

Level Playing Field Provision in the TCA: an introductory guide

Catherine Barnard

Trinity College

Cambridge

1. Introduction

The UK-EU Trade and Cooperation Agreement level playing field (LPF) provisions aim to ensure open and fair competition in a manner conducive to sustainable development. They establish a system which permits divergence and alignment between the UK and EU. In the UK, these provisions cut across both reserved and devolved areas, such as trade, investment, environment and climate.

Since the Senedd has taken steps to ensure that UK-EU arrangements are considered in detail by relevant Committees this paper is intended to provide an early understanding of the operation and consequences of the LPF provisions. It would also provide an opportunity to better identify potential consequences of future UK-EU and Wales-EU divergence and alignment for Wales.

This paper provides an overview of the scope for UK-EU divergence with a view to:

- seeing how alignment and divergence might develop in the context of the Trade and Cooperation Agreement
- Setting out how alignment and divergence between the devolved nations/Wales and the EU could develop
- Explain the consequences of divergence, including non-regression and rebalancing measures
- Identifying areas within, or that impact, devolved competence

2. Divergence and alignment

2.1 What is it?

When the UK left the EU at the end of the transition period on 31 December 2020, UK law was fully aligned (i.e. in conformity with EU law). That alignment was maintained by the passing of the EU (Withdrawal) Act 2018 (EUWA) to ensure continuity of the UK's legal system before and after Brexit. This meant that all EU law (except the Charter of Fundamental Rights), together with principles of interpretation of that law (known as 'general principles of law'), and the pre-Brexit case law of the Court of Justice, was converted into UK law on 31 December 2020 (known as 'Implementation Period Completion Day' (IPCD)) as 'retained EU Law' ([REUL](#)).¹ The Act also provided for the supremacy of EU law over pre-Brexit UK law. So an EU Treaty provision, such as tArticle 157 TFEU on equal pay, trumps conflicting provisions of, for example, the Equality Act 2010. However, s. 8 EUWA gave the government powers to amend that REUL to deal with 'deficiencies' created by the UK leaving the EU. This has led to hundreds of Statutory Instruments being passed.

More significantly, since 31 December 2020, the UK is no longer obliged to comply with EU law. The UK entered a Free Trade Agreement, the Trade and Cooperation Agreement (TCA), which is deliberately 'thin', and so has not required alignment with EU rules. In certain fields, such as social and environmental matters, it expressly allows each side to set its own policies.

The ability for the UK to be able to set its own rules was seen by Leave advocates as a major benefit of Brexit. A Brexit Opportunities Unit was set up inside government and the Taskforce for

¹ <https://ukandeu.ac.uk/reul-lord-frost/>

Innovation, Growth and Regulatory Reform² made recommendations for ‘how the UK can take advantage of our newfound regulatory freedoms and stimulate growth, innovation and competition across the economy, as we seize opportunities outside the EU’.³ Lord Frost, then Brexit Minister, has since made the case for radical change. He said he intended to:⁴

...review comprehensively the substantive content of Retained EU law. Now some of that is already under way - for example our plans to reform the procurement rules that we inherited from the EU, or the plan announced last autumn by my RHF the Chancellor to review much financial services legislation. But we are going to make this a comprehensive exercise and I want to be clear: our intention is eventually to amend, to replace, or to repeal all that retained EU law that is not right for the UK.

However, progress has not been as fast as he would have liked. He resigned from his Cabinet post in December 2021, and on the first anniversary of Brexit there were a number of articles in the press lamenting the failure to take up the regulatory opportunities Brexit offered.⁵

There are six main legal/policy reasons why divergence has not happened as far and as fast as some members of the Vote Leave coalition would like:

- (1) In the areas covered by **the LPF provisions**, if divergence means a (material) impact on trade or investment (see section 3 below), the EU may retaliate.
- (2) **Manufacturers’ wishes**: there are some areas where manufacturers do not want divergence. Chemicals is one of them: ‘the industry is virtually unanimous that there would be no benefits from this. This is not surprising given that incumbent firms have invested heavily to meet current standards, but is similar to industry views in other sectors that have high trade volumes between the UK and the EU and closely integrated supply chains’.⁶
- (3) **The Brussels effect**: given the size and influence of the EU, it sets standards which end up applying across the globe because manufacturers want to comply with one set of standards not a plethora of divergent national standards. As Anu Bradford puts it, ‘Few Americans are aware that EU regulations determine the makeup they apply in the morning, the cereal they eat for breakfast, the software they use on their computer, and the privacy settings they adjust on their Facebook page. And that's just before 8:30 AM. The EU also sets the rules governing the interoffice phone directory they use to call a co-worker. EU regulations dictate what kind of air conditioners Americans use to cool their homes and why their children no longer find soft plastic toys in their McDonald's Happy Meals.’⁷
- (4) **WTO law**. Under the Technical Barriers to Trade Agreement (TBT) and Sanitary and Phytosanitary (SPS) agreement there is an obligation on Members (including the UK) to harmonise standards in accordance with international norms such as those set by the Codex

² <https://www.gov.uk/government/publications/taskforce-on-innovation-growth-and-regulatory-reform-independent-report>

³ <https://www.gov.uk/government/news/search-for-head-of-the-new-brex-it-opportunities-unit-begins>

⁴ <https://www.gov.uk/government/speeches/lord-frost-statement-to-the-house-of-lords-16-september-2021>

⁵ See eg M. Howe QC, ‘We are not making enough of our Brexit freedoms – no wonder voters are angry’ <https://www.telegraph.co.uk/news/2021/12/19/not-making-enough-brex-it-freedoms-no-wonder-voters-angry/>; B. Marlowe, ‘Time is running out to prove Brexit is not a historic failure. It's been five years since the referendum. 2022 is the year reality needs to match the hype’

<https://www.telegraph.co.uk/business/2022/01/04/time-running-prove-brex-it-not-historic-failure/>

⁶ D. Bailey, ‘Manufacturing and Brexit’ <https://ukandeu.ac.uk/wp-content/uploads/2020/06/Manufacturing-and-Brex-it.pdf>

⁷ https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1275&context=faculty_scholarship.

Alimentarius. States can depart from those norms but they must have a good scientific reason for doing so.

- (5) **Northern Ireland Protocol (NIP):** in areas covered by the NIP, there is a legal obligation on dynamic regulatory alignment with the EU.⁸ The more the regulatory divergence in GB in respect of goods, the more difference there is between GB and NI law which means, at least in principle, more checks on the East-West border.
- (6) **Scotland:** in its UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 Scotland is committed to maintaining alignment with EU law. Section 1 gives the Scottish Ministers the discretionary power to continue to keep devolved law in line with EU law following IPCD. Section 2 sets out that the purpose of section 1(1), amongst other things, is to contribute towards maintaining and advancing standards in certain specified areas, namely: environmental protection; animal health and welfare; plant health; equality, non-discrimination and human rights; and social protection. When using the power under section 1(1), the Scottish Ministers must have due regard to this purpose.⁹

All of this has meant that it has proved more difficult to come up a list of post Brexit regulatory opportunities. The FT reports:¹⁰

Senior Whitehall insiders said the hurry to bring together a convincing list of initiatives from across government departments to highlight the opportunities of Brexit had been a struggle.

The Prime Minister published a 100-page ‘benefits of Brexit’ paper on 31 January 2022 highlighting plans for future deregulation, including areas such as gene editing of crops, artificial intelligence and data.¹¹

2.2 Different approaches to divergence

Divergence can take a variety of forms:¹²

- **Active:** new UK or devolved law replacing or amending EU rules.
- **Passive:** where the EU legislates and the UK (or some part of it) does not follow.
- **Procedural:** where the UK (or some part) of it has to introduce new systems to manage regulation post-Brexit.

In the second and most recent divergence tracker produced by UK in a Changing Europe, 21 cases of divergence are identified, all but four of which are ‘active’, meaning new UK law from EU rules (rather than the EU developing new legislation). Does this reflect the UK stepping up the pace of its divergence agenda this autumn? Not necessarily. They say: ‘There has certainly been a rhetorical step-change, with Lord Frost talking up the benefits of divergence in [three separate speeches](#), presenting it is a political imperative to remove all EU law which is not right for the UK and liberalise regulations in order to free up innovation, productivity and growth.’ They continue:

⁸ For a summary on the level of divergence, see L Whitten, Dynamic Regulatory Alignment and the Protocol on Ireland/Northern Ireland: One Year

Review https://drive.google.com/file/d/1cqy_iMRNSAUoEh8VFADgvexDPvdHYn1t/view

⁹ https://www.legislation.gov.uk/asp/2021/4/pdfs/aspen_20210004_en.pdf

¹⁰ P. Foster and G. Parker, ‘Benefits of Brexit’ paper to set out plans for future deregulation’ <https://www.ft.com/content/c00ab524-4320-4036-b8f4-813cfd491bd5>.

¹¹ <https://www.gov.uk/government/publications/the-benefits-of-brexit>

¹² <https://ukandeu.ac.uk/wp-content/uploads/2021/12/Divergence-tracker-2-website-final.pdf>. For criticism, see <https://brexittime.com/2022/01/28/%ef%bf%bcwhat-do-we-really-mean-by-regulatory-divergence-after-brexit/>

Yet this tracker shows that the ambitious rhetoric around divergence is so far not matched by reality. Two of the biggest recent policy announcements have been the Net Zero Strategy and the Autumn Budget but, as the tracker highlights ..., the UK has made minimal use of its regulatory freedom from the EU in these areas. Similarly, the ability to strike new trade deals and develop a new sanctions policy, much vaunted by Brexit supporters, have to date had a relatively limited impact

In fact, what we are seeing most in this edition is the consequences of previously-agreed divergence catching up with the government. The most significant cases date back to the signing of the Trade and Cooperation Agreement (the ending of free movement, rules of origin requirements for goods), highlighting how divergence is a piecemeal process: long after a decision to diverge is made, the government is still having to develop policy and programmes to manage the consequences. The significance of divergence is often not felt until these are in place.

3. The limits on divergence: The LPF provisions

3.1 What is LPF?

The LPF provisions were a key element of the TCA negotiations and they were among the last provisions to be agreed. Essentially they are intended to stop the UK becoming ‘Singapore on Thames’, in other words preventing the UK using its new found regulatory freedom to reduce standards but still enjoy (relatively) good market access to the EU. The Commission’s explanation for LPF is found in Box 1.¹³

¹³ For further details, see <https://commonslibrary.parliament.uk/research-briefings/cbp-9190/>

Box 1 Commission's explanation of LPF¹

Given their geographic proximity and economic interdependence, the EU and the UK agreed to robust commitments to ensure a level playing field for open and fair competition and to contribute to sustainable development.

The nature of these commitments reflects the scope and the depth of the wide-ranging and ambitious economic partnership, including in particular the absence of tariffs and quotas for trade in all goods, comprehensive market access commitments and rules on services and investment, as well as very high level of openness for government procurement. The agreement also foresees unprecedented cooperation on energy and dedicated titles on aviation and road transport, all of which require appropriate level playing field guarantees.

These commitments will prevent distortions to trade and investment, today and tomorrow, and will contribute to sustainable development.

More specifically, these provisions mean that:

- The current high standards applicable in the areas of labour and social standards, environment, and climate cannot be lowered in a manner affecting trade or investment between the Parties.
- Robust and comprehensive rules will prevent distortions created by subsidies, anti-competitive practices, or discriminatory and abusive behaviour by state-owned enterprises.
- Specific standards and rules and the joint political declaration in the area of taxation will contribute towards tax transparency, and will counter tax avoidance and harmful tax regimes and practices.
- A wide-ranging set of commitments building on the EU's most ambitious precedents will ensure that trade supports sustainable development, including through cooperation at the international level.

The LPF provisions cover six areas (see fig 1) with some areas (subsidy control, labour and social standards and the environment and climate attracting the most onerous dispute resolution mechanism (DRM). In order to understand the significance of the LPF provisions in those areas we start by looking at the standard DRM (section 3.2) before looking at the LPF provision in the field of employment and social provisions (section 3.3).

Competition Policy

- Each side has its own policy, incl enforcement; coop between comp authorities
- Title 1 of Part Six n/a

Subsidy control

- Each side has its own policy, incl independent body and role for domestic courts
- Reciprocal mechanism allowing parties to take rapid action (tariffs eg fish); measures can be challenged before AT (Art. 374)

State owned enterprises

- WTO provisions apply, OECD guidance

Taxation

- Maintenance of good standards (transparency, fair tax competition)
- Not subject to dispute settlement

Labour and social standards

- Non-regression in a manner affecting trade and investment
- Domestic system of enforcement
- Not subject to DRM mechanism; own system of panel of experts; temporary remedies available (Art. 410.3)
- Rebalancing (Art. 411)

Environment and climate

- Non-regression in a manner affecting trade and investment
- Specific detail on eg greenhouse gases and carbon pricing
- Domestic system of enforcement
- Not subject to DRM mechanism; own system of panel of expert; temporary remedies available (Art. 410.3)
- Rebalancing (Art. 411.4)

Fig 1 LPF areas in the TCA

3.2 Standard Dispute Resolution Mechanism

In order to understand the consequences of non-compliance with the LPF provisions we first need to consider the standard dispute resolution mechanism in Part Six of the TCA. In summary, the standard procedure has three stages: (1) political: consultation; (2) judicial: arbitration; and (3)

compliance (see fig. 2). The first stage requires formal consultations between the two sides. If this fails, the matter can go to an arbitration tribunal; if this AT finds against, say, the UK the UK must put matters right, failing which the EU can retaliate against the UK (usually imposing tariffs on UK goods), usually in the same sector but cross-retaliation is permissible (tariffs in different sectors).¹⁴

¹⁴ <http://eulawanalysis.blogspot.com/2021/01/analysis-4-of-brex-it-deal-dispute.html>

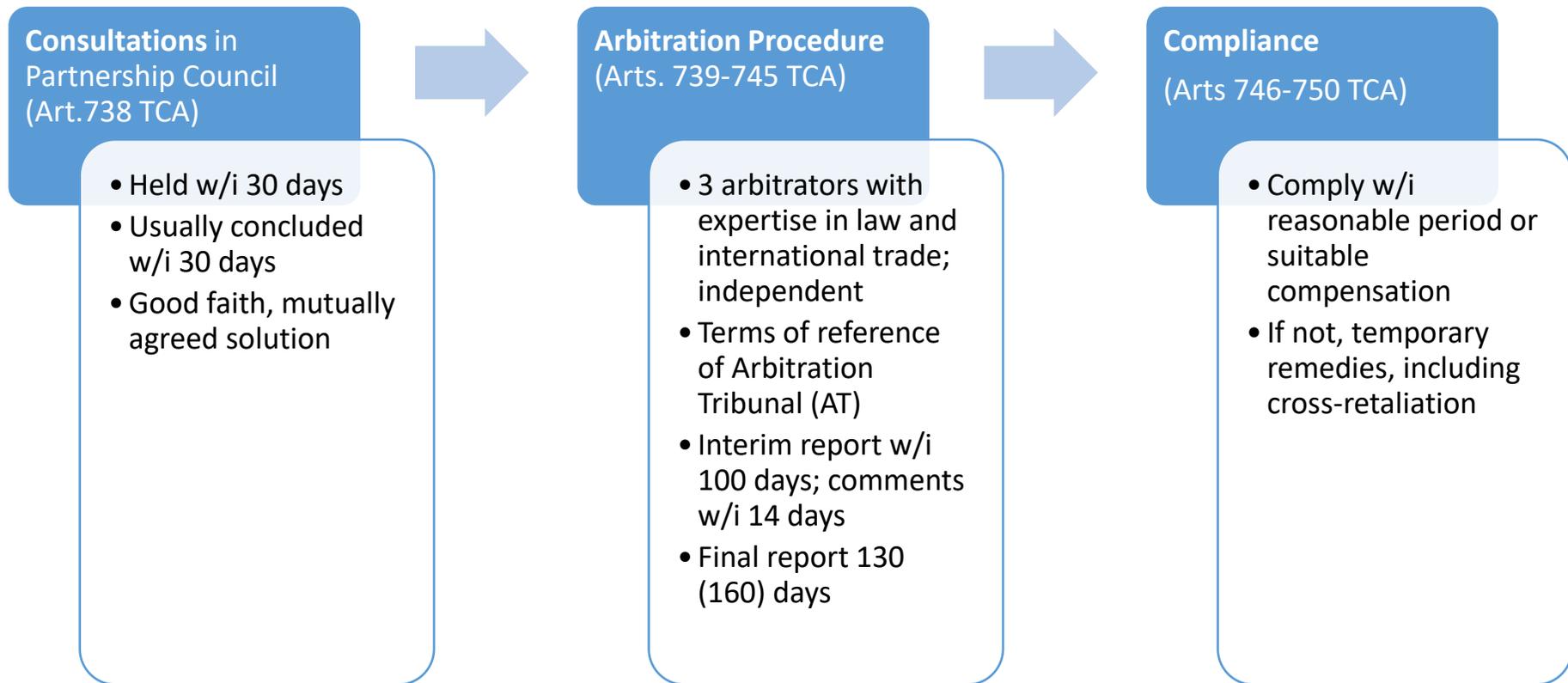


Fig. 2 Standard DRM under the TCA

3.3 Example: the case of labour and social standards

(a) Introduction

There was particular concern on the EU side that Brexit would pave the way for serious deregulation in the labour law field, as many Brexiters had advocated. There was a real fear that the UK would remove the protections under, for example, the Working Time Directive 2003/88¹⁵ and the Agency Workers Directive 2008/104¹⁶ (see fig 3). These initial concerns seemed to have been borne out by the review of employment law initiated by Ashok Sharma in 2020, that the current Business Secretary, Kwasi Kwarteng, found waiting for him when he took over BEIS in January 2021. It is striking that one of the first moves Kwasi Kwarteng made was to put an end to any such review (fig 4). It is not clear whether this was done for domestic reasons or because of concerns about this prompting the EU to trigger the TCA LPF provisions.



Fig.3



Fig 4

(b) Changes and their effects

Let's assume, however, the UK government had gone ahead and decided to change UK employment law. How might this have fitted into the LPF provisions?

The first point to note is that both sides are free to regulate in the field of labour and social protection. Article 387(1) TCA provides:

The Parties affirm the right of each Party to set its policies and priorities in the areas covered by this Chapter, to determine the labour and social levels of protection it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party's international commitments, including those under this Chapter.

Indeed, the EU has put forward some key pieces of legislation since 2021 including its important proposal on Platform Work.¹⁷ However, regulation *may* have the consequence of triggering one of the three LPF provisions (see fig 5):

¹⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0088>

¹⁶ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0104>

¹⁷ file:///C:/Users/csb24/AppData/Local/Temp/COM_2021_762_1_EN_ACT.pdf

- (1) **Non-regression:** departure from *existing* EU employment rules;
- (2) **Other instruments** for trade and sustainable development;
- (3) **Rebalancing measures:** concerning *future* divergence

We shall look at these in turn:

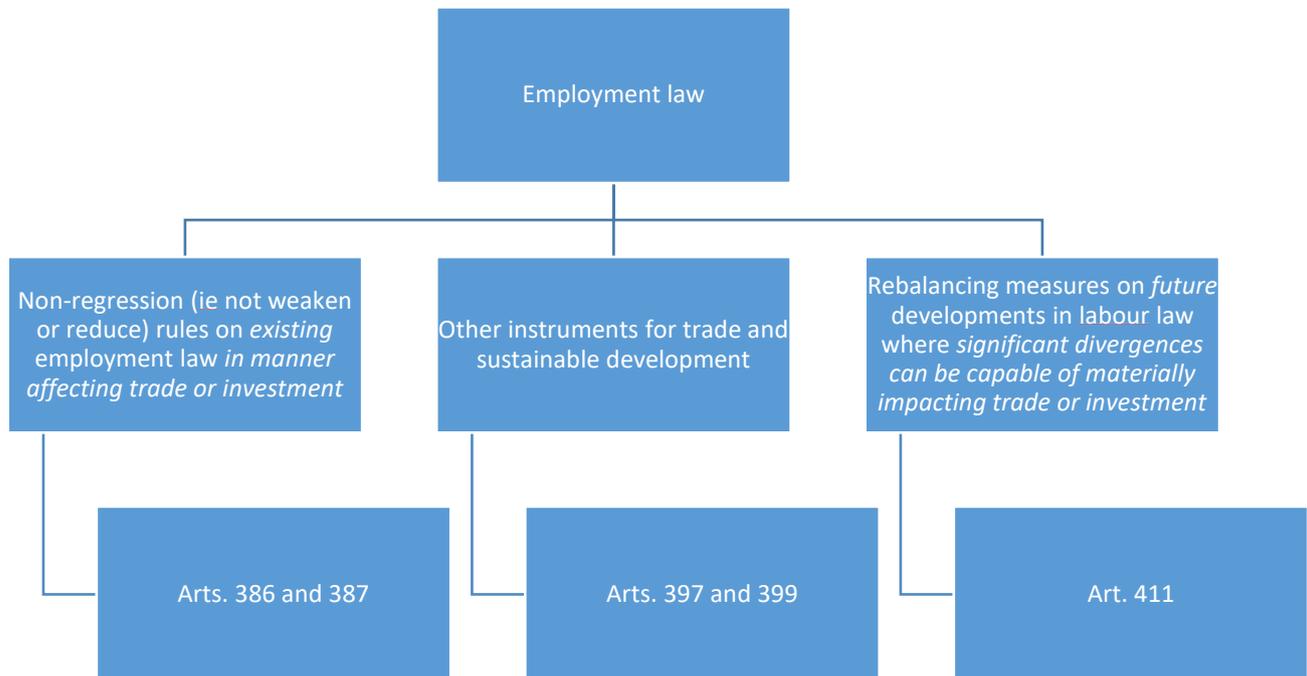


Fig 5 The conditions and remedies for the employment LPF provisions

Non regression procedures

As we have seen, Article 387(1) TCA recognises that both sides have freedom to regulate in the field of labour and social protection. The crucial provisions is Article 387(2) which provides that:

A Party shall not *weaken or reduce, in a manner affecting trade or investment between the Parties*, its labour and social levels of protection below the levels in place at the end of the transition period, including by *failing to effectively enforce its law and standards*. (emphasis added)

In respect of the point about domestic enforcement in the second part of Article 387(2) TCA, Article 388 TCA provides:

each Party shall have in place and maintain a system for effective domestic enforcement and, in particular, an effective system of labour inspections in accordance with its international commitments relating to working conditions and the protection of workers;

ensure that administrative and judicial proceedings are available that allow public authorities and individuals with standing to bring timely actions against violations of the labour law and social standards; and provide for appropriate and effective remedies, including interim relief, as well as proportionate and dissuasive sanctions. ...

There is no comprehensive system of labour inspectorate in the UK. The role currently falls to various government agencies (eg Gangmasters, Licensing and Abuse Authority (GLAA), HMRC, HSE) but only within their limited jurisdiction. Article 387(3) TCA recognises that 'each Party retains the right to exercise reasonable discretion and to make *bona fide* decisions regarding the allocation of labour enforcement resources with respect to other labour law determined to have higher priority, provided that the exercise of that discretion, and those decisions, are not inconsistent with its obligations under this Chapter.'

In respect of the first part of Article 387(2) TCA, non-regression, the provision applies only in the following policy areas: 'fundamental rights at work' (likely to include ILO Declaration on Fundamental Principles and Rights at Work, which includes: freedom of association and the right to collective bargaining (such as the right to join and form trade unions); the elimination of forced labour; the abolition of child labour; and the prohibition of discrimination in employment and occupation)), 'occupational health and safety standards', 'fair working conditions and employment standards' (likely to include working time and agency work), 'information and consultation rights at the company level', and 'restructuring of undertakings' (Art 386(1) TCA).

However, it is not any change in the areas listed in Article 386(1) TCA which triggers the provision; the non-regression provisions apply only where a reduction in the level of protection affects the flow of trade or investment between the UK and the EU (Art 387(2) TCA). As to the potential meaning of the phrase 'in a manner affecting trade', see Box 2. This raises the question as to what happens when 'salami-slicing' occurs i.e. where only minor changes are made each time an amendment is passed such as reducing the recording obligation in respect of working time, even stopping the right to take paid leave at the end of a lengthy period of sick leave. Would these changes 'affect trade or investment between the Parties'.

Assuming the threshold has been met, then the TCA dispute resolution process can be invoked. Like the standard DRM (see fig 2), there are three stages: (1) consultation; (2) panel of experts; (3) compliance. However, the second stage replaces the Arbitration Tribunal with a special panel of experts. The remedies they can order at first sight look weak but in fact the reference to Articles 749 and 750 TCA (Art 410(2)) means that the range of remedies found in the standard DRM can apply to non-regression LPF provision, including retaliation and cross retaliation (see fig 2 above)

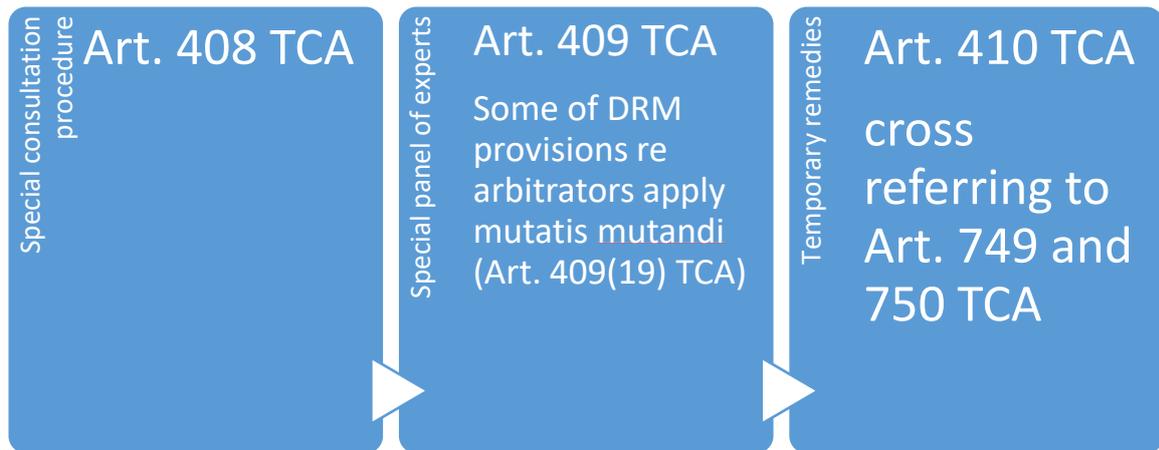


Fig 6 Remedies provisions for breach of the non-regression clause.

Box 2 Potential meanings of 'in a manner affecting trade'

Marley, 'What does the UK-EU deal mean for workers' rights, <https://www.ippr.org/research/publications/uk-eu-deal-workers-rights>

First, one of the key reference points for understanding the phrase 'in a manner affecting trade or investment' comes from the 2018 US-Guatemala dispute over labour rights. In this dispute, the US accused Guatemala of failing to enforce its labour laws, as required under the Dominican Republic – Central American Free Trade Agreement (CAFTA-DR). The labour chapter in CAFTA-DR states that "A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties". The US alleged that Guatemala was not living up to this commitment and following consultations a formal arbitration panel was convened (Arbitral panel report 2017).

The arbitration panel assessed in particular how to interpret the phrase "in a manner affecting trade between the Parties", which is a similar formulation to the phrasing in the UK-EU TCA. It concluded that in the context of CAFTA-DR the phrase meant that an employer or employers engaged in trade between the parties had been conferred a competitive advantage (ibid). In order to prove a competitive advantage, the panel argued that the following factors would need to be considered:

(a) Are the employers which are violating labour laws exporting to the other countries in the agreement, or are they competing with importers from the other countries in the agreement?

(b) What are the impacts of the failure to enforce labour laws (eg what the impacts on labour costs)?

(c) Are the impacts sufficient to have an impact on competitiveness (ie are they not "too brief, too localized, or too small")?

Based on this panel's interpretation, this indicates that there is a relatively high bar for demonstrating a link to trade or investment in similar labour clauses. If the same approach is applied to the non-regression clause in the TCA, then the EU would have to demonstrate that any lowering of labour protections is sufficient to confer a competitive advantage. That is, the EU would need to show that the lowering of labour protections had an impact on businesses in direct competition with counterparts in the EU and that it gave the businesses a meaningful competitive advantage – for instance, by demonstrating that the change had reduced the businesses' labour costs.

However, a more recent report from a panel of experts on a dispute between the EU and South Korea points to an alternative approach to interpreting the trade/investment link in labour clauses. This panel report was the conclusion of a dispute over the labour provisions in the EU-Korea FTA, including a provision to respect, promote and realise the four ILO fundamental principles and rights at work and to make 'continued and sustained efforts' to ratify the fundamental ILO conventions (similar to the TCA provisions discussed above). The EU alleged that South Korea had failed to uphold this provision. For its part, South Korea responded that this matter was out of scope of the agreement because the trade and sustainability chapter states that 'this Chapter applies to measures adopted or maintained by the Parties affecting trade-related aspects of labour' (Report of the panel of experts 2021).

In its assessment, the panel of experts rejected South Korea's argument that the labour provisions in question only related to 'trade-related' matters. The panel argued that the ILO provisions in the agreement were universal in nature and so to limit their scope to only trade-related matters would

be inappropriate. Moreover, the panel also noted separately that, because the EU-Korea FTA highlighted that fundamental labour rights were integral to their ambitions for trade and sustainability, “national measures implementing such rights are therefore inherently related to trade as it is conceived in the EU-Korea FTA” (ibid).

While the EU-Korea panel does not directly contradict the CAFTA-DR panel decision – because they are interpreting different provisions in different agreements – there appears to be a tension between the approaches of the two panels. In the case of the CAFTA-DR panel, there is a clear emphasis on the primacy of trade – the labour clause is only relevant when there is a clear link with trade which can be demonstrated with robust evidence. On the other hand, the EU-Korea panel prioritises fundamental rights, suggesting that any breach of a provision on core labour rights is automatically relevant to trade.

Rebalancing

Processes like those on non-regression discussed above are found in other trade agreements (see eg Article 23.1- 23.11 EU-Canada CETA¹⁸), albeit with less rigorous enforcement mechanisms. The striking addition to the TCA is the provision on rebalancing. Article 411(1) provides:

The Parties recognise the right of each Party to determine its future policies and priorities with respect to labour and social, environmental or climate protection, or with respect to subsidy control, in a manner consistent with each Party's international commitments, including those under this Agreement. At the same time, the Parties acknowledge *that significant divergences in these areas can be capable of impacting trade or investment* between the Parties in a manner that changes the circumstances that have formed the basis for the conclusion of this Agreement. (emphasis added)

Thus Article 411(1) recognises (1) the right of each party to legislate but notes (2) that significant divergences in these areas can be capable of ‘impacting trade and investment’. Article 411(2) TCA goes on to say that: ‘If *material* impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas referred to in paragraph 1, either Party may take appropriate rebalancing measures to address the situation.’ See Box 2 for a discussion of ‘impacts on trade’. Note in the case of Article 411 TCA the threshold is higher (‘material’ impacts) than for non-regression.

Article 411(2) TCA then says that ‘Such measures shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation.’ It adds that ‘Priority shall be given to such measures as will least disturb the functioning of this Agreement. A Party's assessment of those impacts shall be based on reliable evidence and not merely on conjecture or remote possibility.’

¹⁸ https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

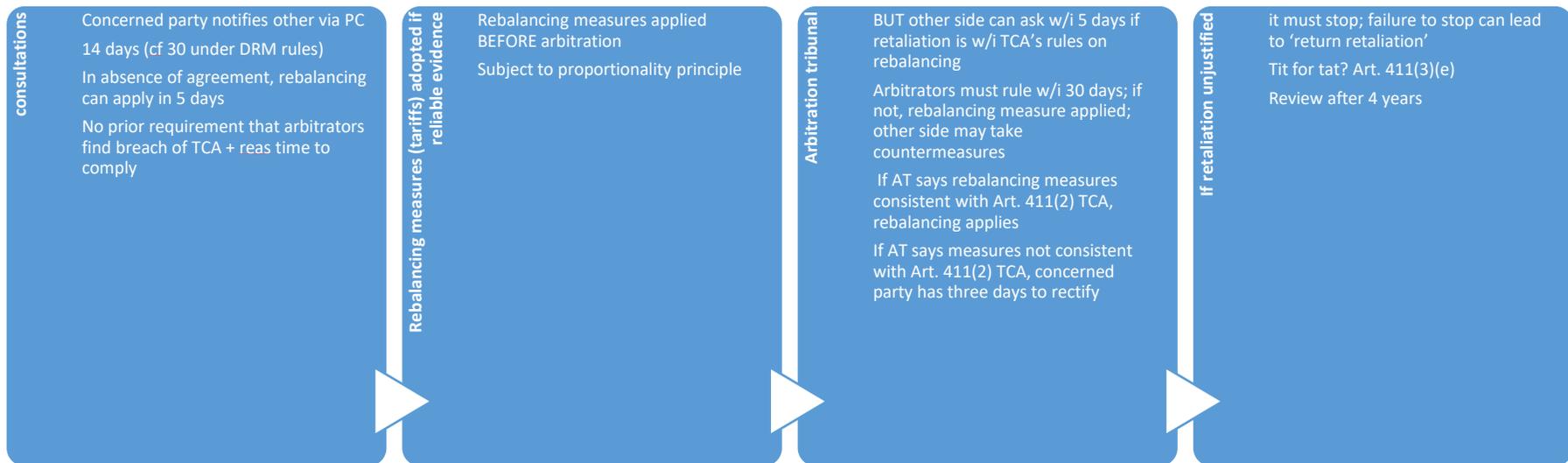


Fig 7 Rebalancing mechanism

If engaged, the rebalancing mechanism is quick and fairly brutal. Unlike the standard DRM (fig 2) and the non-regression DRM (fig 6), the rebalancing mechanism (fig 7) allows the complaining party to get the retaliation in first (see second column). In other words, there is no three stage process (consultation, arbitration/special panel, compliance) but only a two stage process (brief consultation, and then straight to retaliation) unless the complained about party (e.g. the UK, the 'notified party') asks for the establishment of an Arbitration Tribunal (AT). If the AT finds the retaliation by, say, the EU (the 'concerned party') is unlawful then the party doing the retaliation (the EU) must stop. Failure to stop means the UK can cross-retaliate (tit-for-tat). There are special fast track procedures (Art. 760). For example, there are only two days, instead of ten, to decide on composition of tribunal.

In assessing this new procedure, the UKTPO notes that rebalancing is a 'defensive version of dynamic alignment: defensive in that rather than ongoing cooperation and harmonisation, it provides another means for each side to coerce the other'.¹⁹ For the Commission, what is described as '**unilateral rebalancing measures**' in the case of significant divergences in the areas of labour and social, environment or climate protection, or of subsidy control, 'allows for the future-proofing of level playing field provisions to maintain open and fair competition over time'.

If rebalancing measures have been taken frequently or for more than 12 months, each party can seek a review of the trade and other economic parts of the Agreement to ensure an appropriate balance between the commitments in the Agreement on a durable basis. In this case, the Parties could negotiate and amend relevant parts of the Agreement. Any trade or economic part of the Agreement, including aviation, that would remain in place or be renegotiated would retain appropriate level playing field commitments.

Other instruments for trade and sustainable development

In comparison to rebalancing, the third and final limb of the LPF provisions concerns 'other instruments for trade and sustainable development'. Article 397 TCA refers to various international instruments such as the 1992 Rio Declaration on Environment and development and the 2008 ILO Declaration on Social Justice. Article 399 TCA contains a number of commitments to promotion of trade in a way that is conducive to decent work for all. Unlike non-regression and rebalancing, there is no enforcement mechanism.

(c) When might the EU take action?

Some breaches are likely to be considered more serious than others. The IPPR provide a helpful summary of when they think the EU is more likely to take action under the non-regression or the LPF provisions. They suggest the following:²⁰

- An act of divergence **involving the lowering of protections** (i.e. deregulation) is more likely to raise problems in the context of the level playing field, compared to 'passive divergence' as a result of the UK not keeping pace with EU rules. This is because the labour non-regression clause in the TCA does not require such a significant impact on trade or investment compared with the rebalancing clause.
- An act of divergence **disregarding fundamental ILO rights and principles** is more likely to see the EU successfully taking action against the UK. This is because the EU could rely on the

¹⁹ <https://blogs.sussex.ac.uk/uktpo/publications/taking-stock-of-the-uk-eu-trade-and-cooperation-agreement-governance-state-subsidies-and-the-level-playing-field/>

²⁰ <https://www.ippr.org/research/publications/uk-eu-deal-workers-rights>

provisions on multilateral standards in the TCA to contest the UK's actions. These provisions do not require a trade or investment link. The EU is likely to also be particularly concerned about any threat to fundamental labour rights and principles. However, if the EU and the UK were to engage in a dispute related to the commitments to multilateral standards in the TCA, there would be no scope to enact sanctions. This could make it harder to enforce these provisions.

- An act of divergence which is of a **sufficiently large scale** – in terms of its impact, its geographical scope, and the length of time it is in place – is more likely to face difficulties. In particular, the repeal of major EU-derived legislation (on e.g. holiday pay, rest breaks or occupational health and safety) will in all likelihood be more problematic than targeted modifications of legislation or temporary derogations. This is because if the divergence is significant the EU is both more likely to take notice and respond and more likely to be able to demonstrate an impact on trade or investment to a panel of experts. (See for instance paragraph 193 of the panel report for the US-Guatemala dispute, which notes that “effects may in some cases be too brief, too localized or too small to confer a competitive advantage”.)
- An act of divergence **directly affecting a tradeable sector** (or sectors) is more likely to elicit a respond from the EU. (Tradeable sectors typically include industries such as agriculture and manufacturing.) The reason for this is that on the face of it there is more likely to be a stronger case for demonstrating an impact on trade. This aligns with the approach of the panel in the US-Guatemala dispute.
- An act of divergence which **demonstrably lowers labour costs** is particularly likely to lead to the EU successfully taking action under the terms of the TCA. Following the logic of the panel decision in the US-Guatemala dispute, if the EU is able to evidence how divergence has had a real-world impact on competition through reduced labour costs, then its case is likely to be far stronger in the event of a formal dispute. To take a hypothetical example, if the UK government reduced statutory annual leave entitlements and it could be demonstrated that employers had subsequently lowered their labour costs by cutting back on annual leave, then this could be used to make the case that the UK's reduction in labour protections had conferred a competitive advantage on its employers, thereby breaching the non-regression commitment in the TCA.
- An act of divergence which **relates to EU-derived legislation** is more likely to attract the attention of the EU. While the non-regression clause does not explicitly refer to EU standards, it is to be expected that the EU will focus its attention on any efforts to weaken EU-derived protections, as opposed to purely national measures such as the minimum wage. This is because the EU is unlikely to respond in relation to a policy measure which the UK could have implemented as an EU member, given the original purpose of the level playing field was to guard against the risks of the UK having an unfair competitive advantage once it withdrew from the EU. Similarly, the EU is less likely to take action over issues that pre-exist Brexit (for instance, the poor resourcing of the UK's labour inspectorates) or over matters where EU member state themselves are also in breach (eg as Ewing 2021 argues, both the UK and the EU are in breach of ILO Convention 87 on freedom of association and the right to organise).

4. Other domestic limits on divergence

So far, we have focused on the TCA limits on divergence. There are, of course, domestic limits too for the devolved nations. The first and foremost is the Internal Market Act 2020. This Act is premised

on market access principles. It will be recalled that the basic idea is that in the field of goods, goods lawfully produced in Wales should be capable of being sold in England. There are few exceptions to this basic principle (see fig 8)

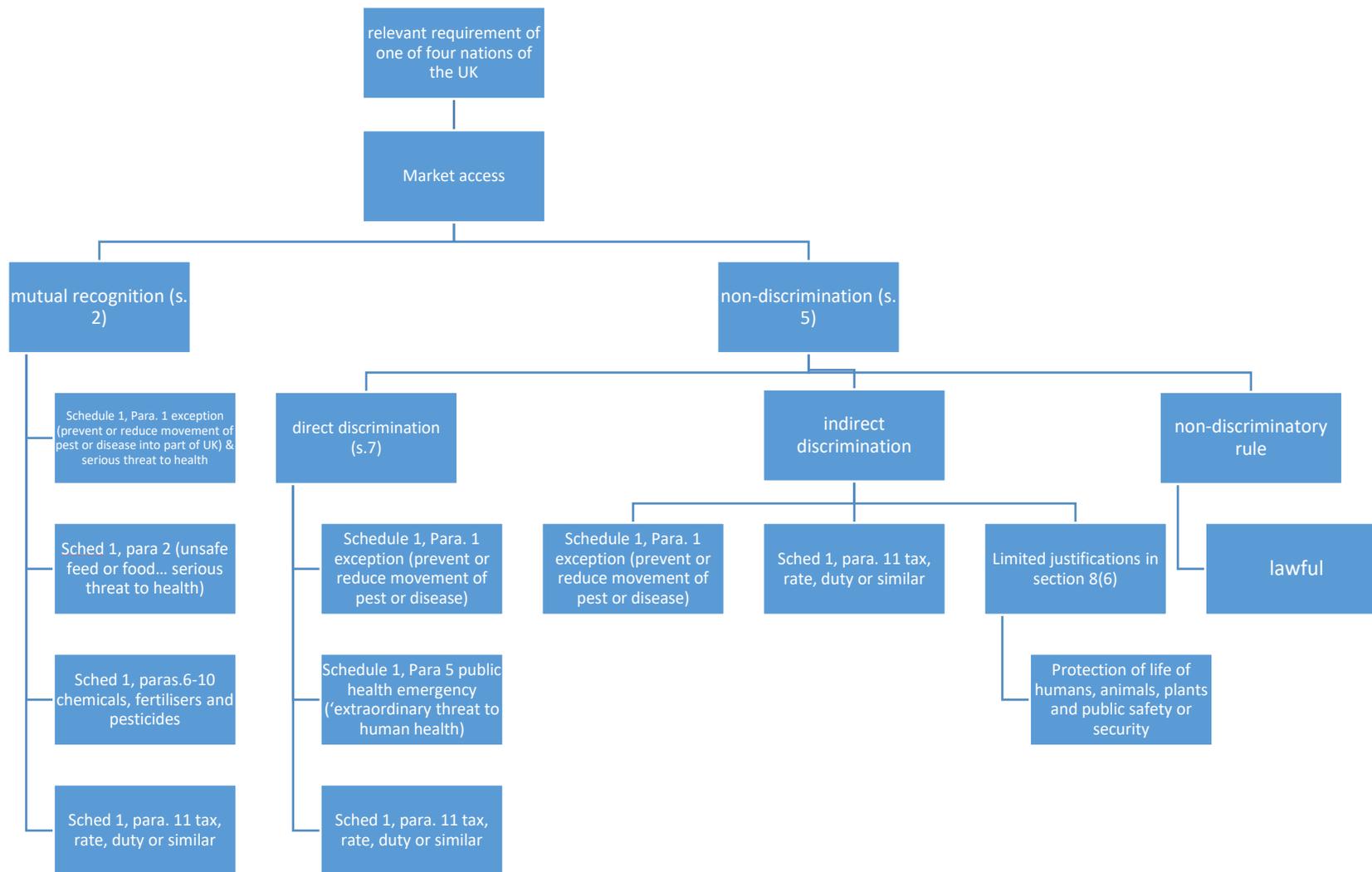


Fig 8 Internal Market Act 2020: Part I on goods

So this would suggest that if Wales wanted to engage in regulatory divergence, this would be possible. Only if, say, England thought Welsh goods constituted a serious threat to health, due to pest or disease or unsafe food or feed could England refuse to admit those goods.

Conversely, if goods are made to a lower standard in England, then under the same mutual recognition principle, English goods must be admitted to the Welsh market. If those English goods are cheaper than Welsh goods then it is likely that the English goods will be bought by consumers both in England and Wales, in preference to the Welsh goods, threatening the viability of Welsh companies. In other words, the market access principles may create an economic constraint on divergence in practice. As Armstrong put it, 'Given the size of both the Scottish and Welsh markets relative to the market in England, there has been an evident anxiety that the rules set for the English market could in practice end up being the basis for the sale of goods or provisions of services in Scotland and Wales to the detriment of the exercise of devolved regulatory competence.' This is referred to in the jargon as 'competitive federalism' but with competition in its most negative form based on lowering of standards. It was for this reason that Scottish Parliament and the Senedd withheld their legislative consent over the implications of the legislation for the exercise of devolved competence.²¹

The IMA 2020 was nevertheless passed. Although certain areas of regulatory policy, like data and consumer protection, product standards and product safety (but not food or pesticides) are reserved, 'the impact of the Act on devolved competences is likely to be felt instead around issues of human, animal and plant health, environmental protection and food standards and safety'.²²

As fig. 8 shows, there are exceptions to the general principles of market access in Schedule 1 for goods and Schedule 2 for services. The Act gives power to the Secretary of State to make changes to these schedules by regulations subject to the affirmative procedure (s.10 IMA 2020 reproduced in the Annex). The Minister can also make changes to the narrow list of justifications available to justify indirect discrimination. The consent of the devolved governments must be sought prior to any exercise of the powers to amend the schedules or the list of legitimate aims. If consent is not obtained within a month, the regulations can nonetheless still be made. So far, no such regulations have been made – so the basic principle of competitive federalism applies with few brakes that can be deployed by the Welsh government.

An attempt to manage the effects of competitive federalism in a more cooperative way was through the adoption of common frameworks (CF).²³ Lord Hope tried to ensure that any divergences which result from the CF programme would be protected from the market access principles. This was rejected by the government but the government did agree to make regulations to amend the schedules to the Act to give effect to agreements that emerge from common frameworks.²⁴ As s.10 IMA 2020 requires, UK ministers need to seek the consent of devolved ministers when exercising

²¹ <https://ukconstitutionallaw.org/2020/12/18/kenneth-armstrong-governing-with-or-without-consent-the-united-kingdom-internal-market-act-2020/>

²² Ibid.

²³ K. A. Armstrong, 'From the Shadow of Hierarchy to the Shadow of Competition – Common Frameworks and the Disciplining of Divergence', U.K. Const. L. Blog (15th December 2021) (available at <https://ukconstitutionallaw.org/>)

²⁴ Sections 10(2) and 18(3) of the Act which allows the Secretary of State, by regulations, to amend Schedule 1 (goods) and Schedule 2 (services) to exclude the outcome of a 'common framework agreement' from the scope of application of the market access principles.

their powers to amend the Schedules. In a Ministerial statement, Neil O'Brien MP noted that a process for agreeing such exclusions in areas of policy divergence within a Common Framework has been developed by the UK Government and the Devolved Administrations. A copy has been placed in the Libraries of both Houses.²⁵ He said that 'where agreement to such an exclusion is reached within a Common Framework, the relevant department and minister will seek that approval by laying a draft statutory instrument before Parliament in accordance with the UK Internal Market Act'.²⁶ What is not clear from this cryptic statement is what happens if the relevant minister fails to lay a draft SI. As Armstrong concludes:²⁷

Any new initiative, for example, on single-use plastics or in combatting microplastics – including any use of the Scottish Government's [power to 'keep pace'](#) with future EU environmental policy developments – would fall within the scope of the Resources and Waste Common Framework. We will then see both the effects of the UK Internal Market Act and the procedure for excluding agreements arising from Common Frameworks in action.

5. Conclusions

It is possible for regulatory divergence to occur. In the Senedd wishes to diverge any improvement of UK standards will not trigger the LPF provisions which would, in any case be brought against the UK not the Welsh government. A lowering of standards would potentially cause more difficulty. The same would apply equally in respect of environmental policy and climate change.

In respect of divergence in respect of human, animal and plant health, and food standards and safety it is likely that the IMA 2020 will provide for greater constraint than any provisions of the TCA.

²⁵ <https://www.gov.uk/government/publications/process-for-considering-ukim-act-exclusions-in-common-framework-areas/process-for-considering-uk-internal-market-act-exclusions-in-common-framework-areas>

²⁶ <https://questions-statements.parliament.uk/written-statements/detail/2021-12-09/hcws459>

²⁷ <https://ukconstitutionallaw.org/2021/12/15/kenneth-a-armstrong-from-the-shadow-of-hierarchy-to-the-shadow-of-competition-common-frameworks-and-the-disciplining-of-divergence/>.

Annex I: S. 10 and 18 IMA 2020

10 Further exclusions from market access principles

(1) Schedule 1 contains provision excluding the application of the United Kingdom market access principles in certain cases.

(2) The Secretary of State may by regulations amend that Schedule.

(3) The power under subsection (2) may, for example, be exercised to give effect to an agreement that—

(a) forms part of a common framework agreement, and

(b) provides that certain cases, matters, requirements or provision should be excluded from the application of the market access principles.

(4) A “common framework agreement” is 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.

(5) References in this section to devolved or transferred matters include reference to corresponding matters in England.

(6) When determining whether a matter is a devolved or transferred matter for the purposes of this section, the following provisions are to be ignored—

(a) section 30A of the Scotland Act 1998;

(b) section 109A of the Government of Wales Act 2006;

(c) section 6A of the Northern Ireland Act 1998.

(7) In making regulations under subsection (2), the Secretary of State must have regard to the importance of facilitating the access to the market within Great Britain of qualifying Northern Ireland goods.

(8) Regulations under subsection (2) are subject to affirmative resolution procedure.

(9) Before making regulations under subsection (2), the Secretary of State must seek the consent of the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland.

(10) If consent to the making of the regulations is not given by any of those authorities within the period of one month beginning with the day on which it is sought from that authority, the Secretary of State may make the regulations without that consent.

(11) If regulations are made in reliance on subsection (10), the Secretary of State must publish a statement explaining why the Secretary of State decided to make the regulations without the consent of the authority or authorities concerned.

(12) In this section—

“devolved administrations” means—

- (a) the Scottish Ministers,
- (b) the Welsh Ministers, and
- (c) a Northern Ireland department;

“qualifying Northern Ireland goods” has the same meaning as in section 47.

18 Services: exclusions

(1) Schedule 2 contains—

(a) a list of services specified in the first column of the table in Part 1 of that Schedule, to which section 19 (mutual recognition) does not apply;

(b) a list of services specified in the first column of the table in Part 2 of that Schedule, to which sections 20 and 21 (non-discrimination) do not apply;

(c) a list of authorisation requirements in Part 3 of that Schedule, to which section 19 does not apply;

(d) a list of regulatory requirements in Part 4 of that Schedule, to which sections 20 and 21 do not apply.

(2) The Secretary of State must keep Schedule 2 under review, and may by regulations—

(a) remove entries in the tables in Part 1 or Part 2 of that Schedule or entries in the lists in Part 3 or Part 4 of that Schedule;

(b) amend entries in those tables or lists;

(c) add entries to those tables or lists.

(3) The power under subsection (2) may, for example, be exercised to give effect to an agreement that—

(a) forms part of a common framework agreement, and

(b) provides that certain cases, matters, requirements or provision should be excluded from the application of this Part.

(4) A “common framework agreement” is 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.

(5) References in this section to devolved or transferred matters include reference to corresponding matters in England.

(6) When determining whether a matter is a devolved or transferred matter for the purposes of this section, the following provisions are to be ignored—

(a) section 30A of the Scotland Act 1998;

(b) section 109A of the Government of Wales Act 2006;

(c) section 6A of the Northern Ireland Act 1998.

(7) Regulations under subsection (2) are subject to affirmative resolution procedure.

(8) Before making regulations under subsection (2), the Secretary of State must seek the consent of the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland.

(9) If consent to the making of the regulations is not given by any of those authorities within the period of one month beginning with the day on which it is sought from that authority, the Secretary of State may make the regulations without that consent.

(10) If regulations are made in reliance on subsection (9), the Secretary of State must publish a statement explaining why the Secretary of State decided to make the regulations without the consent of the authority or authorities concerned.

(11) In this section “devolved administrations” means—

(a) the Scottish Ministers,

(b) the Welsh Ministers, and

(c) a Northern Ireland department.