures under the other settlements). There is a further set of 'reserved' matters which may be removed from central control at some later point.

30 On the origins and development of the Convention, see eg G Cowie and D Torrance, 'Devolution: The Sewel Convention' (House of Commons Briefing Paper CBP-8883) 13 May 2020.

31 Memorandum of Understanding (n 22 above) para 14.

32 See now s 27(8) Scotland Act 1998 and s 107(6) Government of Wales Act 2006, respectively.

33 See here also pre-Brexit, Page and Batey (n 9 above) 511. Page and Batey's early analysis points to the extensive, consensual use of Westminster powers to legislate in areas of and/or affecting devolved competences, including in relation to EU measures.

34 Agriculture Act 2020, sch 5.

35 See s 47 detailing the expiration of particular provisions in relation to Wales at the end of 2024.

terms, its actual use will encounter a range of constitutional and political considerations that should give pause to viewing it as an effective shared governance instrument of positive harmonisation. Winetrobe suggests that the original purpose of Sewel was as ‘a safeguard against sudden, unilateral use of Westminster’s sovereign legislative power’.<sup>36</sup> Taken on these terms, recent practice certainly throws into question the effectiveness of Sewel in achieving its original purpose.<sup>37</sup> That purpose, according to Winetrobe, was also far removed from any idea of the Convention as a positive instrument to trigger UK-wide legislative activity by the Westminster Parliament. It was still less a mechanism to facilitate policy co-operation and shared governance between the UK and devolved governments. Nonetheless, in practice, this *facilitative* function of Sewel has become one of its twin purposes and has been variously described in terms such as enabling policy co-operation,<sup>38</sup> and providing for shared governance.<sup>39</sup> That said, whilst examples of positive co-operation may exist (including the Agriculture Act 2020) and be seen in UK-wide legislative outputs,<sup>40</sup> the process might also involve no more than the extension of English-centric proposals to devolved territories.<sup>41</sup> In short, the Westminster Parliament and the Sewel Convention are inherently limited as institutional forums for genuine shared governance.

The Devolution Acts reflect a democratically endorsed recognition that primary policy responsibility lies with the devolved governments for non-reserved matters, with lines of accountability to their own parliaments. These lines of democratic accountability are inevitably undermined by Westminster legislation that incorporates devolved matters in the absence of full and effective involvement by these devolved institutions. Institutionally, Westminster does not include a strong second chamber to enable the input of regional concerns – as

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36 B K Winetrobe, ‘A partnership of parliaments’ in R Hazell and R Rawlings (eds), *Devolution, Law Making and the Constitution* (Imprint 2005) 44.

37 A McHarg, ‘[The contested boundaries of devolved legislative competence: towards better devolution settlements](#)’ (Institute for Government/Bennett Institute for Public Policy Review of the UK Constitution Guest Paper 2023).

38 A McHarg, ‘Constitutional change and territorial consent: the *Miller* Case and the Sewel Convention’ in M Elliot, J Williams and A L Young, *The UK Constitution after Brexit* (Hart 2018).

39 C McCorkindale, *How is Devolution Changing Post EU?*, Adviser’s Briefing to Scottish Parliament (Constitution, Europe, External Affairs and Culture Committee 17 February 2023).

40 See also eg the Coronavirus Act 2020.

41 See eg Page and Batey (n 9 above) on the discussion around the use of Westminster legislation by the first Scottish Parliament and, more recently, criticism from the Senedd’s Legislation, Justice and Constitution Committee of the reliance on Westminster legislation by the Welsh Government, [Legislation, Justice and Constitution Committee Annual Report 2020/2021](#).

seen, for example, in Germany. Further, the Sewel Convention itself makes no effective provision for devolved *legislative* collaboration.<sup>42</sup> Though the devolved legislatures have clear processes for their side of the process, there are in Westminster no formalised mechanisms for interparliamentary engagement associated with the Convention, and nothing in the Standing Orders of the two Houses that make it a requirement for any Parliamentary Committee, or the floor of the House, to consider the motions from devolved parliaments granting, or withholding legislative consent.

The operation of Sewel relies instead on the existence of a system of IGR. The suggested contours of these processes are foreseen in the separate Devolution Guidance Notes (DGN)<sup>43</sup> which supplement the Memorandum of Understanding. For example, the DGN covering Westminster parliamentary legislation affecting matters devolved to Scotland recognises that ‘although the [Sewel] convention refers to the Scottish Parliament, UK departments will in practice deal with the Scottish Executive’.<sup>44</sup> The DGN generally presuppose early, ongoing, effective engagement at the level of officials and ministers in the development of Westminster legislation incorporating matters that are otherwise devolved.

The UK has generally failed to establish such a system of effective IGR that has the confidence of all parties.<sup>45</sup> This is an obvious matter of concern given the reliance on effective IGR for the Sewel process to reach its potential as a defensive and facilitative tool. Under the Memorandum of Understanding, a suite of Joint Ministerial Committees (JMCs) was established and foreseen as the key forum for IGR. These included a plenary format that was to meet annually and involve the highest-level political representation, along with an EU-focused configuration, and a domestic JMC. However, only JMC (Europe), with a mandate to determine the UK line ahead of upcoming Council meetings, met regularly and consistently. As the former Director General for Devolution in the UK Cabinet Office, Jim Gallagher reported, ‘most intergovernmental relations happen below the political

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42 See also eg Page and Batey (n 9 above). Scottish and Welsh MPs, of course, are able to play a role in representing the interests of their constituencies in Westminster legislative procedures.

43 Cabinet Office, [Devolution Guidance Notes](#).

44 Cabinet Office, [Devolution Guidance Notes: Post-Devolution Primary Legislation Affecting Scotland](#) (November 2005) DGN 10.

45 For recent criticism, see eg N McEwan, M Kenny, J Sheldon and C Brown Swan, ‘Intergovernmental relations in the UK: time for a radical overhaul?’ (2020) 93(1) *Political Quarterly* 632.

radar, as officials deal with day-to-day matters'.<sup>46</sup> Below the level of the JMC, networks of inter-official interactions have operated, necessitated, for example, by the cross-border provision of public services, by the overlap of responsibilities for matters such as tax and welfare, and for the coordination of activity required under particular EU measures, especially in relation to agriculture and environment. As Keating observes, '[i]ntergovernmental relations in devolved and federal systems serve two purposes: to make policy jointly where that is desired; to manage conflicts between governments'.<sup>47</sup> The domestic UK IGR system was not constructed to facilitate joint policymaking, and the JMCs were not decision-making bodies, but were instead, at most, forums 'for communication and shared learning',<sup>48</sup> and offering a dispute resolution mechanism wholly skewed in the UK Government's favour.

These limitations in the UK's system of IGR present barriers to effective policy cooperation across areas of devolved competence. This applies both where Westminster legislates for the whole UK, or, alternatively, through the possible coordination of the separate regulatory activities of the different governments and parliaments. The removal of the rules, governance structures and principles from the EU, which previously operated to connect the centre and the devolved governments, has brought the weaknesses in shared rule into extremely sharp relief.<sup>49</sup> This has triggered reviews of, and adjustments to, key aspects of IGR functioning, most significantly, as a result of the four government joint Review of Intergovernmental Relations, which reported in January 2022.<sup>50</sup> The Review has led to the establishment of a new, three-level hierarchy of intergovernmental machinery, from the Prime Minister and Heads of Governments Council to mid-tier Interministerial Groups, to portfolio-level engagement, as well as a new orientation, with an apparent greater emphasis on shared governance.

The new system breaks from its predecessor in that the previous dominance of central government is challenged, through measures including the rotation of the location and chairs for Interministerial Groups' meetings, and significantly, in the creation of a standing IGR Secretariat. This is staffed from across the different governments,

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46 J Gallagher, 'International relations in the UK: co-operation, competition and constitutional change' (2012) 14 *British Journal of Politics and International Relations* 198, 200.

47 SPICE and M Keating, *Joint Briefing for the Constitutional Affairs, Europe, External Affairs and Culture Committee* (Intergovernmental Relations Panel 9 June 2022).

48 McEwen and Petersohn (n 10 above).

49 See also eg McEwen (n 10 above).

50 Conclusions of the *Joint Review of Intergovernmental Relations* (13 January 2022).

and it demonstrates a degree of independence previously absent from the IGR system. This independence is also apparent in a new dispute resolution procedure, which was previously fully under the control of the UK Government. As the House of Lords Constitution Committee observes, however, success depends on whether the governments are ‘committed to using the new structures to cooperate on achieving shared objectives, rather than simply managing—or taking opportunities to accentuate—their differences’.<sup>51</sup>

## **2 THE COMMON FRAMEWORKS, POSITIVE HARMONISATION AND SHARED RULE**

The conclusions of the UK and devolved governments’ joint Review of Intergovernmental Relations reflect a commitment – on paper at least – to more effective structures and institutions of shared governance.<sup>52</sup> Reflecting this orientation towards more effective shared rule, this section introduces discussion of the Common Frameworks as consensus-based instruments for the coordination of policy between the UK and devolved governments. We explore the potential contribution and emerging limits of the Frameworks as tools for positive harmonisation in relation to the management of devolved competences previously falling within the scope of the EU Treaties.

### **2.1 Origins, rationale and development**

The underpinning principles of the Frameworks approach to cooperation on policy were first set out in a JMC (EU Negotiations (EN)) Communiqué from October 2017.<sup>53</sup> The Communiqué recognises a commitment on the part of all governments ‘to work together to establish common approaches in some areas that are currently governed by EU law’ within areas of devolved competence. First amongst the reasons for establishing Frameworks is ‘the need to enable the functioning of the UK internal market, while acknowledging policy divergence’. Additionally, Frameworks are to be established where necessary to:

ensure compliance with international obligations; to ensure the UK can negotiate, enter into and implement new trade agreements and international treaties; to enable the management of common resources;

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51 House of Lords, Select Committee on the Constitution, ‘*Respect and Co-Operation: Building A Stronger Union for the 21st Century*’ 10th Report of Session 2021–22, HL 140, para 182.

52 See n 50 above.

53 *Joint Ministerial Committee (EN) Communiqué*, 10 October 2019, intergovernmental agreement between UK, Scottish and Welsh Governments, subsequently endorsed by Northern Ireland Executive in June 2020.

to administer and provide access to justice in cases with a cross border element; and to safeguard the security of the UK.<sup>54</sup>

Commitment to proceed through the Frameworks approach was part of a compromise deal reached through intergovernmental negotiations around the passage of what would become the EU (Withdrawal) Act 2018. As introduced, the Bill had originally proposed a blanket restriction on the exercise of devolved competences falling within the scope of returning EU powers. That restriction would bind the devolved governments unless and until specific powers were released under Orders in Council from Whitehall.<sup>55</sup> In its place, an agreement was reached that the default position would be the ‘return’ of powers to the devolved legislatures, with the potential for temporary freezes to be placed on regulatory activity in areas where divergence might be problematic, and where common frameworks would be needed. The power for UK ministers to introduce these freezes over devolved legislation was included in the EU (Withdrawal) Act, and made subject to a devolved consent request requirement – though the absence of consent was not an absolute block to action. For England, a political restriction was accepted as applying on Westminster and Whitehall. This was all contained in an Intergovernmental Agreement (IGA) between the Welsh and UK Governments,<sup>56</sup> which committed the parties to ‘continue to work together to create future common frameworks where they are necessary’.<sup>57</sup> Whilst the agreement was sufficient for the Welsh Government to give consent to the Bill, the Scottish Government refused both to sign up to the IGA, or to give its consent. Nonetheless, it has participated in the development of Common Frameworks alongside the other governments.

The Common Frameworks establish a new and potentially far-reaching intergovernmental platform for policy coordination and introduce a layer of *political* obligation on law makers when exercising their *legislative* powers – sometimes to act jointly, sometimes to cooperate and collaborate, and at the very least, to have regard to the possible consequences of proposed regulatory choices on others. Legally, these processes are non-binding, with each of the four governments retaining its right to exercise its respective competences in particular policy areas in accordance with the devolution legislation.<sup>58</sup>

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54 Joint Ministerial Committee (EN) Communiqué (n 11 above).

55 EU (Withdrawal) Bill, cl 11.

56 [Intergovernmental Agreement on the European Union \(Withdrawal\) Bill and the Establishment of Common Frameworks](#) (24 April 2018).

57 *Ibid* para 1.

58 See eg Department of Environment, Food and Rural Affairs, [Resources and Waste Provisional Common Framework: Framework Outline Agreement and Concordat](#) (CP 770 December 2022 ) 10.



The success (or failure) of the Common Frameworks thus turns, to a great extent, on the strength of political relationships between the four governments. In that regard, the Frameworks extend the reach of the evolving IGR structures into an underdeveloped aspect of the UK's territorial constitution, its internal market.

Input from the different Whitehall ministries produced an initial list of over 150 areas of EU and devolved competence overlap, where Frameworks might be required.<sup>59</sup> This original list of measures was subsequently revised and refined – to there now being a total of 32 Common Frameworks – 26 bringing together the four governments of the UK, the remaining six involving only the governments in Belfast and London.<sup>60</sup> As of June 2023, only one of the Frameworks had passed all stages of legislative scrutiny from the four parliaments demanded of it,<sup>61</sup> long after the target date of January 2021 for the completion of the process.<sup>62</sup> In the meantime, the remaining frameworks have been operating on a provisional basis. Frameworks exist in particular in the areas of agricultural and environmental regulation, as well as food standards and safety, procurement, and professional qualifications. Where there is limited potential for divergence, or where the significance of any divergence is minimal for internal or international trade, it has been decided that no framework is required.<sup>63</sup> For a very small number of Framework areas, for example, fisheries management, there is agreement that cooperation will in part be managed through new, primary Westminster legislation. For the most part however, frameworks are mechanisms to coordinate the regulatory activity of the different legislatures within the UK.

A broad understanding of policy coordination is employed under the Common Frameworks which, depending on the policy area, can include common minimum (or maximum) regulatory standards, along with setting common goals, placing limits on policy divergence or requiring mutual recognition.<sup>64</sup> Whilst frameworks differ from issue to issue, there are some commonalities. Each consists of a general overview of the issue and the principles which necessitate the framework – whether

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59 Frameworks Analysis: Breakdown of Areas of EU Law that Intersect with Devolved Competences in Scotland, Wales and Northern Ireland (9 March 2018). This document has subsequently been regularly updated and amended.

60 Frameworks Analysis 2021, Updated Analysis (9 November 2021).

61 Department for Levelling Up, Housing and Communities, *Hazardous Substances: Planning Framework* (CP 508 August 2021).

62 The original timeframe may appear ambitious given the complexities involved. In any case, the continued suspension (at the time of writing) of the Northern Ireland Assembly continues to block final approval for the remaining provisional Frameworks.

63 See Frameworks Analysis 2021 (n 60 above).

64 Joint Ministerial Committee (EN) Communiqué (n 11 above).

the demands of the internal market, or some other reason. They detail any relevant underpinning legislation and include a concordat or memorandum of understanding signed by the parties which sets out how the governments are to cooperate in policy development, and how they are to manage any proposed divergence in regulation. The Resources and Waste Common Framework, for example, envisages UK-wide discussion of policy decisions, including new policy creation, regulatory change and operational issues.<sup>65</sup> These might lead to UK-wide measures, or a coordinated multinational approach. The Food and Feed Safety and Hygiene Common Framework meanwhile includes *inter alia* a commitment to identify where concurrent powers could be available so one statutory instrument could be used to implement consistent decisions (with consent) across the UK;<sup>66</sup> whilst the Nutrition Related Labelling, Composition and Standards Common Framework establishes a commitment to share policy proposals in primary, secondary and non-statutory measures in good time to allow for full consideration and the agreement of a common approach wherever possible.<sup>67</sup>

## 2.2 Coordinating policy, managing divergence

A fundamental and, as yet, unanswered question is whether the Frameworks will actually reach full maturity as instruments of positive harmonisation, especially given the nascent state of improved UK IGR.<sup>68</sup> A defining feature of their functioning thus far has been their rather ‘thin’ approach to policy coordination. Presently, policy coordination appears to have proceeded only to the extent of the UK and devolved governments reaching agreement that specific regulatory objectives – including, for example, the regulation of single-use plastics (SUPs); the introduction of deposit return schemes and the regulation of food and drink that is high in fat, sugar and salt – fall within the scope of specific Frameworks.<sup>69</sup> Beyond this, there is as yet little evidence of policy coordination in ‘thicker’ substantive terms; for example, through

65 Department of Environment, Food and Rural Affairs, *Resources and Waste Provisional Common Framework: Framework Outline Agreement and Concordat* (CP 770 December 2022).

66 Cabinet Office, *Food and Feed Safety and Hygiene Common Framework: Provisional Framework Outline Agreement and Concordat* (CP 321 November 2020).

67 Department of Health and Social Care, *Nutrition Related Labelling, Composition and Standards Provisional Common Framework* (CP 306 October 2020).

68 For concerns here, see also House of Lords, *Common Frameworks Scrutiny Committee, ‘Common Frameworks: An Unfulfilled Opportunity?’* (HL 2022–23) 41. See also section 1.2, above.

69 For a summary of regulatory initiatives, see Office for the Internal Market, *Annual Report on the Operation of the UK Internal Market 2022–2023* (21 March 2023) 28–41.



joint agreement on minimum standards or rules on mutual recognition. This is despite strong demand-side interest from stakeholders in the use of the Common Frameworks more substantively to prevent the emergence of future barriers to trade within the UK internal market.<sup>70</sup> A review of formative practice gives the distinct impression of (as yet) ‘unfulfilled’ regulatory potential in that regard. Indeed, initial practice points to development of the Common Frameworks primarily as mechanisms that impose largely procedural obligations (eg to share details on parallel regulatory initiatives), rather than as forums to negotiate more substantive policy coordination.<sup>71</sup>

The Frameworks effectively cast the UK internal market as being a shared regulatory space. In theory, there is scope for cooperative, consensual joint policymaking in this space, in line with the JMC (EN) principles, and their declared respect for the devolution settlements and the democratic accountability of the devolved legislatures. However, the Common Frameworks speak not just to policy coordination, but also to the management of regulatory divergence, and to the defence of legislative autonomy. It should be recalled that the first of the grounds for Common Frameworks – enabling the functioning of the UK internal market – explicitly includes acknowledging the potential for policy divergence. How much divergence can be accommodated is less clear. The 2017 principles give very little guidance. They foresee frameworks ‘maintaining, at a minimum, the same degree of flexibility for differentiated policy solutions as was provided under the relevant EU law instruments’.<sup>72</sup> This is effectively backward looking and gives little guidance on how to manage new policy developments, or to determine how much of, for example, an interference in trade will be deemed too much, and how much can be accommodated. It also makes no attempt to build in a commitment to subsidiarity, such as the one that applies to EU governance, and acknowledges and protects the position of subnational regions.

The newly defined UK internal market reads in new limits to devolved competence, tied to the realisation of the shared functional objective of regulating intra-UK trade. For the devolved governments, this challenges the traditional view of devolution as an expression of political self-rule. Despite its agreement to participate in the frameworks process, the Scottish Government, in particular, has voiced dissatisfaction at the prospect of additional interference with its devolved competences imposed by the political commitment to work together under the Frameworks. This can be seen explicitly in the text of the Feed and Food Safety Framework, for example, which acknowledges

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70 See *ibid* 44–46.

71 House of Lords (n 68 above).

72 Joint Ministerial Committee (EN) Communiqué (n 11 above).

the refusal by the Scottish Government to define common approaches here as *necessary* as this could mean that a harmonised approach was required.<sup>73</sup> Instead, there is agreement that a common approach is ‘at least desirable’, and permitting ‘evidence-based divergence where this is considered appropriate’.<sup>74</sup>

The texts of the Frameworks thus incorporate commitments both to pursue harmonisation, as well as to accommodate divergence. Just as the frameworks differ in the emphasis they place on the need for harmonisation, they also differ in the space recognised for divergence. Whilst the Food, Feed Safety and Hygiene Framework foresees the possibility of divergence ‘where risk analysis shows divergence to be both necessary and proportionate to the risk to provide appropriate consumer protection’,<sup>75</sup> the Resources and Waste Framework reads as being particularly positive and open to divergence.<sup>76</sup> Divergence under this Framework is acknowledged as potentially providing ‘key benefits, such as driving higher standards, [and] generating innovation’. ‘Divergence on policy’ is ‘an acceptable outcome’ that can be referred on for ‘review and approval’.<sup>77</sup> Consistency is not a feature across the Frameworks. Whilst the variety of models may be criticised for complexity, it is not inconsistent with the breadth of practices that fall under the banner of harmonisation under EU law and also differs from (and within) policy sector to policy sector.

Individual Frameworks establish procedures for resolving disputes where the UK and devolved governments are unable to reach agreement on regulatory divergence. These procedures are of particular significance where policy divergence would impact negatively on JMC (EN) principles; for example, where policy divergence is considered liable to create new barriers to intra-UK trade.<sup>78</sup> The dispute resolution process, which starts at the level of officials but can escalate to ministerial level, operates solely through political channels. Whilst this may not be out of alignment with the approach to UK IGR generally, it represents an obvious conceptual gap in relation to the regulation of policy divergence within the UK internal market. Alongside the positive harmonisation framework to coordinate policies, we might expect the Common Frameworks –

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73 Cabinet Office, *Food and Feed Safety and Hygiene Common Framework: Provisional Framework Outline Agreement and Concordat* (CP 321 November 2020) 7.

74 *Ibid.*

75 *Ibid.* 13.

76 Department of Environment, Food and Rural Affairs (n 65 above).

77 *Ibid.* 27.

78 *Ibid.* 30.

and, in particular, their dispute resolution structures – to prescribe a set of thicker substantive principles against which the effects of disputed policy initiatives may be assessed. Multilevel structures governing cross-border trade typically engage the principles of non-discrimination, mutual recognition and market access to that end as instruments of negative harmonisation. Their inclusion within a system of shared rule complements mechanisms for joint or coordinated policymaking. UKIMA was to bring a set of negative harmonisation principles into the same space as the positive harmonisation – though in a highly confrontational and disruptive way.

### **3 THE UKIMA: ENTER NEGATIVE HARMONISATION**

The previous section explored the operation of the Common Frameworks as potential instruments of positive harmonisation. This section turns to consider intervening changes to managing intra-UK policy divergence as a result of the UK Government’s introduction of a second instrument: the UKIMA. We examine the UKIMA as a tool of negative harmonisation and then turn to consider its interaction with the pre-existing Common Frameworks.

#### **3.1 Objectives and principles**

The UKIMA has four main objectives: first, to make provision for an internal market for goods and services within the UK, including in relation to the recognition of qualifications; secondly, to address the specific position of Northern Ireland post-Brexit; thirdly, to authorise the provision of financial assistance by the UK Government to support, among other things, economic development and infrastructure projects throughout the UK; and, finally, to reserve to the UK Government exclusive competence to regulate the provision of state aid within the UK post-Brexit.<sup>79</sup> The UK Government maintained that legislation was necessary to address each of these objectives as a means to secure frictionless trade across the four nations of the UK following the UK’s exit from the EU internal market.<sup>80</sup> In relation to Northern Ireland, the UKIMA served an additional important function in the implementation

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79 UKIMA, Preamble. For discussion, see eg M Dougan, J Hunt, N McEwen and A McHarg, ‘Sleeping with an elephant: devolution and the United Kingdom Internal Market Act 2020’ (2022) 138 *Law Quarterly Review* 650; T Horsley, ‘Constitutional reform by legal transplantation: the United Kingdom Internal Market Act 2020’ (2022) 42(4) *Oxford Journal of Legal Studies* 1143 and K Armstrong, ‘The governance of economic unionism after the United Kingdom Internal Market Act’ (2022) 85(3) *Modern Law Review* 635.

80 Department for Business, Energy and Industrial Strategy, [UK Internal Market](#) (White Paper CP 278 July 2020).

of the Protocol on Northern Ireland annexed to the EU/UK Withdrawal Agreement.<sup>81</sup>

With respect to the internal market, parts 1 and 2 of the UKIMA guarantee the free movement of in-scope goods and services between the four nations of the UK. This is achieved by mandating the prospective application of two fundamental principles – mutual recognition and non-discrimination – to all commercial transactions that fall within its scope. Accordingly, section 2 UKIMA provides that goods lawfully produced in, or imported into, one part of the UK where they may also be lawfully sold should, in principle, be able to be lawfully sold in all other nations of the UK. Statutory provisions that impose ‘relevant requirements’ that speak, among other things, to the particular characteristics of those goods or, likewise, to their production, presentation or packaging are prohibited. Parallel frameworks govern the application of the principle of non-discrimination in relation to goods and, by analogy, the application of mutual recognition and non-discrimination to the provisions of in-scope services.<sup>82</sup>

Mutual recognition and non-discrimination (the ‘market access principles’ under the UKIMA) may be considered to replace the EU Treaty provisions guaranteeing the free movement of goods and services within the EU internal market (eg article 34 of the Treaty on the Functioning of the EU (TFEU) on goods and article 56 TFEU on services).<sup>83</sup> These provisions applied, pre-Brexit, as enforceable limits on the exercise of competences by both the UK and devolved governments, including in relation to intra-UK trade. For example, in *Petsafe Ltd*, article 34 TFEU was invoked to challenge, as a restriction on the free movement of goods, a ban on the use of electric collars on cats and dogs in Wales under the Animal Welfare (Electronic Collars (Wales)) Regulations 2010.<sup>84</sup> As replacements for the EU Treaty rules on intra-EU movement, the market access principles speak conceptually to the dynamics of negative harmonisation. Whereas the Common Frameworks exist to coordinate policy divergence politically by consensus, the UKIMA establishes a legal framework to scrutinise the regulatory preferences of individual governments for compliance

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81 Protocol on Ireland/Northern Ireland [2020] OJ L27/102, implemented by the European Union (Withdrawal Agreement) Act 2020. On 24 March 2023, the EU–UK Joint Committee reached agreement on the Windsor Framework amending the Protocol. For analysis, see eg C R G Murray and N Robb, ‘From the Protocol to the Windsor Framework’ (2022) 74 (AD1) Northern Ireland Legal Quarterly 1–21.

82 See ss 5–9 and ss 19–21 UKIMA, respectively.

83 The EU free movement also regulates capital and payments (art 63 TFEU) and persons (arts 45 and 49 TFEU).

84 *R (on the application of Petsafe Ltd)* (n 14 above). See also eg *Sinclair Collins v Lord Advocate* [2012] CSIH 12.

with a set of directly enforceable norms: non-discrimination and mutual recognition.

Domesticating EU legal principles, the UKIMA is a paradigmatic example of what comparative scholars would recognise as a legal transplant.<sup>85</sup> The UK Government's enacting of the UKIMA represents an attempt to transpose legal principles and structures from one legal system to another; in this case, from the EU as a quasi-federal supranational 'new legal order' to the UK as a nation state combining a cornerstone principle of parliamentary sovereignty with a territorial constitution incorporating an advanced framework for the devolution of government power internally.<sup>86</sup> The transplantation analogy extends beyond the domestication of the market access principles. Notably, the UKIMA also takes inspiration from the EU internal market's procedures for the *ex ante* review of member state legislation introducing new technical standards. Under EU law, member states are obliged to notify the EU Commission of draft measures, facilitating, where necessary, prior scrutiny for compliance with the Treaty provisions on intra-EU movement.<sup>87</sup> Under the UKIMA, the notification requirement is modified. Rather than impose notification requirements on the devolved governments, the UKIMA tasks a newly established Office for the Internal Market (OIM) to provide independent guidance on the potential economic impact of proposed legislation at the request of the UK or one of the devolved governments.<sup>88</sup>

### 3.2 The UKIMA and the Common Frameworks

As negative harmonisation instruments, the UKIMA's market access principles occupy the same space as the Common Frameworks. Whereas the Frameworks seek to manage diversity by reaching agreement on the coordination of regulatory policies in specific substantive areas, the UKIMA addresses regulatory diversity by scrutinising measures that interfere with the free movement of goods and services within the UK internal market. The distinction here

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85 For discussion, see Horsley (n 79 above). For comparative law perspectives, contrast eg Alan Watson, *Legal Transplants: An Approach to Comparative Law* 2nd edn (University of Georgia Press 1993); P Legrand, "The impossibility of "legal transplants"" (1997) 4 *Maastricht Journal of European and Comparative Law* 114.

86 The UK Government has proved reluctant to acknowledge this process of legal transplantation. Indeed, its White Paper reads as a conscious attempt to downplay EU influence.

87 Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services [2015] OJ L 241-1.

88 Ss 34–36 UKIMA.

between regulatory approaches connects with the dynamics of self- and shared rule. The Common Frameworks reflect the dynamics of shared rule as instruments that provide a potential structure for the UK and (in particular) devolved governments to enhance self-rule through cooperation on policy.<sup>89</sup> Contrastingly, the market access principles present as potential threats to self-rule. For the Scottish, Welsh and Northern Ireland Governments, in particular, their operation targets the exercise of devolved competences as tools to regulate, without external interference, economic (and non-economic) activity within their respective territories – the primary expression of democratic self-rule.

Concerns about the practical effects of the market access principles on the ability of devolved governments to regulate independently underscored the Welsh Government's (as yet unsuccessful) efforts to seek judicial review of the UKIMA.<sup>90</sup> Counsel for the Welsh Government argued that section 54(2) of the Act (adding the UKIMA to the list of instruments protected from modification by the Welsh Senedd) had 'the effect of extinguishing the practical effect of devolved competence in areas which include food standards and environmental protection'.<sup>91</sup> Future Senedd legislation in key areas of devolved competence, it was argued, would be subject to compliance with the market access principles and, accordingly, potentially unenforceable against goods and services entering Wales from elsewhere within the UK where they may be lawfully sold and provided. In a judgment upheld on appeal, the Divisional Court (Lewis LJ and Steyn J) rejected the judicial review application on the grounds that, in the absence of specific legislation, it was premature.<sup>92</sup> But the substance of the Welsh Government's abstract argument, namely that the UKIMA imposes new restrictions on the exercise of devolved legislative competences, is intellectually sound.

Despite the fact that they occupy the same space (the regulation of the UK internal market), there was never any serious political intention on the part of the UK Government to align the UKIMA with the pre-existing Common Frameworks programme. Indeed, in its original form,

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89 See here also eg McEwen (n 6 above).

90 *R (On the Application of the Counsel General for Wales) v The Secretary of State for Business Energy and Industrial Strategy* [2021] EWHC 950 (Admin).

91 *R (On the Application of the Counsel General for Wales) v The Secretary of State for Business Energy and Industrial Strategy* [2022] EWCA Civ 118, [15].

92 *R (On the Application of the Counsel General for Wales)* (n 90 above) [38], confirmed on appeal in *R (On the Application of the Counsel General for Wales) v The Secretary of State for Business Energy and Industrial Strategy* (n 91 above) [36]. The UK Supreme Court refused permission to appeal in August 2022. For analysis, see G P Evans, 'Devolution and declaratory judgments: the Counsel General's Reference on the UK Internal Market Act 2020' NILQ (forthcoming).

the UKIM Bill made no reference at all to the Frameworks. The two mechanisms were enacted by different (Conservative) governments with very different visions of internal regulatory governance post-Brexit. The UK Government's rationale for introducing the UKIMA was based on its contention that the Common Frameworks did not sufficiently address the potential economic 'spill over' effects for business and consumers of future regulatory divergence between the four nations.<sup>93</sup> The Lords Constitution Committee contested that claim, arguing that, with sufficient political buy-in from all four governments, the Frameworks were perfectly capable, as a matter of principle, of managing regulatory divergence within the UK.<sup>94</sup> The Scottish Government also disputed the UK Government's diagnosis that the market access principles were necessary to prevent the emergence of future obstacles to intra-UK trade. Together with the Welsh Senedd, it refused to grant its legislative consent to the UKIMA's enactment.

In substantive terms, the domestication of the EU principles of non-discrimination and mutual recognition under the UKIMA injects what might be considered a missing element into the newly reconstituted UK internal market – an instrument of negative harmonisation. In contrast to the Common Frameworks, the market access principles actually prescribe substantive limits on the space for policy divergence in relation to intra-UK trade. Their effect is to impose a set of directly enforceable limits on the exercise of devolved competences. This represents a partial replication, in a new domesticated form, of the limits that EU law previously placed on the power of the devolved governments to exercise full control over the regulation of economic activity within their respective territories, including in relation to the management of intra-UK trade. They do this in a more absolute, unconditional way than operated under EU law.

In particular, the UKIMA defines exceptions to the principles of non-discrimination and mutual recognition considerably more narrowly than under the EU Treaties. For example, with respect to goods, section 8(6) UKIMA permits only the justification of indirectly discriminatory regulatory measures that are considered necessary to protect public safety or security and/or the protection of the life or health of humans, animals or plants. Previously, under EU law, it was open to the devolved governments to justify policies that interfered with the Treaty provisions on intra-EU movement, including in relation to intra-UK trade, using a more expansive framework of express derogations

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93 Department for Business, Energy and Industrial Strategy (n 80 above).

94 House of Lords, Select Committee on the Constitution, United Kingdom Internal Market Bill (HL Paper 151). See also E Lydgate and C Anthony, 'Brexit, food law and the UK's search for a post-EU identity' (2022) 85(5) *Modern Law Review* 1168, 1182.

(article 36 TFEU) or an open-ended list of overriding public interest requirements recognised by the EU Court of Justice.<sup>95</sup> It was on that basis that the Welsh Government in *Petsafe Ltd* successfully argued that the Welsh ban on the use of electric collars on cats and dogs was justified on social policy grounds as a proportionate restriction on the free movement of goods under article 34 TFEU.<sup>96</sup> The effect of the UKIMA's narrowing of justification grounds is to prioritise economic efficiency over competing public interest concerns, accentuating the deregulatory qualities of the UK internal market post-Brexit.

### 3.3 Alignment under UKIMA principles

During its passage through the UK Parliament, the UKIM Bill was amended to take express account of the Common Frameworks, which remain the devolved governments' preferred instruments for the management of intra-UK regulatory diversity post-Brexit. As a result of this, the Act now makes it possible to exempt so-called 'Common Framework Agreements'<sup>97</sup> from the application of the market access principles. Under the UKIMA, the power to grant exemptions is reserved to UK government ministers.<sup>98</sup> However, in a concession to a consensus-based approach to IGR (and meaningful shared rule), the UK and devolved governments reached agreement on a process for considering exemptions pursuant to section 10 (for goods) and section 18 (for services) UKIMA.<sup>99</sup> That agreement, however, remains political and, as such, has no effect on the Secretary of State's legal powers under that Act.<sup>100</sup>

The intergovernmental agreement on process outlines that it is the responsibility of the nation (or nations) seeking an exemption from the market access principles to set out the scope and rationale for the proposed exemption with supporting evidence. The proposal<sup>101</sup> is to be considered within the relevant Common Framework in accordance with the prescribed decision-making processes set out therein. Where agreement is reached, this is to be notified and recorded within the

95 See eg Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) ECLI:EU:C:1979:42, para 8. In all cases, justifications are subject to a strict proportionality test.

96 *R (on the application of Petsafe Ltd)* (n 14 above).

97 Defined as 'a consensus between a Minister of the Crown and one or more devolved administrations as to how devolved or transferred matters previously governed by EU law are to be regulated after IP completion day'. See UKIMA, s 10(4).

98 Ss 10 and 18 UKIMA.

99 [Process for Considering UK Internal Market Act Exclusions in Common Framework Areas](#) (10 December 2021).

100 See also eg *Armstrong* (n 79 above) 658.

101 The Agreement references 'proposals' for exemptions rather than 'requests'.



Common Framework; for example, through an exchange of letters. It is then the responsibility of the relevant Secretary of State to introduce a statutory instrument into Parliament giving effect to the agreement for approval under the affirmative resolution procedure. Substantively, exemptions to the market access principles are not tied to the specifics of the proposing government's particular policy framework, but instead directed towards the removal of defined categories of products (or services) from the scope of the UKIMA generally.<sup>102</sup>

The process for exempting agreements reached through the Common Frameworks from the UKIMA's market access principles was first activated in relation to legislation on SUPs. In 2021, the Scottish Parliament enacted a ban on the supply and, in certain instances, manufacture of SUPs which entered into force on 1 June 2022.<sup>103</sup> The Scottish Government succeed in securing agreement on an exemption through the Resources and Waste Common Framework – resulting in the UK Government's enactment of the UKIMA 2020 (Exclusions from Market Access Principles: Single-Use Plastics) Regulations 2022, amending schedule 1 of the UKIMA. The Scottish Government is on record criticising both the narrowness of that amendment and the delay in securing it through the agreed intergovernmental process. Indeed, two months elapsed prior to the enactment of the 2022 Regulations during which the Scottish SUP regulations were in force and, as such, technically vulnerable to judicial review for compliance with the market access principles.

The Scottish Government has since sought a further section 10 UKIMA exemption to cover its deposit return scheme (DRS). The proposed scheme introduces a refundable deposit charge for in-scope single-use drinks containers and supplier-based obligations to fulfil certain collection obligations directly or indirectly. Similar schemes are being developed for England and Wales.

Having initially anticipated securing a single exemption to cover both its SUP and DRS regulations, the Scottish Government found itself required to propose a further, separate exemption for the latter. The Scottish Government maintains that it duly made such a proposal in compliance with the terms of the intergovernmental agreement on the exemption process and has publicly expressed its frustration at the UK Government's apparent lack of engagement in dealing with this. Procedurally, it is notable that the agreed intergovernmental process does not require the relevant (here: Scottish) minister to submit a separate formal 'request' to the Secretary of State once agreement has

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102 UKIMA 2020 (Exclusions from Market Access Principles: Single-Use Plastics) Regulations 2022, s 2.

103 Environmental Protection (Single-Use Plastic Products) (Scotland) Regulations 2021.

been reached on its proposal through the relevant Common Framework. Under the agreed process, it is the responsibility of the Secretary of State (here: the Department for Environment, Food and Rural Affairs (DEFRA)) to take forward the exemption proposal as agreed between the four governments through the Common Framework.

In 2023, the Scottish Government announced its decision to postpone the operation of the scheme until 1 March 2024 as a result of delays in its efforts to secure an exemption from the market access principles.<sup>104</sup> In an indication of escalating tensions, one Member of the Scottish Parliament (MSP) (Ross Greer, Scottish Green Party) wrote to the Speaker of the House of Commons accusing the Secretary of State for Scotland (Alistair Jack, Conservative) of misrepresenting the Scottish Government's engagement with DEFRA through the Common Frameworks programme to secure an exemption for its DRS legislation pursuant to section 10 UKIMA.<sup>105</sup> The Secretary of State is recorded as having reported to the House that the UK Government had not yet received an official ministerial 'request' from the Scottish Government for such an exemption. As Mr Greer sought to remind the Secretary of State – echoing the (then) First Minister's correspondence to the Prime Minister<sup>106</sup> – the agreed intergovernmental process imposes no such procedural requirement. Subsequently, in a move that the Scottish First Minister, Humza Yousaf (Scottish National Party), condemned as a 'democratic outrage',<sup>107</sup> the UK Government announced that it would only partially exempt the DRS from the application of the market access principles, citing a need to align the Scottish scheme with its own proposals for England and Wales.<sup>108</sup> Without an exemption, the DRS would be confined to in-scope drinks containers produced within the Scottish market, resulting in additional costs for Scottish producers and consumers should a less onerous scheme be introduced to cover the rest of the UK market.

The Scottish Government's efforts to secure an exemption for the DRS captures the emerging dynamics of intra-UK trade relations post-Brexit. Rather than evidence of an emerging culture of cooperative intergovernmental decision-making through agreed Frameworks and exemption processes, the DRS experience points to a model of IGR that remains principally characterised by bilateral confrontations between the UK Government and the government of one of the devolved nations.

104 Minister for Green Skills, 'Circular economy and biodiversity', [letter dated 18 April 23](#).

105 Ross Greer MSP, [letter dated 22 April 2023](#).

106 First Minister of Scotland to UK Prime Minister, [letter dated 28 February 2023](#).

107 A Learmouth, 'UK Government unveil conditions for "consistent" DRS exemption' *The Herald* (Glasgow 27 May 2023).

108 'Policy statement: Scottish Deposit Return Scheme – UK internal market exclusion' (27 May 2023).

Political tension between the UK Government and devolved governments is also visible in other areas, notably in relation to the UK Government's introduction of the Genetic Technology (Precision Breeding) Bill.<sup>109</sup> That Bill (now enacted)<sup>110</sup> introduces legislative changes for England only, removing restrictions on the development of certain types of precision-breeding technologies. The Scottish and Welsh Governments alleged that the UK Government had only informed them of the Bill's content immediately prior to its introduction in an alleged breach of a political obligation to manage potential divergence through the Common Frameworks. An amendment was tabled (but subsequently withdrawn) at committee stage to prevent the operative parts of the Bill coming into force until a Common Framework agreement on precision breeding has been agreed between the UK Government and the Scottish and Welsh Governments.<sup>111</sup> Responding at committee stage, the Minister for Farming, Fisheries and Food (Victoria Prentis, Conservative) maintained that the Bill was out of scope given that the four administrations had jointly resolved not to adopt a Common Framework on genetically modified organism technologies.<sup>112</sup>

#### **4 THE COMMON FRAMEWORKS: UNTAPPED POTENTIAL?**

The Common Frameworks exhibit clear potential as instruments of positive harmonisation. As outlined, they establish, by consensus, possible mechanisms for the UK and devolved governments to coordinate policymaking across the four nations of the UK. However, a review of initial practice indicates that the Common Frameworks remain some way off reaching maturity as positive harmonisation tools in relation to domestic market regulation (see section 2, above).<sup>113</sup> The criticism here is not that the Frameworks are yet to emerge as forums for joint agreement on uniform UK-wide regulatory standards with respect, for example, to SUPs or the introduction of deposit return schemes. Uniformity is rarely, if ever, the prescribed end goal of positive harmonisation within any system of multilevel governance.<sup>114</sup> Rather, with the Common Frameworks, the concern

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109 See eg Scottish Government, 'Genetic Technologies (Precision Breeding) Bill': [letter to UK Government](#)', letter dated 10 June 2022.

110 Genetic Technology (Precision Breeding) Act 2023.

111 Public Bill Committee (Bill 11) 2022–2023, 252.

112 Ibid 254.

113 See also House of Lords (n 68 above).

114 For comparative analysis of regulatory dynamics across different internal markets, see Anderson (n 5 above).

is that these instruments may fall far short of their potential as tools simply to coordinate (as opposed to unify) divergent policy preferences throughout the UK post-Brexit. As section 2 outlined, the experience thus far points to their functioning as little more than mechanisms for the devolved governments simply to report (and defend) specific decisions on policy, rather than as forums for meaningful agreement on intra-UK policy coordination. Should that approach endure, shared rule would end up being more procedural than substantive.

The question that arises is: what factors are conditioning the operation of the Common Frameworks as positive harmonisation tools? In particular, what may be restricting their potential flourishing as instruments for effective substantive policy coordination between the UK and devolved governments?

In this section, we draw attention to three issues. First, there is the underlying question of political ‘buy-in’. Exiting the EU legal order requires the UK and devolved governments to reach a new agreement on the UK internal market as an object of regulation. Secondly, there is the issue of political context. Changes to the framework within which competences are exercised post-Brexit are generating new tensions between the UK and devolved governments with respect to the conceptualisation of devolved competences under the UK’s territorial constitution. Thirdly, there is the enduring structural problem of disaggregating ‘English’ and ‘UK-wide’ regulatory interests and establishing effective structures to balance the former alongside the interests of the three other (much smaller) nations.

#### **4.1 In search of new consensus**

First, on political ‘buy-in’, there is little evidence thus far to indicate that the UK and devolved governments have reached workable agreement on the UK internal market as an *object* of regulation. Consensus on the nature of a functional problem (and the principles designed to resolve it) is an essential prerequisite for effective coordination within any system recognising distinct layers of government.<sup>115</sup> With respect to the UK internal market, agreement presently appears, at best, only partial. The initial approach under the Frameworks remains the highwater mark in terms of joint agreement on the existence of a functional problem. Signing off the Frameworks programme, the UK and devolved governments recognised a common regulatory challenge arising as a result of the repatriation of competences post-Brexit. The subsequent enactment of the UKIMA disturbed that consensus, with the devolved governments expressly refuting the UK Government’s

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115 On the importance of generating common interests as a basis for shared rule alongside self-rule, see eg R L Watts, *Comparing Federal Systems* 3rd edn (McGill-Queen’s University Press 2008) 182.

diagnosis that further intervention was required in the form of the market access principles to prevent the emergence of future obstacles to intra-UK trade.

The gap between the UK and devolved governments in relation to the UK internal market as an object of regulation reflects the pull of competing conceptions of self- and shared rule in relation to devolution.<sup>116</sup> For the devolved governments, acknowledging the UK internal market as a shared regulatory space that cuts across the devolved competences challenges the view of devolution as a ‘voluntary union of nations’, according to which devolved competences exist as a direct expression of democratic self-rule.<sup>117</sup> This is apparent, post-Brexit, from the devolved governments’ concerns about the practical effects of the market access principles on their regulatory autonomy (section 3.2, above). Resistance to the application of these principles follows from their capacity to reduce the power of the devolved governments to exercise full control over the regulation of economic activity within their respective territories.<sup>118</sup> The concern here is amplified when one considers the dominance of England as the largest of the four UK markets.<sup>119</sup>

The UK Government, on the other hand, appears more open, conceptually, to the idea of the UK internal market as a shared regulatory space requiring the introduction of additional directly enforceable legal principles to manage future policy divergence. However, its diagnosis of the regulatory problem (prospective regulatory divergence as an obstacle to intra-UK trade) is not matched by a developed understanding of *how* shared rule should operate in practice. Its initial attempt through the Common Frameworks represents the clearest attempt to bring together the UK and devolved governments to agree on future policy coordination. But that insight was short-lived. The subsequent approach of the Johnson Government through the UKIMA repudiated

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116 On competing conceptions of the UK constitution order generally, see eg D Wincott, C R G Murray and G Davies, ‘The Anglo-British imaginary and the rebuilding of the UK’s territorial constitution after Brexit: unitary or union state?’ (2022) 10(5) *Territory, Politics, Governance* 696.

117 See eg Scottish Government, ‘[After Brexit: the UK Internal Market Act and devolution](#)’ (8 March 2021) 3. On self-rule as a defining characteristic of Scottish devolution, see eg A Page, ‘Scotland in the United Kingdom: an enduring settlement?’ in A Lopez-Basaguren and L Escajedo San-Epifanio (eds), *Claims for Secession and Federalism: A Comparative Study with a Special Focus on Spain* (Springer 2019).

118 The UKIMA was also added to the list of ‘protected’ instruments under the Devolution Acts, meaning that it may not be modified by the devolved legislatures. See s 54 UKIMA.

119 England accounts for around 85% of the UK’s gross domestic product. See here also eg Dougan et al (n 79 above) 671.

the very idea of shared rule by monopolising political authority from the centre.

Disagreement over the UK internal market as a regulatory object extends to normative principles. Under the Common Frameworks, the UK and devolved governments effectively sidestepped the crucial matter of determining *what* replacement substantive principles ought to inform the regulation of the UK internal market post-Brexit. Nothing was agreed beyond an abstract commitment to ‘maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules’.<sup>120</sup> Following the enactment of the UKIMA, the market access principles now occupy that space, imposing thicker substantive limits on domestic policymaking. In their new, modified form, these principles are strongly deregulatory, articulating a vision of the UK internal market that prioritises considerations of economic efficiency over the protection of other non-economic values.<sup>121</sup> The shift to efficiency represents a significant adjustment to pre-existing EU legal frameworks, which aspire to balance the economic benefits of liberalising intra-EU with the achievement of a broad range of social and political objectives.<sup>122</sup> It is an ideological choice in favour of ‘economic unionism’<sup>123</sup> that was imposed on the devolved governments and one that remains strikingly out of alignment with their respective regulatory traditions, at least to the present point.<sup>124</sup>

The UK experience thus far contrasts with that of the EU’s internal market. True, member states periodically take aim at particular EU instruments or EU judicial decisions that they consider to interfere

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120 Joint Ministerial Committee (EN) Communiqué (n 11 above).

121 For criticism, see eg Scottish Government (n 117 above) 17.

122 See here eg art 3(2) TEU: ‘The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.’

123 Armstrong (n 79 above).

124 Among other things, devolution has enabled the Scottish and Welsh Governments to diverge on issues such as land reform; the regulation of smoking and alcohol; personal care provision; access to higher education; and, in Scotland, direct taxation. Signalling further departure from UK government policy, the Scottish Parliament enacted the European Union (Continuity) (Scotland) Act 2021 empowering Scottish Ministers to align with future developments in EU law where appropriate (and permissible under the Scotland Act 1998). For an early survey of policy differences post-devolution, see A Trench and H Jarman, ‘The practical outcomes of devolution: policy-making across the UK’ in A Trench (ed), *Devolution and Power in the United Kingdom* (Manchester University Press 2007).

unjustifiably with their often jealously guarded regulatory autonomy. But, at the macro level, there is no fundamental disagreement between the member states with the objective of establishing a functioning internal market in accordance with the provisions of the EU Treaties. Nor is there any dispute with regard to the specific regulatory instruments designed to achieve that objective. The EU internal market rests on consensus between the member states on the co-existence of instruments of positive and negative harmonisation as tools to realise the economic, social and political benefits of market integration. Agreement between the member states further extends to normative principles, with the EU Treaties (under the supervision of the EU Court of Justice) providing for the establishment of a functioning internal market that aspires to balance economic benefits of liberalising intra-EU trade with the achievement of a wide range of social policy objectives and respect for fundamental principles, notably subsidiarity and proportionality.

## 4.2 Political context

Secondly, turning to consider changes in political context, Brexit has transformed the framework within which devolved competences are exercised under the UK's territorial constitution, generating new sites of political tension between the UK and devolved governments. Membership of the EU internal market had a significant impact on devolved competences. In a break with the 'devolve and forget' (or 'hyper-dualist') logic of devolution, it carved out a distinctive space for the exercise of devolved competences as *concurrent* rather than *de facto* exclusive competences.<sup>125</sup> This was visible both vertically in interactions with EU institutions as well as horizontally *vis-à-vis* the UK Government.

Vertically, from their inception, the devolved governments were locked into the EU's internal market project as an area of shared member state and EU responsibility under the EU Treaties.<sup>126</sup> This required compliance with the EU Treaty provisions guaranteeing the free movement of goods, persons, services and capital. The exercise of devolved competences therefore had to be 'other regarding' at all

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125 J Hunt, 'Subsidiarity, competence, and the UK territorial constitution' in O Doyle, A McHarg and J Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions under Pressure* (Cambridge University Press 2021).

126 The Devolution Acts reinforced this as a matter of domestic law. See s 27(3) Scotland Act 1998 and s 94(6)(c) Government of Wales Act 2006. See also eg M Keating, 'Brexit and devolution in the United Kingdom' (2017) 5(2) *Politics and Governance* 1.

times with respect to the demands of the EU internal market.<sup>127</sup> The EU Treaty provisions on intra-EU movement functioned to ensure the representation of external interests in domestic political processes within the devolved territories.<sup>128</sup> Accordingly, the Scottish Government could only legislate to introduce minimum alcohol pricing within Scotland provided that this was compatible with the demands of article 34 TFEU on the free movement of goods.<sup>129</sup> In that respect, as a matter of EU law, the position of the devolved governments was no different from that of the UK Government legislating in areas of reserved (or non-devolved) competence within the scope of Union law.

Horizontally, EU membership also facilitated the exercise of devolved competences concurrently with the UK Government in areas of Union policymaking. This was most visible in relation to the implementation of EU policy, where the UK and devolved governments coordinated the exercise of their respective competences to adapt EU frameworks to local conditions within the four markets of the UK. The Concordat on the Coordination of European Policy Issues, agreed between the UK and devolved governments, outlined the freedom (within the constraints of Union law) for the devolved governments to adapt EU rules to local conditions, or, alternatively, to coordinate UK or GB-wide approaches with the UK and other devolved governments.<sup>130</sup> When challenged, the EU Court of Justice confirmed that intra-UK differentiation with respect to the implementation of EU policies was permitted as a matter of Union law.<sup>131</sup>

Cooperation between the UK and devolved governments in areas of devolved competence extended further to capture political input into EU policymaking.<sup>132</sup> A Memorandum of Understanding concluded between the UK and devolved governments explicitly recognised the intersection of EU and devolved competences in several areas of EU policymaking, together with the particular interest and role of the devolved governments in these areas.<sup>133</sup> Further (or accordingly), the

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127 The position for Wales differed prior to the transfer of legislative competences under the Government of Wales Act 2006.

128 Regan (n 8 above). See also, with respect to art 34 TFEU, Maduro (n 8 above). For criticism on limits, see eg Jaakkola (n 8 above).

129 See *Scotch Whisky Association v Lord Advocate and Advocate General* [2017] SC 465.

130 Concordat on the Coordination of European Union Policy Issues (n 22 above), B4 Common Annex, B4.17.

131 *R (Horvath) v Secretary of State for Environment, Food and Rural Affairs* [2006] EWHC Admin 1833.

132 See eg A-L Högenauer, 'The Scottish Parliament – active player in multilevel European Union' in G Abels and A Appller (eds), *Subnational Parliaments* (Routledge 2016).

133 Memorandum of Understanding (n 22 above) para 18.



Concordat on the Coordination of European Policy Issues empowered the devolved governments, where appropriate, to represent the UK interest at Union level through the Council of the European Union.<sup>134</sup> This was despite the formal designation of EU relations as a reserved competence under the Devolution Acts.<sup>135</sup>

Aligning devolution with the structures of the EU as a quasi-federal system of multilevel governance in the above manner, membership of the EU internal market exercised powerful effects on the conceptualisation of devolved competence. For the devolved governments, alignment challenged the perception of devolved competences as *de facto* exclusive; in other words, as powers enabling them to exercise near total control over the regulation of economic and non-economic activity within their respective territories. For the UK Government, EU membership exercised a powerful check on opposing political impulses to control devolution from the centre in line with the orthodox, legalistic view of devolution as a framework that remains firmly embedded within a unitary domestic constitution. EU principles and structures, including an active commitment to subsidiarity, mandated that the UK Government should coordinate the exercise of its competences in relation to EU membership with those of the devolved governments in areas of Union policymaking. Taken together, the overall effect on devolved competences was largely unifying, with both the UK and devolved governments recognising a collective interest in coordination and shared rule both vertically and horizontally within EU frameworks.

Brexit appears to have largely extinguished the disciplinary (and unifying) effects of EU principles and structures on the exercise of devolved competences.<sup>136</sup> Without these guardrails in place, domestic regulatory interactions are transitioning to a new operational understanding of devolved competences that points to increasing polarisation. For the UK Government, the repatriation of EU competences in devolved policy areas appears tied to its understanding of the UK internal market as the continuation, domestically, of a previously EU-managed shared regulatory space. On that view, the exercise of devolved competences post-Brexit remains, by default, necessarily 'other regarding'. Membership of the UK internal market

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134 Concordat on the Coordination of European Union Policy Issues (n 22 above), B4 Common Annex, B4.13.

135 Northern Ireland Act 1998, sch 2, s 3; Scotland Act 1998, sch 5, s 7(1); Government of Wales Act 2006, sch 7A, s 10(1) and (2).

136 Concurrent competence continues to define other aspects of domestic policymaking, notably in relation to aspects of social security under the Scotland Acts 2012 and 2016. See here eg A Page, 'Scotland in the United Kingdom' (2019) and A Evans, 'Inter-parliamentary relations in the United Kingdom: devolution's undiscovered country?' (2019) 39(1) *Parliament, Estates and Representation* 98.

requires the devolved governments to exercise their competences in a manner that takes direct account of any effects on intra-UK trade. Contrastingly, for the devolved governments, the repatriation of EU powers in areas of devolved competence is internalised as an expansion of *de facto* exclusive competences. Brexit marks a point at which devolved powers in areas previously governed by EU law should increase in line with their understanding of devolution as a constitutional framework that exists, first and foremost, to protect democratic self-rule.

The Common Frameworks stand out against that backdrop as a (non-legislative) attempt to preserve the logic of concurrency and coordination under the UK constitution despite far-reaching changes in political context post-Brexit. The Frameworks carry over into a new domestic context the EU-facing conceptualisation of UK and devolved competences as *de facto* concurrent, rather than *de facto* exclusive. Stripped to their core, they commit the UK and devolved legislatures to cooperate on policy coordination in areas of devolved competence that were previously within the scope of EU law. But that is about all they carry over. As our analysis has set out (sections 2 and 3, above), the Frameworks are light on substantive principles and, further, notably fail to transplant into domestic law many of the EU's important tools that are designed to enhance the scope for divergent policymaking within the EU's internal market as a shared regulatory space. These tools include, among other things, the open-ended set of overriding public interests justifying restrictions on cross-border movement as well as the EU's active commitment to subsidiarity. As our analysis reveals (section 3.3, above), the effective functioning of the Common Frameworks as instruments of positive harmonisation is also undermined by operational tensions. Recall here, for instance, the Scottish Government's difficulties, through an agreed intergovernmental process, to exempt regulations from the UKIMA's market access principles.

### 4.3 Structural legacies

A further powerful drag on the potential development of the Common Frameworks as positive harmonisation instruments is structural.<sup>137</sup> Effective domestic mechanisms for shared rule – including the Common Frameworks – are premised on a clearer division between the UK Government's role as the representative of UK and English interests, respectively. In its current form, the UK's asymmetric constitution does not meaningfully disaggregate English and UK-wide representative interests in that regard. Under both the Common Frameworks and the

137 See also eg McEwan et al (n 45 above) 638. See also Arden LJ in *R (Horvath)* (n 131 above) [51]–[59].

UKIMA, the UK Government occupies a dual representative position by default. It coordinates at the centre in proxy for UK interests whilst at the same time representing the political and economic interests of the English nation.

As mechanisms for shared rule, the Frameworks would offer greater potential for substantive policy coordination if they brought together representatives from the four nations of the UK as opposed to, as is currently the case, simply the UK and devolved governments. Presently, for example, when considering proposals to exempt Common Framework Agreements from the application of the market access principles, the UK Government acts in a dual representative capacity as both a regulator for England and as the institution tasked with protecting the joint UK-wide interest in ensuring the free movement of goods and services. This fusion of self-rule interests (English regulatory preferences) with shared rule concerns (joint UK and devolved agreement on policy coordination) inevitably conditions decision-making. Recall here, for instance, the UK Government's decision only partially to exempt the Scottish deposit return scheme from the application of the market access principles. In reviewing that scheme's effects on intra-EU trade, the UK Government makes no secret of its desire for substantive regulatory alignment with its own proposals for England (and Wales and Northern Ireland).<sup>138</sup>

Post-Brexit there has been some movement towards disaggregation through recent reforms to aspects of IGR. This includes, for instance, the introduction of changes to the management of dispute resolution processes, which the UK Government has traditionally dominated through the exercise of administrative gatekeeping functions.<sup>139</sup> Attributing such functions to the UK Government in areas of shared responsibility effectively leaves it to 'mark its own homework' as one stakeholder put it.<sup>140</sup> The Review of Intergovernmental Relations improves on this, by providing for the establishment of a Secretariat that is independent of the UK Government.<sup>141</sup> Composed of representatives from all four UK governments, its existence and functioning appeal to the logic of shared rule, albeit with regard only to dispute resolution and general administration. Independence from the UK Government is

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138 [Policy Statement: Scottish Deposit Return Scheme – UK Internal Market Exclusion](#) (27 May 2023). The Welsh Government is cooperating with the UK Government with a view to establishing a common scheme, which will also extend to Northern Ireland. For an overview of proposals, see 'Introducing a Deposit Return Scheme for drinks containers in England, Wales and Northern Ireland'.

139 See also section 1.2 above.

140 C Jones, 'Brexit and devolution: stresses, strains and solutions' speech at the Institute for Government, 10 September 2018, cited in eg McEwan et al (n 45 above) 638.

141 [Review of Intergovernmental Relations](#).

also visible in the attribution of advisory and reporting powers to the new OIM (section 3.1, above). The UKIMA establishes the OIM (within the Competition and Markets Authority) as a reporting, advisory and monitoring body that is directed to act ‘even-handedly’ with respect to the four UK administrations.<sup>142</sup> The OIM published its first annual report on the operation of the UK internal market in March 2023.<sup>143</sup>

The above changes, however, do very little to address to the core issue of tackling longstanding asymmetries in the UK’s territorial constitution. Devolution has never extended to include representation for England as a distinct nation, with English representation left to the UK Government and the UK Parliament. The fusion of UK with English interests is particularly deeply embedded in legal accounts of the UK’s territorial constitution.<sup>144</sup> Ideas of the UK as a unitary state under the Diceyan doctrine of (UK) parliamentary supremacy reflect distinctly English accounts of the UK constitution. EU membership directly challenged that account in relation to devolution,<sup>145</sup> but the pull of the old view has resurfaced to define UK Government approaches to the task of de-Europeanising the domestic constitution post-Brexit. Periodic proposals have been issued to address constitutional asymmetries (which present a serious challenge given the relative size of England), including Welsh Government suggestions to establish a UK Council of Ministers, with representation from each of the four governments, or earlier proposals for the introduction of a Minister for England within the UK Government. Lasting stability with respect to both the management of the UK internal market, specifically, and devolution, more broadly, requires ambitious constitutional reform.<sup>146</sup>

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142 S 31(4) UKIMA.

143 OIM (n 69 above).

144 See here see eg Wincott et al (n 116 above).

145 See eg Case 213/89 *R v Secretary of State for Transport, ex p Factortame Ltd* ECLI:EU:C:1990:257. For the classic account on revolutionary change, see H W R Wade, ‘Sovereignty – revolution or evolution?’ (1996) 112 *Law Quarterly Review* 568.

146 See eg Labour Party, *A New Britain: Renewing our Democracy and Rebuilding our Economy – Report of the Commission on the UK’s Future* (Labour Party 2022) and Alliance for Radical Democratic Change ‘*Stronger Scotland, better Britain*’ (Press release 1 June 2023). See also eg V Bogdanor, *The New British Constitution* (Hart 2009) and V Bogdanor, *Beyond Brexit: Towards a New British Constitution* (Tauris 2019).

## 5 CONCLUSION

With regard to matters of internal market governance, Brexit represents the continuation of a functional problem in a new political context. Functionally, the problem remains one of managing policy coordination (or the limits of policy divergence) within a political system that recognises distinct sites of political authority – in our example, arising as a consequence of devolution. Brexit requires the UK and devolved governments to reach a new consensus around how to address that problem in a newly reconstructed domestic context.<sup>147</sup>

In this contribution, we have drawn on distinctions between positive and negative harmonisation and related perspectives on self- and shared rule to reflect on progress towards achieving a new consensus. The results of our enquiry demonstrate the disruptive impact of removing EU principles and structures on the establishment and effective functioning of new domestic mechanisms for positive and negative harmonisation post-Brexit. Without the disciplinary effects of EU frameworks, efforts to establish replacement mechanisms to manage domestic internal market governance are struggling to gain traction. Detached from the EU as a system of multilevel governance, the UK constitution appears fundamentally unable to manage strengthening claims to self-rule from Cardiff and Edinburgh through new instruments of positive and negative harmonisation. The problem is not simply one of differing political parties governing the UK and devolved nations, respectively. Even if political alignment across the four nations should increase in the future (eg as a result of a change in UK Government), fair-weather governance is an impoverished basis for effective constitutional functioning. What is missing are robust institutional structures for shared rule to manage intra-UK policy divergence. This is not a new problem, but one that has emerged, post-Brexit, as a (if not, *the*) defining challenge for the UK constitution.<sup>148</sup>

The Common Frameworks stand out as the clearest attempt thus far to balance self- and shared rule within the constraints of the present constitutional settlement. Initially introduced with little enthusiasm in response to the UK Government's proposals to repatriate EU competences, the Frameworks appear now to be emerging as the devolved governments' preferred instruments for managing regulatory divergence post-Brexit, not least following the introduction of the UKIMA with its distinctly deregulatory rules on market access. Conceptually, the Frameworks represent a continuation of pre-

147 On the need for a renewal of political consensus more broadly, see the Welsh First Minister's call for a 'solidarity union' built around rights to public services and financial solidarity. See S Carrell, 'UK could break up unless it is rebuilt as "solidarity union"', says Mark Drakeford' *The Guardian* (London 29 May 2023).

148 For earlier recognition, see eg Arden LJ in *R (Horvath)* (n 131 above) [51]–[59].

existing mechanisms for intergovernmental cooperation. However, in contrast to earlier instruments that were often largely technical in nature, the Common Frameworks are now required to discharge highly politicised functions across wide-ranging spheres of devolved policymaking. Structural biases and attitudinal distortions inherent in the UK's present constitutional settlement inherently undermine their capacity to do so effectively as potential positive harmonisation instruments by privileging UK Government control by default. The Scottish Government's efforts to diverge in relation to managing the circular economy exemplifies the practical effects of these biases and distortions. Future efforts to pursue intra-UK regulatory divergence in other areas of devolved policymaking will only further increase tensions to the point where the old constitution may finally snap, threatening the integrity of the Union.