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BRIEFING PAPER

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# The United Kingdom Internal Market Bill 2019-21

By Library specialists

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# Summary

With the end of the transition period, the UK will leave the EU single market. The EU legal underpinnings for free trade in goods and services between the four nations will fall away. To prevent new barriers to intra-UK trade from emerging the Government has proposed a new legal framework: the United Kingdom Internal Market Bill. The Bill was introduced into the House of Commons on 9 September 2020.

The overarching policy objectives of the Bill are to provide continuity for businesses and citizens and improve competitiveness and business environment across the UK. The Government says that the Bill would contribute to general welfare and prosperity in all nations of the UK. The Government has also argued that a UK internal market would help the UK in reaching international trade agreements and allow the benefits of those agreements to extend to all parts of the UK.

The provisions of the Bill set out general principles for market access and support, affecting trade in goods and services. The UK internal market principles would apply to all nations of the UK equally.

Taking into account that trade in goods between Northern Ireland and the rest of the UK is subject to the Northern Ireland Protocol in the Withdrawal Agreement, the Bill introduces special provisions to avoid that goods travelling from NI to GB are discriminated against and can gain unfettered access to the rest of the UK.

The clauses with regard to Northern Ireland (market access for goods and state aid) have attracted considerable attention because of their impact on the UK and EU negotiations on their future relationship. The issue of state aid/ subsidies, which is also regulated under the Northern Ireland Protocol, and addressed by this Bill, has become one of the most contentious areas in the negotiations.

## What is in the Bill?

The proposals set out in the Bill have proven controversial with the Scottish and Welsh Governments. They have repeatedly raised concerns about the impact of Internal Market legislation on their respective devolution settlements.

The Bill proposes to change the "competence" of the three devolved legislatures by adding a reservation on the provision of subsidies, and by protecting the Act itself from modification by the Scottish and Welsh Parliaments or the Northern Ireland Assembly.

- **Parts 1 and 2: UK market access (goods and services)**

The Bill sets out two principles that will govern access to the UK market for goods and services. The principles aim to allow people and businesses to trade across the UK without having to face different barriers in its different nations.

The first principle means that if a good or service can be legally sold in one part of the UK (as it meets the relevant regulations) then it can be sold in any part of the UK. This is the principle of mutual recognition.

The second principle prevents parts of the UK treating goods coming in from other parts of the UK less favourably than local goods. This is the principle of non-discrimination.

The Bill provides some exclusions to these principles. For instance, taxes are excluded from both mutual recognition and non-discrimination.

- **Part 3: Mutual Recognition of professional qualifications**

This part of the Bill introduces a unified system for the recognition of professional qualifications across the UK for professions that are regulated by law (regulated professions), such as architects or accountants. Professionals regulated in one part of the UK will be able to seek recognition of their qualifications in another, allowing them to provide services. The principle of equal treatment is introduced to protect practitioners qualified in one part of the UK from less favourable treatment than locally qualified providers.

- **Part 4: Office for the Internal Market (OIM)**

The Government intends to establish an independent Office for the Internal Market (OIM) within the Competition and Markets Authority (CMA). Part 4 of the Bill (clauses 28–29) would give new powers to the CMA to monitor, advise and report on the internal market, supported by enforceable investigatory powers.

The reports and advice of the CMA are the non-binding. The Government would be for the respective legislatures and administrations to resolve disputes through existing intergovernmental processes.

- **Part 5: Northern Ireland Protocol**

The Northern Ireland Protocol, an integral part of the Withdrawal Agreement, sets out how goods will be traded between Northern Ireland and Great Britain (the rest of the UK) after the transition period ends. It applies the EU's customs code (the rules on how goods are traded in and out of the EU) to Northern Ireland. Despite also containing a principle of unfettered market access for goods moving from NI to GB, the application of the customs code means that certain checks and processes will be required when moving these goods.

Part 5 of the Bill empowers Ministers to prevent the application of, and unilaterally re-interpret and disapply parts of the Protocol, as well as ignore their legal obligations under both domestic and international law to enact the Protocol. Specifically, Part 5 does this by:

- Restricting UK authorities from using their powers after the transition period in a way that might result in the introduction of checks, controls or administrative processes for goods moving from Northern Ireland to Great Britain (**Clause 41)**.
- Giving a power to Ministers to make regulations to change how exit procedures for goods operate when moving from Northern Ireland to Great Britain (**Clause 42)**.
- Giving the Secretary of State an enabling power to make regulations that can interpret Article 10 of the Protocol, and further disapply and modify its effects, including disapplying it entirely. Article 10 applies EU state aid rules to 'measures which affect that trade between Northern Ireland and the EU' (so not just subsidies given in NI). (**Clause 43)**
- Stating that only the Secretary of State may notify the European Commission of state aid or proposed state aid, and give information about it, if this is required by Article 10 of the Protocol (**Clause 44**).

**Clause 45** deals with the incompatibility with domestic law and international law that might arise from the inclusion and exercise of powers under clauses 42 and 43. It does this through a series of extraordinary measures that build upon one another. The Clause

- States that the powers given to Ministers under Clauses 42 and 43, as well as Clause 45 itself will be regarded as legally effective notwithstanding any incompatibility or inconsistency with "*any* relevant international or domestic law".

- Picks apart the foundations of how the Withdrawal Agreement is given supremacy and direct effect in domestic legislation through the EU (Withdrawal) Act 2018.
- Ensures domestic courts would still have to give full force and effect to these regulations made even if those regulations were in conflict with all relevant domestic and international laws, *and international law as a whole.*
- Restricts and potentially precludes entirely domestic judicial review of section 42 or 43, a so called "ouster clause".

**Part 6: Financial assistance powers**

The Bill creates a new power allowing ministers to provide financial assistance for a wide range of different purposes. This power is intended to be used to replace the funding that the EU currently distributes within the UK. It seems likely that funding provided under this power will come directly from the UK Government rather than via the devolved administrations, as is often the case at present.

The Bill also contains provisions on government financial assistance and clauses that in effect give the UK Parliament the exclusive right to legislate on how subsidy controls will work in the future.

**Other issues raised**

On 16 July 2020 the UK Government published a White Paper seeking views on its proposals to legislate on the operation of the UK Internal Market. The consultation raised various issues, for example if the proposed framework would help maintain existing standards when the UK signs new free trade agreements with other countries. A concern was also raised that the size of England relative to the other nations could mean that standards adopted in England would dominate throughout the UK.

*Section 3.6 of this briefing has been updated on 14 September 2020 to include recent commentary and help ensure clarity.*

# 1. Introduction

The United Kingdom Internal Market Bill was introduced into the House of Commons on 9 September 2020.

- The Bill has 7 main parts and two schedules:
- UK market access: goods
- UK market access: services
- Independent advice and monitoring of UK internal market
- Northern Ireland Protocol
- Financial assistance powers
- Final provisions

The two schedules set out exclusions from market access principles.

On 16 July 2020 the UK Government published a White Paper seeking views on its proposals to legislate on the operation of the UK Internal Market. The consultation closed on 13 August 2020. The Government has also published Government response to the consultation on the UK Internal Market.

Bill documents including Explanatory Notes, the Impact Assessment and Delegated Powers Memorandum are available on the Bill page on Parliament's website.

# 2. Background

## 2.1 Why is there an Internal Market Bill?

In July 2020 the Government published a White Paper, UK Internal Market, in which it sought views on its proposals about how the UK's internal market would operate after the end of the transition period on 31 December 2020.

While the UK was an EU member state and during the current transition period, trade in goods and services between the four nations of the UK is underpinned by EU law. The EU single market breaks down barriers to trade between the EU's member states. It is based on the "four freedoms" – freedom of movement of goods, services, people and capital. The White Paper says:

> While the Internal Market has been enshrined in British law for over three centuries, the UK's accession to the then-European Economic Community in 1973 saw European law take on a more direct role in providing the legislative underpinning of our economy. European directives and regulations, along with relevant judgements from the Court of Justice, replaced British law and took on an integral role in the legislative underpinning of the Internal Market.[1]

As EU law falls away at the end of the transition period, the Government believes legislation is necessary to underpin the UK Internal Market through a "Market Access Commitment":

> As we move away from the system and rules of the EU Single Market, it is imperative that UK business and citizens are provided with a fundamental, legal commitment of continued market access to all of the UK. As some powers will be held by the devolved administrations, a Market Access Commitment will update fundamental economic protections and provide businesses with greater certainty as to the legal landscape.[2]

The main differences between the Government's approach and that taken in the EU single market are discussed in section 3.1 below.

## 2.2 What the UK Government is proposing

### Objectives

The main aim of the UK Internal Market Bill is to make provision in connection with the UK internal market, providing continued certainty for people and businesses to work and trade freely across the whole of the UK.[3]

The UK Internal Market White Paper says that the Government's proposals for the UK internal market are guided by three overarching policy objectives:

- to secure continued economic opportunities across the UK;

1 BEIS, UK Internal Market, CP278, July 2020, para 2
2 BEIS, UK Internal Market, CP278, July 2020, para 12
3 UK Internal Market Bill, Explanatory Notes, para 1

- to continue to increase competitiveness and enable citizens across the UK to be in an environment that is the best place in the world to do business;
- to continue to support the general welfare, prosperity and economic security of all our citizens.[4]

In addition, there are three "supporting aims":

- to maintain frictionless trade between all parts of the UK;
- to maintain fair competition and prevent discrimination;
- to continue to protect business, consumers and civil society by engaging them in the development of the market.[5]

The Government argues that dedicated legislation would give legal certainty to businesses and consumers which intergovernmental co-operation would not provide.[6] It says that a Market Access Commitment set out in law would help prevent increasing regulatory differences that hinder trade across the whole of the UK, and could have impacts on the welfare of citizens and the economy. Therefore, the Bill proposes "a coherent approach to market access and support for the UK internal market".[7]

## 2.3 Market access principles

The Bill aims to allow people and businesses to trade across the UK as they do now, without additional barriers based on which nation they are in. The principles of mutual recognition and non-discrimination are put forward in the Bill to achieve this market access.

### Mutual recognition

A mutual recognition system aims to ensure that compliance with regulation in one territory is recognised as being compliant in another. This means that businesses only have to comply with one set of regulations rather than having to ensure they meet potentially different sets of regulations in different parts of the UK. The White Paper notes that mutual recognition is "a known and well-tested system, used in countries such as Australia and Switzerland."[8]

The White Paper says:

> The experience of mutual recognition in other countries shows that it can provide a low-cost and decentralised way of dealing with differences in regulation. A mutual recognition system does nevertheless protect the ability of administrations to regulate domestically produced goods, professionals and services originating from their territory, while ensuring that any differences in regulation that emerge *between* jurisdictions do not result in unnecessary barriers to trade.[9]

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4 BEIS, UK Internal Market, CP278, July 2020, para 104
5 BEIS, UK Internal Market, CP278, July 2020, paras 106-08
6 BEIS, UK Internal Market, CP278, July 2020, paras 112-15
7 Explanatory Notes, UK Internal Market Bill, para 7
8 BEIS, UK Internal Market, CP278, July 2020, para 130
9 BEIS, UK Internal Market, CP278, July 2020, para 131

In the Bill, mutual recognition covers regulation in three areas: goods, services and professional qualifications.

## Non-discrimination

The non-discrimination principle, which supports mutual recognition, prohibits direct or indirect discrimination of goods, services and professionals. The White Paper says:

> A requirement not to discriminate (a 'non-discrimination principle') provides additional support to mutual recognition. This makes it unlawful for a government to regulate in any way that affords less favourable treatment to goods, professionals or service providers originating in or from another territory to that afforded to its own goods professionals or service providers. This principle forms an essential part of the Internal Market legislation of other countries, including Canada.[10]

"Direct discrimination" occurs when an individual or business is explicitly treated less favourably by another administration "expressly on the grounds of residence or geographical origin".[11]

The Government expects non-discrimination to apply to ancillary areas of regulation not directly related to the lawful sale of goods, such as requirements on transportation, disposal or the manner of sale of goods.[12]

"Indirect discrimination" refers to regulations which do not explicitly discriminate but place imported goods or service providers from another part of the UK at a disadvantage compared to local goods or services. The White Paper provides an example of "indirect discrimination":

> If Wales specified that milk cannot be transported more than a certain distance which meant that in effect most milk from England, Scotland and Northern Ireland could not be sold in Wales, this could be viewed as a case of indirect discrimination.[13]

On professional qualifications, the Government sets out in the White Paper:

For professional qualifications, a system will be introduced to ensure that professionals regulated in one part of the UK will be able to seek recognition of their qualifications in another, allowing them to provide services. As with goods, the principle of non-discrimination could apply in certain areas of professional regulation that are exclusions from the core approach.[14]

The White Paper states that the "system outlined above is intended to provide the underpinning legislation for the whole UK Internal Market – including Northern Ireland."[15] The principles of mutual recognition and non-discrimination, covering goods, services and professional qualifications, would apply to all nations of the UK.

[10] BEIS, UK Internal Market, CP278, July 2020, para 132
[11] BEIS, UK Internal Market, CP278, July 2020, para 134
[12] BEIS, UK Internal Market, CP278, July 2020, para 145
[13] BEIS, UK Internal Market, CP278, July 2020, para 137
[14] ` BEIS, UK Internal Market, CP278, July 2020, para 141
[15] BEIS, UK Internal Market, CP278, July 2020, para 146

The Bill introduces separate provisions with regard to Northern Ireland. For goods moving from Great Britain to Northern Ireland the provisions in the Northern Ireland Protocol are followed. However, the Bill will provide for unfettered access through the application of mutual recognition and non-discrimination to qualifying goods from Northern Ireland to the rest of the UK.

# 3. Issues

## 3.1 Comparison with the EU single market

The principle of mutual recognition is used in the EU single market. It provides that if a product or service is lawfully placed on the market in one Member State of the EU/EEA, it can be marketed in another Member State without barriers. However, it is important to note that the EU single market is also underpinned by the principle of harmonisation – where "Member States' rules are explicitly brought into line through legislation."[16] Both harmonisation and mutual recognition have advantages and disadvantages. Mutual recognition may be simpler, allow different approaches to regulation and be more adaptable. Harmonisation may provide greater certainty for business.[17] A report produced by the Coalition Government in 2013 said:

> Whatever the objective merits of the two systems, harmonisation has been used more in practice. One estimate is that only around one-fifth of goods are traded under mutual recognition without the need for a Directive.[18]

A paper by the Welsh Government also pointed to differences between the Government's proposals and the single market:

> It is also widely recognised by academics that there is a big difference between what is being suggested by the UK Government and how the EU Single Market works, and the context of the UK is key. By legislating in this way, the UK Government would be imposing a model of mutual recognition and non-discrimination on the three other nations of the UK, whereas the EU Single Market is a result of Member States voluntary coming together to negotiate and agree a set of rules to which they are all bound.[19]

## 3.2 Treatment of pre-existing differences in regulation

The White Paper on the Internal Market stated that "existing regulatory differences (which remain unchanged)" would be out of scope of the UK Internal Market.[20] In response, both the Scottish and Welsh Governments raised concerns about a lack of detail regarding what "existing regulatory differences" means in relation to the Internal Market and devolved competence, giving some specific examples of concerns.

The Senedd Cymru/Welsh Parliament External Affairs and Additional Legislation Committee raised questions about the White paper in a

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16 HM Government, Review of the Balance of Competences between the United Kingdom and the European Union: Single Market, July 2013,para 2.55
17 HM Government, Review of the Balance of Competences between the United Kingdom and the European Union: Single Market, July 2013,para 2.56-59
18 HM Government, Review of the Balance of Competences between the United Kingdom and the European Union: Single Market, July 2013,para 2.61
19 Welsh Government, The UK Government's White Paper on a UK Internal Market: Welsh Government Analysis, 14 August 2020
20 BEIS, UK Internal Market, CP278, July 2020, para 144

letter to UK Government Ministers, including on what the term "existing differences" means.[21] The letter went on to describe a series of case studies on existing policy differences in Wales that raise questions of scope of the internal market. These included examples in social care, housing and building regulations, and student finance. These case studies are also set out in a Welsh Parliament research service briefing on the Internal Market White Paper (September 2020)

The Scottish Government also raised concerns about a lack of detail in the White Paper on the exclusion of "existing differences" citing existing differences in health care, water supply, smoking bans, and student tuition fees.[22]

The Government's response to the consultation and the Bill excludes existing regulations in place before the Bill comes into force from the scope of mutual recognition and non-discrimination, unless "substantive changes" are made. The Bill also includes specific exclusions for categories of goods, services and professional qualifications – these are discussed in more detail in sections 6.1, 6.2 and 6.3 below.

## 3.3 How will standards be maintained?

The Government has been keen to stress that its proposals will not mean any lowering of standards. In the White Paper, the Government stated it was committed to retaining "exceptionally high standards":

> The UK's exceptionally high standards will underpin the functioning of the Internal Market, to protect consumers and workers across the economy. These high standards are neither dependent on EU membership nor on what is agreed in Free Trade Agreements we sign with other countries. They are domestic standards. In many cases, the UK either goes beyond EU standards or is the first mover to improve standards before the EU. We will maintain this world-leading position moving forward.
>
> Under the Government's proposed approach, the devolved administrations would retain the right to legislate in devolved policy areas that they currently enjoy. Legislative innovation would remain a central feature – and strength – of our Union. The Government is committed to ensuring that this power of innovation does not lead to any worry about a possible lowering of standards – by both working with the devolved administrations via the Common Frameworks programme and by continuing to uphold our own commitment to the highest possible standards.[23]

However, the question of whether the proposals could lead to a "race to the bottom" has been raised. Responding to the Secretary of State's statement on 16 July 2020, the Shadow Business Secretary (Ed Miliband) said:

> The risk is that one legislature would be able to lower its food safety standards and animal welfare standards, and force the other nations, which would have no recourse, to accept goods

[21] Correspondence from Chair of Welsh Parliament External Affairs and Additional Legislation Committee, David Reese, to Alok Sharma and Simon Hart, 30 July 2020.

[22] Scottish Government, UK internal market: initial assessment of UK Government proposals, 12 August 2020, paras 42-45

[23] BEIS, UK Internal Market, CP278, July 2020, paras 31-32

> and services produced on that basis— in other words, a race to the bottom. The Secretary of State talks about levelling up, but there is a real risk of levelling down. That is not in the interests of consumers, workers or businesses, and it does not adequately respect devolution. For Northern Ireland, if standards in the UK diverge significantly below those of the EU, there is a real risk that checks on food and other products going from Great Britain to Northern Ireland would increase in parallel.[24]

The issue of standards has been raised by a committee of the Welsh Parliament which asked the UK Government whether "any specific mechanisms will be included to maintain high standards". [25] The Committee used the example of meat products and asked a number of questions, including whether the internal market would have minimum standards:

> Food products appear to be captured by the White Paper. Therefore, if Scotland sets lower standards for food products, the principles of non-discrimination and mutual recognition would apply. This would mean that food of a lower standard could be placed on the market in Wales, despite the restrictions set out in The Products Containing Meat etc. (Wales) Regulations 2014.

The Committee also asked what would happen if one part of the UK completely deregulated this area? Will such matters be dealt with by common frameworks? And what international obligations might arise so as to override domestic law in this area?[26]

## 3.4 England's dominance

It has been suggested that the size of England relative to the other nations could mean that standards adopted in England would dominate throughout the UK. Nicola McEwen, Professor of Territorial Politics and Co-Director of the Centre on Constitutional Change at the University of Edinburgh, has said:

> The sheer size of the English economy and population relative to the others is also likely to give English businesses and consumers, and the UK government making policies for England, considerably greater influence in determining regulatory standards across the UK.[27]

England accounted for 84% of the UK population in 2019, Wales 5%, Scotland 8% and Northern Ireland 3%.[28] In terms of GDP, England made up 86% of the UK total in 2018, Scotland 8%, Wales 3% and Northern Ireland 2%.[29]

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[24] HC Deb 16 July 2020 c1702

[25] Letter from David Rees, Chair of Welsh Parliament External Affairs and Additional Legislation Committee to Alok Sharma and Simon Hart, 30 July 2020

[26] Letter from David Rees, Chair of Welsh Parliament External Affairs and Additional Legislation Committee to Alok Sharma and Simon Hart, 30 July 2020

[27] Nicola McEwen, Proposals for a UK internal market law: a sledgehammer to crack a nut? The UK in a Changing Europe, 21 July 2020

[28] ONS Statistical Bulletin, Population estimates for the UK, England and Wales, Scotland and Northern Ireland, mid-2019, 24 June 2020, Table 2

[29] Regional and country economic indicators, Commons Library Briefing Paper, 14 August 2020, p4, based on ONS, Regional economic activity by GDP, December 2019. An additional 1% of UK GDP is economic output that isn't assigned to any nation of the UK (this is mostly off-shore oil and gas extraction).

## 3.5 Free trade agreements and the UK internal market

The White Paper made a link between the UK internal market and UK free trade agreements with other countries. It argued that a UK internal market would help the UK in reaching international trade agreements and allow the benefits of those agreements to extend to all parts of the UK.[30] Furthermore, the White Paper said that while the devolved governments implement international obligations in devolved policy areas, it is the UK Government which enters into international agreements. These agreements are binding "on the whole or any part of the UK":

> The devolved administrations have competence to observe and implement international obligations that relate to devolved matters. The UK Government is responsible, as a matter of international law, for compliance with those obligations.
>
> To ensure such compliance, however, consideration must be given to the important interactions between a well-functioning Internal Market in the UK and the implementation of future trade deals.[31]

In some federal countries, however, regulations differ between states. A recent report by the CBI refers to various services being regulated at state level in the US "and therefore not within the scope of a trade negotiation". The US is, nevertheless, able to reach trade agreements with other countries. The CBI report said:

> The opportunity to achieve mutual recognition for professional qualifications is often seen as an easy win for the UK-US relationship. But the federal structure means that most of these services are licensed at the state level, and therefore not within the scope of a trade negotiation. For example, each state administers its own bar examination to license attorneys and includes sections on specific legal fields relevant to their state. Other high-skilled industries such as architecture, engineering, and medicine are licensed in the same manner.[32]

There are other differences between US states. For example, 13 states have not signed the WTO's General Agreement on Procurement.[33] The CBI report says:

> Due to constitutional limitations, the UK will not be able to achieve progress in this area [procurement at state level] through a formal FTA negotiation with the US federal government.[34]

A Welsh Parliament Research Service Briefing Paper also makes the point that sub-federal governments often "maintain a high degree of regulatory autonomy":

> As the White Paper itself says, it is important to note that some of the examples provided are of Federal States, and whilst many of

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[30] BEIS, UK Internal Market, CP278, July 2020, para 45
[31] BEIS, UK Internal Market, CP278, July 2020, paras 123-24
[32] CBI, A roaring trade: Capitalising on the opportunities of a UK-US Free Trade Agreement, March 2020, p35
[33] CBI, A roaring trade: Capitalising on the opportunities of a UK-US Free Trade Agreement, March 2020, p34
[34] CBI, A roaring trade: Capitalising on the opportunities of a UK-US Free Trade Agreement, March 2020, p35

> them have taken actions to seek to ensure that international trade agreements signed by the federal government can be fully implemented within their territories, most of the sub-state territories and governments maintain a high degree of regulatory autonomy when deciding how or if they will implement international trade agreements. In addition, the examples illustrate that it is commonplace for trade agreements negotiated between two national governments to include carve-outs for specific territories.[35]

## 3.6 Compatibility with International Law

According to the Government, this Bill, if enacted, would give Ministers powers to adopt regulations that violate international law.[36] It would also prevent legal challenges to the use of those powers. This issue comes in light of clauses 42 and 43, (see Sections 6.5 and 6.8) which provide powers to make regulations, and include the power to make provision for:

> … rights, powers, liabilities, obligations, restrictions, remedies and procedures that would otherwise apply, as a result of relevant international or domestic law, not to be recognised, available, enforced, allowed or followed.

Clause 45 (discussed further in Section 6.5 and 6.8) goes further to require UK domestic courts to give full force and effect to regulations made under clauses 42 and 43, even where these are incompatible with or breach:

- provisions of the Northern Ireland Protocol;
- other provisions in the Withdrawal Agreement;
- other EU law or international law;
- provisions of the European Communities Act 1972;
- provisions of the EU (Withdrawal) Act 2018;
- retained EU law or separation agreement law;
- any other legislation, convention or rule of international or domestic law whatsoever, including any order, judgment or decision of the European Court or of any other court or tribunal

This is a far-reaching power to effectively allow the breach of any international obligation that may be engaged in the creation of regulations under clauses 42 and 43. Notably, this is not specifically limited to a breach of the Northern Ireland Protocol, but to *all* international obligations that may have legal implications in this context.

### Relevant international law

International law governs the creation, termination, interpretation, and violations of treaties under the Vienna Convention on the Law of Treaties (VCLT). While the Withdrawal Agreement is a treaty between the UK (a state) and the EU (an international organisation), and the VCLT applies to treaties between states, large parts of the VCLT reflect

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[35] Welsh Parliament, Internal Market White Paper Research Briefing, August 2020, p16
[36] HC Deb 8 September 2020 Vol 679 c509

customary international law on treaties which does bind the EU (and is also part of the common law in the UK). Further, the Court of Justice of the EU (CJEU) in its Wightman judgment on 10 December 2018 confirmed that the VCLT could be taken into account for the international law on treaties.

Under the VCLT, and customary international law, states are under a general obligation to abide by their agreements in good faith according to the principle of *pacta sunt servanda* (agreements must be kept, see Article 26 VCLT). *Pacta sunt servanda* does not mean that treaties cannot be terminated, but the grounds for doing so are strictly limited, as detailed in light of a previous version of the Withdrawal Agreement in the Library Briefing Paper: Could the Withdrawal Agreement be terminated under international law? 19 March 2019. Commentators have also pointed out these exceptions do not apply to the UK's current position.[37]

Article 27 of the VCLT specifically provides that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This means that this Bill cannot change the legally binding nature, in international law, of the UK's international obligations. The use of the powers in clauses 42 and 43 to disapply the UK's international obligations domestically would still violate the relevant international obligations in international law.

**Legal effect of the Bill, if enacted, in international law**

While some uses of the powers in clauses 42 and 43 may not breach international law, the existence of the power to override a number of the UK's international obligations may itself constitute a violation of international law.

As detailed in Section 6.8, clause 45 effectively disapplies, in the context of these regulations, sections 7A and 7C of the EU (Withdrawal) Act 2018, a provision that Parliament approved as part of the EU (Withdrawal Agreement) Act 2020. It does so by preventing the Withdrawal Agreement and EU law from having "the same legal effects" in UK law as they produce in other EU member states, as required under Article 4(1) of the Withdrawal Agreement.

The UK is under a positive obligation in Article 4(2) of the Withdrawal Agreement to "ensure compliance with" this requirement, including by ensuring that there are "the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation." By attempting to remove the courts' powers for the purposes of regulations under clauses 42 and 43, the UK would be in breach of this part of the Withdrawal Agreement.[38]

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[37] One of these exceptions was discussed in the context of the previous version of the Withdrawal Agreement: Marko Milanovic, Brexit, the Northern Irish Backstop, and Fundamental Change of Circumstances, *EJIL: Talk!*, 18 March 2019.

[38] See, for example, Prof Mark Elliot, 'The Internal Market Bill – A Perfect Constitutional Storm', Public Law for Everyone, 9 September 2020; See also, Comments by Lorand Bartels (University of Cambridge), 9 September 2020.

Additionally, the UK has an obligation of good faith under Article 5 of the Withdrawal Agreement to "ensure the fulfilment of obligations" under the Agreement, and also "to refrain from any measures which could jeopardise the attainment of the objectives of this Agreement." Should this Bill be enacted, the UK may also breach this obligation of good faith by creating legal powers specifically permitting such obligations to be undermined.[39]

**The UK's dualist approach to international law**

In the UK, provisions of an international treaty can only have direct effect in domestic law if they are written into or incorporated by domestic legislation. Thus provisions of treaties that are not made part of UK law (i.e. have not been incorporated) are not usually recognised by UK courts.[40] This is known as a dualist approach to international law. It has been confirmed in many domestic cases, including the recent *Miller* case.[41]

The Attorney General provided the Government's legal position on the Bill on 10 September. It said that this dualist approach to international law allows the domestic principle of parliamentary sovereignty to have effect.[42] The Attorney General wrote:

> Parliament is sovereign as a matter of domestic law and can pass legislation which is in breach of the UK's Treaty obligations. Parliament would not be acting unconstitutionally in enacting such legislation.

Similar arguments have also been made in recent commentary.[43] While this does mean the Bill, if enacted, could be compatible with the UK's domestic law, the UK's internal principle of parliamentary sovereignty has no bearing on the legal effect of the UK's *international* obligations because, as detailed above, no rule of a state's internal law can be used to justify a breach of an international obligation according to Article 27 of the VCLT. Moreover, in the recent *Miller* case, the Supreme Court discussed the dualist approach to international law and the role of Parliamentary sovereignty, stating:

> … international law and domestic law operate in independent spheres. … [T]reaties between sovereign states have effect in international law and are not governed by the domestic law of any state.[44]

This confirms that parliamentary sovereignty does not change the binding nature of the UK's international obligations. Therefore, international lawyers have said that the UK would still be in breach of

39 For example, Comments on Twitter by Lorand Bartels (International Law, University of Cambridge), 10 September 2020, discuss this possibility.
40 See, for example, Anthony Aust, *Modern Treaty Law and Practice*, 3rd edition, pp 168-171
41 *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
42 Letter Dated 10 September 2019 from the Attorney General to Simon Hoare MP, Chair, Northern Ireland Affairs Committee, Annex.
43 See, Martin Howe, 'Forget the foaming indignation, this Brexit bill is perfectly justifiable', *The Telegraph,* 10 September 2020.
44 *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [55]

the international obligations mentioned above, regardless of the internal principle of parliamentary sovereignty which can only apply domestically.[45]

### Possible legal consequences

The EU Commission has threatened to take legal action, in accordance with the dispute settlement procedures in the Withdrawal Agreement, should the UK adopt the relevant powers in breach of its international obligations.[46]

The Withdrawal Agreement details the dispute settlement procedure in Articles 167 to 181. Under Article 168, both the EU and the UK shall only have recourse to the procedures provided for in the Agreement – disputes cannot be resolved in other ways. Firstly, the EU and the UK must enter into consultations in the Joint Committee in good faith (Article 169). Article 170 establishes that if no mutually agreed solution is found through consultations as per Article 169 after three months, either party may request the establishment of an arbitration panel. Such a panel can however also be established if mutually agreed by the parties within the first three months.

Article 173 specifies that ordinarily, the arbitration panel will issue a ruling within 12 months; where it cannot, it will notify the parties and explain why there is a delay. If a matter is declared urgent by either party, the panel itself will determine how urgent the question is - and if it agrees that it is urgent, it will "make every effort" to rule within six months.

Article 175 begins a sequence of Articles that set out what will happen once an arbitration panel has ruled. It stipulates that the arbitration panel's rulings are binding, and that both parties "shall take any measures necessary" to comply with any ruling. Article 176 makes clear that the parties will negotiate what they believe to be a "reasonable period of time" to comply with a panel ruling; where the parties cannot agree on this, the complainant (the party that started the arbitration proceedings) will request the panel to determine what a "reasonable period of time" for compliance will be. Any such agreed period can be extended if the parties mutually agree.

For further details on the dispute settlement procedure, and the remedies available therein, see the Library Briefing Paper The UK's EU Withdrawal Agreement, 11 April 2019.[47]

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[45] See, for example, Prof Mark Elliot's Comments, 10 September 2020.
[46] EU Commission Statement, 10 September 2020.
[47] This paper details the previous Withdrawal Agreement, but the Dispute Settlement Provisions are unchanged.

# 4. Devolution and the Internal Market

## 4.1 Background

The UK Internal Market White Paper stated that the UK Government would legislate "in a way that respects the devolution settlement".[48]

The proposals set out in that White Paper however, proved controversial with both the Scottish and Welsh Governments. They have repeatedly raised concerns about the impact of Internal Market legislation on their respective devolution settlements.

The UK Government argues that not only has an Internal Market existed in some form since 1707, but also that its proposals simply seek to replace rules presently governing the UK's place in the EU Single Market. The Scottish Government disputes this historical provenance, while both it and the Welsh Government believe the proposals to be fundamentally different from those already in place.[49]

## 4.2 Power grab or power surge?

A lot of the controversy surrounding the proposals (and Brexit in general) have focussed on whether there will be a "power grab" (which would see the competence of the devolved administrations diminished) or a "power surge" (which would see the competence of the devolved administrations increased) at the end of the transition period.[50]

Following publication of the Internal Market Bill, the Chancellor of the Duchy of Lancaster, Michael Gove, repeated the UK Government's view that the devolved administrations would "enjoy a power surge when the transition period ends in December".[51]

The Scottish Government's Constitution Secretary, Mike Russell, has previously described the list of powers issued by the UK Government as "one of the most shocking pieces of dishonesty" he had seen from a government.[52]

## 4.3 Reaction to the Internal Market White Paper

### Welsh Government

The Welsh Government's Counsel General and Minister for European Transition, Jeremy Miles MS, first set out the Welsh Government's

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48 BEIS, UK Internal Market, CP278, 16 July 2020, p10.
49 See Commons Library Insight, The 'Internal Market' and the Union, 23 July 2020.
50 See Commons Library Insight, "EU powers after Brexit: 'Power grab' or 'power surge'?"
51 Scotland Office press release, "UK Internal Market Bill introduced today", 9 September 2020.
52 BBC News online, "Fresh row over devolved powers after Brexit", 16 July 2020. The White Paper included a list of "Example areas" of "new powers transferring to the devolved administrations" (see p16). See also the UK Government's *Revised Frameworks Analysis* from April 2019.

position on 7 July 2020. Mr Miles then issued a written statement on 22 July, emphasising that the way the UK Government had approached the White Paper was "unacceptable" and calling for a more collaborative approach.

Jeremy Miles wrote again to Business Secretary Alok Sharma on 14 August 2020. He said the Welsh Government was concerned the White Paper would exacerbate existing tensions in a way "which, if not addressed, will accelerate the break-up of the Union".[53]

### Scottish Government

Mike Russell MSP, The Scottish Government's Cabinet Secretary for the Constitution, Europe and External Affairs also wrote to Michael Gove on 3 July 2020. He said the Scottish Government "could not, and would not, accept any such plans" to legislate for the UK Internal Market. The Scottish Government later published an "Initial assessment" of the White Paper.[54]

There was no formal response from the Northern Ireland Executive.

### Public Administration and Constitutional Affairs Committee

On 10 August 2020, the Chair of the House of Commons' Public Administration and Constitutional Affairs Committee, William Wragg MP, referred to the White Paper's "significant constitutional effect". He added that proposals for principles of mutual recognition and non-discrimination would "effectively create new reservations in areas of devolved competence".[55]

### Other responses

In Plaid Cymru's response to the White Paper consultation, Liz Saville Roberts MP said it was "nakedly taking back competencies already held in Wales […] the Westminster Government is chipping away at two decades of devolution".

The National Farmers' Union Scotland, the Scottish Council for Development and Industry, the Scottish Chambers of Commerce and the Wales Civil Society Forum on Brexit also responded to the consultation.

## 4.4 How the Bill impacts on devolution

The Internal Market Bill proposes to change the "competence" of the three devolved legislatures. It does this in two ways: by creating a new "reserved matter" on regulation of the provision of subsidies (**Clause 48**) and by protecting the Act itself from modification by the devolved legislatures (**Clause 49**) (See Section 6.7 below).

The Bill's Explanatory Notes state that within their respective areas of legislative competence, the UK Government and devolved legislatures

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53 Letter from Jeremy Miles to Alok Sharma, 14 August 2020.
54 Scottish Government, UK internal market: initial assessment of UK Government proposals, 12 August 2020.
55 Letter from William Wragg MP to Michael Gove MP and Alok Sharma MP, 10 August 2020.

"will retain the capacity to enforce their own requirements on goods produced in or imported into the relevant part of the UK".[56] It notes "specific exclusions" from the principles of mutual recognition and non-discrimination for goods. The Bill also introduces specific exclusions for services and professional qualifications (see Sections 6.1, 6.2 and 6.3 respectively).

However, the Bill provides the BEIS Secretary of State with a power to alter those exclusions "to retain flexibility for the internal market system in response to changes in market conditions".[57] Also, as mentioned above, Clause 49 means that any legislation passed by the Scottish Parliament, Senedd Cymru/Welsh Parliament or Northern Ireland Assembly after the Act's passing "that would impede the operation of the UK internal market will have no effect".[58]

Following publication of the Bill, Professor Nicola McEwen, at Edinburgh University, tweeted that this "suggests a significant recentralisation of power" from the devolved legislatures to Westminster.

## Power to provide financial assistance

The Bill (clauses 46-47) includes a power "to provide financial assistance" but this does not appear to alter the devolution settlements. The UK Government can already spend in devolved areas.[59] See also Section 6.6 below.

The Explanatory Notes state that Part 6 of the Bill grants the power to a UK Minister of the Crown to provide funding for economic development, infrastructure, culture, sporting activities, and international educational and training activities and exchanges. The Explanatory Notes acknowledge that these purposes "fall within wholly or partly devolved areas". But the new powers are intended to "sit alongside the existing powers by which the UK Government can fund in relation to devolved matters across the devolved nations, in particular the Industrial Development Act 1982".[60]

A government official reportedly told Politico that the spending powers would be used "sparingly" but demonstrated that the "devolve and forget approach of the Blair/Brown years" was over.[61]

Since the 2017 general election, several Scottish Conservative MPs have campaigned for the UK Government to spend in devolved areas.[62] See further Section 6.6 below.

## State aid/subsidy control

The power to provide financial assistance appears to be linked to control of subsidies at the end of the transition period. Previously, the UK

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56 Explanatory Notes, UK Internal Market Bill, para 12
57 Explanatory Notes, para 26.
58 Explanatory Notes, para 74.
59 See Commons Library Insight, "Can the UK Government spend in areas devolved to Scotland?", 14 June 2019.
60 Explanatory Notes, para 81.
61 Alex Wickham, "POLITICO London Playbook: Oxford down — New rules — Market day", 9 September 2020.
62 See David Torrance (ed), *Ruth Davidson's Conservatives: The Scottish Tory Party, 2011-19*, Edinburgh: Edinburgh University Press, 2020.

Government has set out plans for a Shared Prosperity Fund to take the place of European Structural Funds. The Scottish and Welsh Governments have been critical of these plans, arguing that they ought to be fully involved in any replacement.

A Scotland Office press release on the Internal Market Bill stated that it would:

> enable the UK Government to provide financial assistance to Scotland, Wales, and Northern Ireland with new powers to spend taxpayers' money previously administered by the EU. From January 2021, the UK will be able to invest in communities and businesses nationwide with powers covering infrastructure, economic development, culture, sport, and support for educational, training and exchange opportunities both within the UK and internationally – much of which were previously done at an EU level.[63]

Clause 48 of the Bill, as mentioned above, explicitly reserves to the UK Parliament "the exclusive ability to legislate for a subsidy control regime once the UK ceases to follow EU state aid rules". This means the devolved legislatures will not be able to legislate in this area as it will be an exclusive competence of the UK Parliament.[64]

Despite this new reservation, the UK Government has long stated its belief that the regulation of state aid was already a reserved matter.[65] In response to this, the Scottish Government argued that legal competence rested with Scottish Ministers and the Scottish Parliament.[66]

The Welsh Government's Analysis of the UK Internal Market White Paper reached the same conclusion for Wales (that state aid was a devolved matter) as the Scottish Government had for Scotland.[67]

## Northern Ireland

The Northern Ireland Protocol is covered in Sections 6.5 and 6.8 of this briefing. Beyond the Bill's impact on the Withdrawal Agreement, Part 5 also requires public authorities, including the devolved administrations, to:

> have regard to the need to maintain Northern Ireland's integral place in the UK internal market, when dealing with matters arising from the Northern Ireland Protocol. It also prohibits such authorities from imposing new checks, controls or administrative processes on goods from Northern Ireland.

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63 Scotland Office press release, 9 September 2020.

64 See Commons Library briefing paper, *Reserved matters in the United Kingdom*, 5 April 2019, for a fuller explanation of reserved powers in Scotland, Wales and Northern Ireland.

65 In 2019, the UK Government published draft State Aid (EU Exit) Regulations 2019 (secondary legislation) which would have empowered the CMA to regulate, monitor and enforce activities currently carried out by the European Commission, but these did not take effect.

66 Scottish Parliament Official Report, Culture, Tourism, Europe and External Affairs Committee, 25 April 2019.

67 Welsh Government Analysis, The UK Government's White Paper on a UK Internal Market, 14 August 2020.

## 4.5 Intergovernmental relations

The UK Internal Market White Paper stated that the UK's current intergovernmental (IGR) arrangements would have to be "expanded" to account for Internal Market legislation.[68] The Bill, however, does not include any changes to current IGR arrangements, which are largely non-statutory.[69]

The White Paper added that any such arrangements would need to take account of the "Review of Intergovernmental Relations" agreed by the Prime Minister and First Ministers of Scotland and Wales on 14 March 2018.[70] In letters to Mike Russell and Jeremy Miles in July 2020, Michael Gove referred to "restarting" work on this review.[71]

### Competition and Markets Authority

The Explanatory Notes make clear that the "independent, advisory body" mentioned in the White Paper will be a new Office for the Internal Market (OIM) within the Competition and Markets Authority (CMA).

According to the Bill's Explanatory Notes, the OIM will "provide all administrations, legislatures, and external stakeholders with published reporting on developments in the UK internal market".[72]

Clauses in Part 4 of the Bill provide that the UK Government, Scottish Ministers, Welsh Ministers and Northern Ireland departments may request that the CMA provide a report on the impacts of a regulation implemented by another administration (see Section 6.4 of this briefing).[73]

It does not appear that the OIM will have formal representation from the devolved administrations or the UK Government. Where there is a dispute, the OIM:

> will ultimately provide such reports to the UK Parliament and each of the devolved legislatures and it will be for these bodies, supported by their respective administrations and intergovernmental processes, to determine how to take action in response, minimising the need to seek court action.[74]

During a debate on the White Paper in the House of Lords on 29 July 2020, the UK Government minister Lord Callanan said dispute resolution was "ultimately a matter for the courts".[75]

Professor Nicola McEwen believes that "instead of building structures to make governments work together", the Internal Market Bill "all but cuts

68 BEIS, UK Internal Market, CP278, July 2020, p26
69 See Commons Library briefing paper, *Intergovernmental relations in the United Kingdom*, 24 July 2018, for a description of the IGR status quo.
70 No 10 Downing Street, "Joint Ministerial Committee (Plenary)", 14 March 2018. On 3 July 2019, Draft principles for intergovernmental relations were agreed as part of this ongoing review.
71 Cabinet Office, Letters from the Chancellor of the Duchy of Lancaster to the Devolved Administrations, 16 July 2020
72 Explanatory Notes, para 52
73 Explanatory Notes, para 79
74 Scotland Office press release, 9 September 2020
75 HL Debs 29 July 2020 Vol 805 c272

devolved governments out of the process. [It will be even] harder now to reach agreement in [the] ongoing IGR review".

## 4.6 Common Frameworks Programme

The Bill's Explanatory Notes state that as part of its "vision" for the UK Internal Market, the UK Government is:

> engaging in a process to agree a common approach to regulatory alignment with the devolved administrations. The Common Frameworks Programme aims to protect the UK internal market by providing high levels of regulatory coherence in specific policy areas through close collaboration with devolved administrations.[76]

The Common Frameworks Programme is ongoing. Principles were agreed between the UK Government and Scottish and Welsh Governments at the Joint Ministerial Committee (European Negotiations) in October 2017, and later by the Northern Ireland Executive.

The Bill itself does not make reference to the Common Frameworks Programme, although the White Paper argued that these could not "on their own […] guarantee the integrity of the entire Internal Market".[77]

Both the Scottish and Welsh Governments believe the Common Frameworks Programme renders Internal Market legislation unnecessary.[78]

## 4.7 Legislative consent

The Bill's Explanatory Notes state that the UK Government will seek legislative consent for the provisions which impact upon the devolution settlements. This follows the Sewel Convention, under which the UK Government does "not normally" legislate with regard to matters that affect or are within the legislative competence of the Scottish Parliament, the Welsh Parliament or the Northern Ireland Assembly without the consent of the legislature concerned.[79]

Shortly before publication of the Bill the Scottish Government said Scottish Parliament consent would be "impossible". Jeremy Miles, the Counsel General for Wales, reportedly told the *Guardian* that the Bill in its current form had "no prospect" of getting Welsh Parliament consent. He added: "The question is if they don't get that consent whether they will proceed regardless."[80]

As is clear from the passage of the *European Union (Withdrawal Agreement) Act 2020* in January 2020, the UK Government and Parliament is prepared to legislate in the absence of legislative consent

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76 Explanatory Notes, para 8.
77 CP 278, p38.
78 See ITV News online, "Scottish Government calls for alternative to 'unacceptable' Internal Market Bill", 3 September 2020
79 See Commons Library briefing paper, *Devolution: The Sewel Convention*, 13 May 2020
80 Libby Brooks & Steven Morris, "Plan for post-Brexit UK internal market bill 'is an abomination'", *Guardian*, 9 September 2020

from the Scottish and Welsh Parliaments and the Northern Ireland Assembly.

## 4.8 Critical reaction in Scotland, Wales and Northern Ireland

Both the Scottish and Welsh Governments renewed their criticism of and opposition to the UK Government's Internal Market proposals upon publication of the Bill.

### Scotland

Nicola Sturgeon, the First Minister of Scotland, tweeted that it represented "a full frontal assault on devolution".

In a statement issued following publication of the Bill, Ms Sturgeon added: "The UK government are not only set to break international law – it is clear they are now set to break devolution."[81]

According to the *Guardian*, Alex Rowley, a Scottish Labour MSP, described the Bill as "a farce that threatens the very foundations of the United Kingdom".[82]

### Wales

Mark Drakeford, the First Minister of Wales, also tweeted that the Bill was "an enormous power grab – undermining powers that have belonged to Wales, Scotland and Northern Ireland for over 20 years".

The Counsel General for Wales, Jeremy Miles, said in a statement that the "UK government is explicitly seeking to rewrite the devolution settlement. The fact that they are also seeking primary legislation shows they are taking those powers from us."

David Melding, the Welsh Conservative Party's shadow counsel general in the Welsh Parliament, resigned following publication of the Internal Market Bill.[83]

The *Guardian* also quoted Adam Price MS, the leader of Plaid Cymru, as saying the Bill signified "the destruction of two decades of devolution".[84]

### Northern Ireland

Nichola Mallon MLA, the SDLP's deputy leader and Northern Ireland Minister for Infrastructure, tweeted that: "No NI Executive department is immune from this power grab. Whatever your party politics, if you believe in devolution, then you should be very alarmed by this."

81 *Guardian*, 9 September 2020
82 *Ibid*
83 BBC News online, "Welsh Tory quits Senedd frontbench over prime minister's union stance", 9 September 2020.
84 *Guardian*, 9 September 2020

## Support for the Bill

Alister Jack MP, the Secretary of State for Scotland, said the UK Government was "taking action to protect the vital UK internal market, while respecting and strengthening devolution".[85]

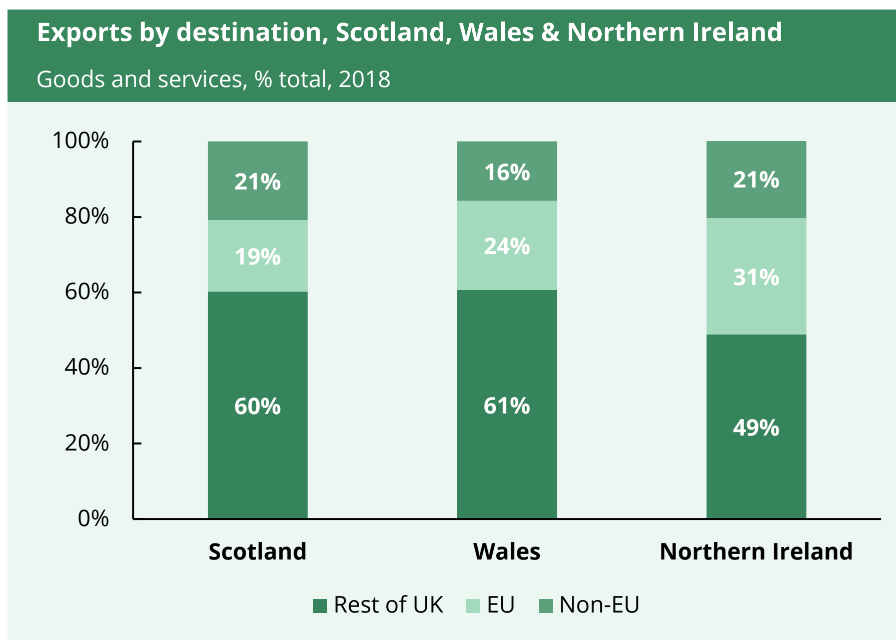
A Scotland Office press release quoted Audrey Baxter, Chief Executive of Baxters Food Group, and David Lonsdale, Director of the Scottish Retail Consortium, as supporting the Bill.[86]

85 Scotland Office press release, 9 September 2020
86 *Ibid*

# 5. Statistics on trade between the four nations of the UK

If sales from each of the devolved administrations to the rest of the UK are treated as exports, then the rest of the UK is (by some margin) the single largest export market for Scotland, Wales and Northern Ireland, accounting for just over 60% of Scottish and Welsh exports and just under half of Northern Ireland's exports in 2018 (the most recent year for which data is available).

The importance of trade with the EU (excluding the UK) varies, accounting for just under a fifth of Scotland's exports, just under a quarter of Wales' exports and just under a third of Northern Ireland's exports.




**Exports by destination, Scotland, Wales & Northern Ireland**

Goods and services, % total, 2018

Sources: Scottish Government, Export Statistics Scotland 2018; Welsh Government, Trade Survey for Wales, 2018; Northern Ireland Statistics and Research Agency, Broad Economy Sales and Export Statistics. Figures may not sum due to rounding.

## 5.1 Scotland

In 2018, Scotland's total external sales of goods and services were worth £85.0 billion.

Of this total:

- £51.2 billion (60.2%) were sales to the rest of the UK
- £33.8 billion (39.8%) were international exports
- £16.2 billion (19.0%) were exports to the EU, while £17.7 billion (20.8%) were exports non-EU countries.[87]

[87] All data in this section are taken from the Scottish Government publication, Export Statistics Scotland 2018. Data in this section do not include exports of oil and gas

In 2018, sales to the rest of the UK were around one and a half times greater than Scotland's international exports.

| Scottish exports by destination, 2018 | £ billions | % total |
|---|---|---|
| Rest of UK | 51.2 | 60.2% |
| International exports | 33.8 | 39.8% |
| *of which* | | |
| EU | 16.2 | 19.1% |
| Non-EU | 17.7 | 20.8% |
| **Total exports** | **85.0** | **100.0%** |

Source: Scottish Government, Export Statistics Scotland 2018

## International exports

Looking at international exports, the EU (taken as a bloc) was Scotland's largest international export market in 2018, accounting for 48% of Scottish international exports, with sales of £16.2 billion (sales to the rest of the UK were around three times greater); looking at individual countries, the USA was Scotland's largest international export market, with exports of £5.5 billion, equal to 16% of Scotland's international exports in 2018. Seven of Scotland's ten largest international export markets were EU member states – combined, these seven countries accounted for 38% of Scotland's international exports in 2018.

## Exports by type

Scottish Government statistics divide Scottish exports into three categories – manufactured goods, services and other – the latter category includes goods and services produced by several industries, including agriculture, mining, utilities and construction.

The composition of Scottish exports varies by destination – services made up just under 60% of Scottish sales to the rest of the UK in 2018, while manufactured goods made up 55% of Scotland's international exports and just over 60% of Scotland's exports to the EU.

Source: Scottish Government, Export Statistics Scotland 2018

Scottish sales of services to the rest of the UK were worth £29.6 billion in 2018 - financial services were single largest category of service exports to the rest of the UK, worth £10.5 billion, just over a fifth of all Scottish sales to the rest of the UK.

International exports of manufactured goods were worth £18.7 billion in 2018, with food, beverages and tobacco being the single largest category of exported manufactured goods, worth £6.3 billion, just under a fifth of Scottish international exports. Food, beverages and tobacco was also Scotland's single largest export to non-EU countries, worth £4.0 billion, 23% of the total.

Scotland's single largest export to the EU was refined petroleum and chemical products, with exports worth £3.4 billion, followed by food, beverages and tobacco at £2.3 billion. Combined, these two categories accounted for 36% of Scottish exports to the EU.

## Imports

Data on Scotland's imports are available in the Scottish Government's quarterly national accounts, though these are considerably less detailed and calculated differently from data in the Exports Scotland publication and are not directly comparable with the above data on Scottish exports.

Scottish imports were worth £96.6 billion in 2018, of which £62.4 billion (65%) were imports from the rest of the UK, while £34.4 billion (35%) were international imports. No additional geographical breakdown or breakdown by type of import are available.[88]

[88] Scottish Government, Gross Domestic Product - quarterly national accounts: quarter 1 2020 (January-March), July 2020

## 5.2 Wales

In 2018, Wales' external sales of goods and services were worth £49.7 billion.

Of this total:

- £30.1 billion (60.6%) were sales to the rest of the UK
- £19.6 billion (39.4%) were international exports
- £11.8 billion (23.7%) were exports to the EU, while £7.8 billion (15.7%) were exports to non-EU countries.[89]

In 2018, sales to the rest of the UK were around one and a half times larger than Wales' international exports.

| Welsh exports by destination, 2018 | £ billions | % total |
|---|---|---|
| Rest of UK | 30.1 | 60.6% |
| International exports | 19.6 | 39.4% |
| *of which* | | |
| EU | 11.7 | 23.6% |
| Non-EU | 7.8 | 15.8% |
| **Total exports** | **49.7** | **100.0%** |

Source: Welsh Government, Trade Survey for Wales, 2018

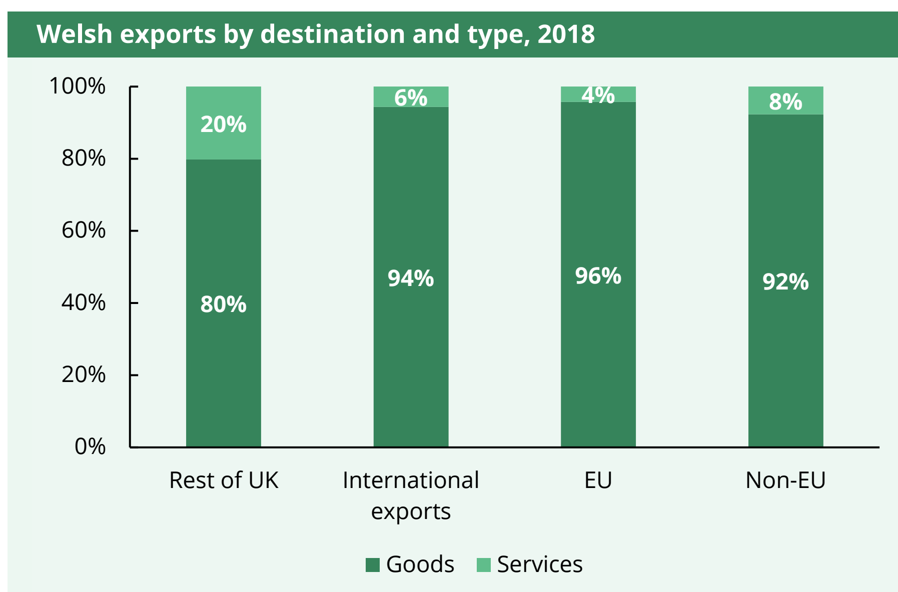
### International exports

Looking at international exports, the EU (taken as a bloc) was Wales' largest international export market in 2018, accounting for 60% of Welsh international exports, with sales of £11.7 billion (sales to the rest of the UK were around two and half times greater); looking at individual countries, France was Wales' largest international export market, with exports of £4.3 billion, equal to 22% of Welsh international exports, followed by China with exports of £1.9 billion, equal to 10% of Wales' international exports.

### Exports by type

Welsh exports are heavily weighted toward goods rather than services, though there is some variation in the composition of exports by destination, with exports of services being more pronounced in sales to the rest of the UK than in international exports.

[89] All data in this section are taken from Welsh Government publication, Trade Survey for Wales: 2018, July 2020




Goods made up 80% of Wales' sales to the rest of the UK. Goods made up 95% of all Welsh international exports, 96% of Welsh exports to the EU and 92% of Welsh exports outside the EU.

Manufactured goods made up just under half of Wales' sales to the rest of the UK, followed by business and other services, which made up 18%.

## Imports

In 2018, Wales' imports of goods and services were worth £45.2 billion.

Of this total:

- £34.3 billion (63.5%) were purchases from the rest of the UK
- £11.9 billion (22.0%) were international imports
- £8.6 billion (15.9%) were imports from the EU, while £3.3 billion (6.1%) were imports from non-EU countries.

In 2018, purchases from the rest of the UK were around three times larger than Wales' international imports.

**Welsh imports by source, 2018**

| | £ billions | % total |
|---|---|---|
| Rest of UK | 34.3 | 63.5% |
| International exports | 11.9 | 22.0% |
| *of which* | | |
| EU | 8.6 | 15.9% |
| Non-EU | 3.3 | 6.1% |
| Unallocated (rUK & int'l) | 7.8 | 14.4% |
| **Total exports** | **54.0** | **100.0%** |

Source: Welsh Government, Trade Survey for Wales, 2018

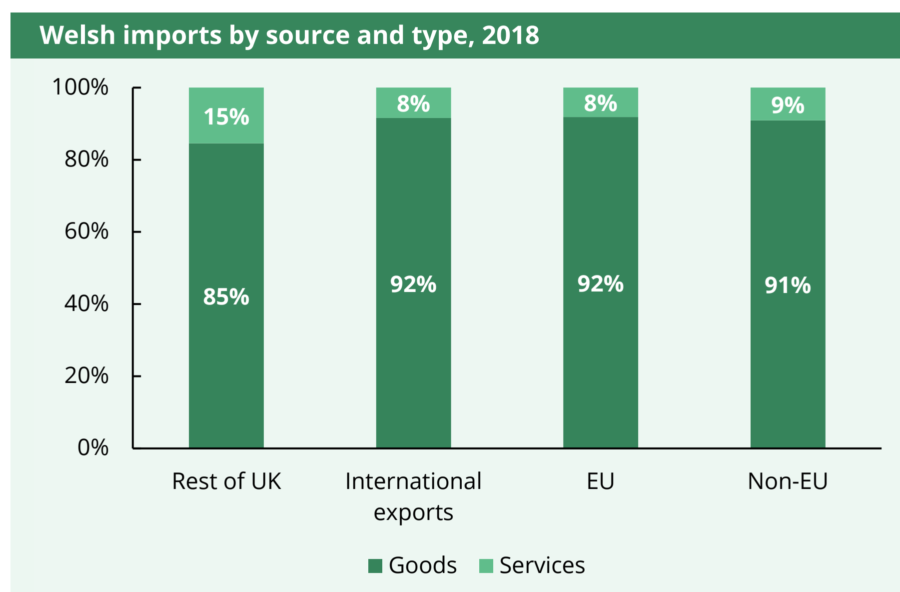
## International imports

Looking at international imports, the EU (taken as a bloc) was Wales' largest source of international imports in 2018, accounting for 72% of Welsh international imports, with sales of £8.6 billion (purchases from the rest of the UK were around four times greater); looking at individual countries, Germany was Wales' largest source of international imports, with imports of £1.7 billion, equal to 15% of Welsh international imports, followed by Belgium with imports of £1.0 billion, equal to 8% of Wales' international imports.

## Imports by type

Welsh imports are heavily weighted toward goods rather than services, though there is some variation in the composition of exports by destination, with imports of services being more pronounced in purchases from the rest of the UK than in international imports.

Welsh imports by source and type, 2018




Goods made up 85% of Wales' purchases from the rest of the UK, though this proportion was somewhat lower for Wales' international imports – goods made up 92% of all Welsh international imports.

# 5.3 Northern Ireland

In 2018, Northern Ireland's external sales of goods and services were worth £21.7 billion. Of this:

- £10.6 billion (48.6%) were sales to the rest of the UK
- £11.1 billion (51.4%) were international exports.
- £6.6 billion (30.3%) were exports to the EU, while £4.5 billion (20.6%) were exports to non-EU countries.[90]

Sales to the rest of the UK from Northern Ireland were broadly similar to the value of Northern Ireland's international exports.

[90] All data in this section taken from NISRA publication, Broad Economy Sales and Exports Statistics, December 2019

| N. Ireland exports by destination, 2018 | | |
|---|---|---|
| | £ billions | % total |
| Rest of UK | 10.6 | 48.6% |
| International exports | 11.2 | 51.4% |
| *of which* | | |
| EU | 6.6 | 30.3% |
| Non-EU | 4.5 | 20.6% |
| **Total exports** | **21.8** | **100.0%** |

Source: NISRA, Overview of Northern Ireland Trade

## International exports

Looking at international exports, the EU (taken as a bloc), was Northern Ireland's largest international export market in 2018, accounting for 59% of Northern Ireland's international exports (sales to the UK were around one and a half times greater). A large proportion of Northern Ireland's exports to the EU are made up of exports to the Republic of Ireland, which accounted for 37% of Northern Ireland's international exports, with sales of £4.2 billion, equal to 64% of all Northern Ireland's exports to the EU.

## Exports by type

Northern Ireland's exports are more heavily weighted toward goods than services, though exports of services are more pronounced in sales to the rest of the UK than in international exports.

**Northern Ireland exports by destination and type, 2018**

Source: NISRA, Overview of Northern Ireland Trade

## Imports

In 2018, Northern Ireland's imports of goods and services were worth £21.2 billion. Of this:

- £13.4 billion (63.2%) were purchases from the rest of the UK
- 7.8 billion (36.8%) were international imports.

- £5.4 billion (25.5%) were imports from the EU, while £2.4 billion (11.3%) were imports from non-EU countries.[91]

Purchases from the rest of the UK from Northern Ireland were over one and a half times greater than the value of Northern Ireland's international imports.

| N. Ireland imports by source, 2018 | £ billions | % total |
|---|---|---|
| Rest of UK | 13.4 | 63.2% |
| International exports | 7.8 | 36.8% |
| *of which* | | |
| EU | 5.4 | 25.5% |
| Non-EU | 2.4 | 11.3% |
| **Total exports** | **21.2** | **100.0%** |

Source: NISRA, Overview of Northern Ireland Trade

## International imports

Looking at international imports, the EU (taken as a bloc), was Northern Ireland's largest source of international imports in 2018, accounting for 69% of Northern Ireland's international imports (purchases from the UK were around two and a half times greater). A large proportion of Northern Ireland's imports from the EU are made up of imports from the Republic of Ireland, which accounted for 36% of Northern Ireland's international imports, with purchases of £2.8 billion, equal to 69% of all Northern Ireland's imports from the EU.

## Imports by type

Northern Ireland's imports are more heavily weighted toward goods than services, though imports of services are more pronounced in purchases from the rest of the UK than in international imports.

Source: NISRA, Overview of Northern Ireland Trade

[91] Data from NISRA, Broad Economy Sales and Exports Statistics: Purchases and Imports, May 2020

# 6. The Bill

## 6.1 Market access for goods (Part 1)

Part 1 of the Bill (**Clauses 1-14**) focuses on the internal market for goods. It sets out two principles to underpin market access, that of:

- mutual recognition
- non-discrimination

- As is explained in section 2.3 above, mutual recognition means that if the regulations in one part of the UK allow for the sale of a good then the good can also be sold in other parts of the UK even if regulations there differ. The principle of non-discrimination means that regulations can't discriminate against goods coming from other parts of the UK.

- The two principles aim "to allow people and businesses to trade as they do now, without additional barriers based on which nation they are in."[92]

### Mutual recognition for goods (Clauses 2-4)

The Bill sets out how the mutual recognition principle will apply in the UK's internal market for goods. The principle means that if a good can be sold in the part of the UK that it has been produced in (or imported into), as it meets the relevant regulations, it can be sold in other parts of the UK.[93] The Bill's Explanatory Notes give the following example:

> a packet of crisps made in one part of the UK that met the relevant requirements in that part (for example on the composition of the crisps or the packaging) could be sold in any other part of the UK without having to meet any other relevant requirements that apply there.[94]

#### The regulatory requirements covered

The Bill sets out the regulatory requirements that mutual recognition will apply to. Broadly speaking, these are the regulations that a good must satisfy in order to be sold in that part of the UK. The requirements must also be within scope of the mutual recognition principle. Clause 3(4) sets out the requirements within scope of mutual recognition:

- characteristics of the goods (such as their nature, age, composition);
- presentation of the goods (such as name, labelling, lot-marking);
- production of the goods;[95]
- identification or tracing of an animal;
- inspection, assessment, registration, certification, approval or, authorisation of the goods;

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92 UK Internal Market Bill: Explanatory Notes, para 7a
93 This is also the case if there are no relevant requirements to be met in the part of the UK that the good was produced in.
94 UK Internal Market Bill: Explanatory Notes, para 11
95 Including the rearing, keeping or slaughtering of animals or the cultivation or harvesting of plants.

- documentation or information about the goods that must be recorded, produced or kept about the goods or submitted to an authority;
- anything else that must be done to the goods before they can be sold.

The Secretary of State may alter the list of requirements through secondary legislation, subject to the affirmative procedure. In advance, the Secretary of State must consult Scottish and Welsh Ministers and the Department for the Economy in Northern Ireland**.**

**Exclusions to mutual recognition**

The Bill provides for some exclusions to the mutual recognition principle.

*Existing diverging regulations*

Existing regulations (in place before this part of the Bill comes into force) that already diverge across the UK will be outside of the scope of mutual recognition. If substantive changes are made to such existing regulatory requirements they will then be brought into scope of mutual recognition.

*Sales for a public function*

The way in which a sale is defined in the Bill (**clause 13**) excludes sales which are not made in the course of business or are for performing a public function. In general, this means that sales made by public bodies or authorities are excluded from the mutual recognition principle. The Bill's Explanatory Notes give the example of the supply of medication by the NHS:

> the supply of medication by the NHS to a patient through a prescription would not be covered as it is a sale made by a public authority fulfilling a public function.[96]

- However, sales made by public authorities for commercial purposes, and not for serving a public function, are within scope The Bill's Explanatory Notes give the example of the supply of medication by the NHS:

> if a public body were to set up a gift shop selling merchandise, this would be captured as 'sale' for the purposes of this part as it would be commercial activity not directly related to its public functions[97]

- This definition of sales, and the exclusions it results in, applies to both the mutual recognition principle and the non-discriminatory principle.

*Other policy areas*

Schedule 1 sets out other policy areas that are excluded. The Secretary of State may alter the excluded areas through secondary legislation, subject to the affirmative procedure.

Tax, rates, duties and similar charges are excluded from the market access principles (both mutual recognition and non-discrimination).

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[96] UK Internal Market Bill: Explanatory Notes, para 16

[97] UK Internal Market Bill: Explanatory Notes, para 153

These are excluded as they are dealt with by existing fiscal frameworks.[98]

Certain measures relating to threats to human, animal or plant health, as well as authorisations and restrictions of chemicals, are excluded from the scope of mutual recognition. The Government response to the consultation on options in its Internal Market White Paper (published on 9 September 2020) explained its approach to these exclusions from mutual recognition:

> The Government will exclude selected types of Sanitary and Phytosanitary legislation from mutual recognition so as not to impact measures necessary to prevent the spread of animal and plant disease. It will also exclude measures needed in food or feed emergencies. In these limited circumstances restrictions on the movement of goods are justified and proportionate to protect plant, animal and human health. Authorisations for some chemicals and the restrictions process under REACH will also be excluded to ensure that different geographical risks associated with these products can continue to be taken into account across the UK. In all of these areas the non-discrimination principle will apply.[99]

Food in general is not excluded from mutual recognition and, as noted above, the Explanatory Notes to the Bill use the composition and packaging of a packet of crisps as an example of mutual recognition.[100]

## Non-discrimination for goods (Clauses 5-9)

**Clauses 5-9** of the Bill set out how the non-discrimination principle will apply in the UK's internal market for goods. Broadly speaking, the principle will prevent parts of the UK treating goods coming in from other parts of the UK less favourably than local goods. Both direct and non-direct discrimination are covered:

- direct discrimination is where an incoming good receives unfavourable treatment compared to a local good
- indirect discrimination is where a regulation, while not directly discriminating, disadvantages incoming goods and distorts the market
- Clause 5(3) says that if a regulatory requirement in a part of the UK is discriminatory against incoming goods it will have no effect for those goods.

### Direct discrimination

The Bill says that a regulation directly discriminates against an incoming good if it puts that good at a disadvantage compared to a local good and that the regulation would not apply in the same way to the local good. The Bill's Explanatory Notes give the following example of direct discrimination:

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98 UK Internal Market Bill: Explanatory Notes, para 317

99 Department for Business, Energy and Industrial Strategy, *Government response to the consultation on the UK Internal Market*, 9 September 2020, p15

100 UK Internal Market Bill: Explanatory Notes, para 11

> a requirement that incoming produce must be chilled but local produce does not.[101]

An incoming good is said to be at a disadvantage if it is more difficult, or less attractive, to sell or buy the goods or do anything related to their sale.

For the non-discrimination principle to apply, the local good must be materially the same as the incoming good and share its material circumstances. The local good must also not come from, or pass through, the part of the UK in which the incoming good is coming.

### Indirect discrimination

The Bill says that if a regulation isn't directly discriminating against an incoming good it indirectly discriminates against it if it puts the incoming good at a disadvantage, has an adverse market effect and can't reasonably be considered necessary for achieving a legitimate aim.

According to **clause 8(3)** a regulation has an adverse market effect if it effects competition in the market by putting the incoming good at a disadvantage while not disadvantaging comparable local goods.

A legitimate aim, for which indirect discrimination can be justified, is defined by Clause 8(6) as either "the protection of the life or health of humans, animals or plants" or "the protection of public safety or security". The Secretary of State may alter the list of legitimate aims by secondary legislation, subject to the affirmative procedure.

### Goods with a 'relevant connection'

Clauses 5(4) and 5(5) set out how goods are defined as being from a part of the UK. , The Bill describes this as the goods having a "relevant connection" with a part of the UK. A "relevant connection" is defined as meaning that the goods or their components:

- are produced in that part of the UK;
- are produced by a business based in the part of the UK;
- come from, or pass through, that part of the UK before reaching the destination part.

### Regulatory requirements covered

The Bill sets out the relevant requirements that will apply for the principle of non-discrimination. Broadly speaking, these are regulatory requirements that apply to goods sold in the part of the UK in question. The requirements must also be within scope of the non-discrimination principle. Clause 6(3) sets out the requirements within scope of the non-discrimination principle:

- the circumstances or manner in which goods are sold;
- the transportation, storage, handling or display of goods;
- the inspection, assessment, registration, certification, approval or authorisation of goods;

[101] UK Internal Market Bill: Explanatory Notes, para 18

- the conduct or regulation of businesses that engage in the sales of certain goods or types of goods
- Any requirements that are in scope for mutual recognition of goods are not in scope for non-discrimination.

**Exclusions from non-discrimination**

The Bill provides for some exclusions to the non-discrimination principle.

*Existing regulations*

Existing regulations (those in effect that day before this part of the Bill comes into force) will be outside of the scope of non-discrimination. If substantive changes are made to such existing regulatory requirements they will then be brought into scope of non-discrimination.

*Sales for a public function*

As with mutual recognition, the way in which a "sale" is defined in the Bill excludes sales which are not made in the course of business or are for performing a public function (clause 13).

*Other policy areas*

As discussed for mutual recognition, Schedule 1 sets out other policy areas that are excluded. The Secretary of State may alter the list of exclusions through secondary legislation, subject to the affirmative procedure.

Tax, rates, duties and similar charges are excluded from the market access principles (both mutual recognition and non-discrimination).

The Government's response to its White Paper consultation clarifies that "food and feed emergency legislation will also be excluded from direct discrimination measures in the case of a public health emergency".[102]

Indirect discrimination doesn't apply to requirements made by Acts of Parliament where these requirements apply to both goods in the destination and originating part of the UK.

## Modification in connection with the Northern Ireland Protocol (Clause 11)

**Clause 11** applies to the sale of goods in Great Britain, and states that the mutual recognition principle applies to all qualifying Northern Ireland goods "as if they were produced in, or imported into, Northern Ireland" (Clause 11(2)).

Non-qualifying Northern-Ireland goods will only receive mutual recognition if they meet the conditions for the mutual recognition principle to apply had they been imported to England, Scotland or Wales (Clause 11(4)).

Section 8C of the *EU (Withdrawal) Act 2018* (as amended), gives powers to Ministers by regulation to enable access for qualifying

[102] Department for Business, Energy and Industrial Strategy, *Government response to the consultation on the UK Internal Market*, 9 September 2020, p7

Northern Ireland goods and to define what they are. They have yet to be defined.

The Northern Ireland Affairs Select Committee (NIAC), in their report on Unfettered Access: Customs Arrangements in Northern Ireland after Brexit, suggested reasons why the Government may wish to define goods as having qualifying status or not:

> This may differentiate goods from Northern Ireland, which could qualify for unfettered access, from those originating in the Republic of Ireland or elsewhere. Goods which do not have this qualifying status may be subject to the UK's customs and regulatory regime. It is therefore an important consideration that Northern Ireland goods can be easily distinguished from others, to ensure they have free access to the UK market while also protecting the integrity of the UK market.[103]

The Committee also recommended the Government clarify how goods will be given qualifying status:

> The Government must clarify the process and criteria by which Northern Ireland goods will be given qualifying status and so benefit from unfettered access. If the Government's policy includes the certification of goods by businesses, it must set out what actions businesses will need to take no later than 1 October 2020 to allow businesses time to prepare.[104]

## 6.2 Market access for services (Part 2)

**Part 2 (clauses 15-21)** of the Bill sets out the regulation of service providers on the UK internal market. It establishes the two market access principles for services:

- mutual recognition and
- non-discrimination.

The principles are discussed more generally in section 2.3 of this briefing.

In this Bill, the principle of mutual recognition of authorisations to provide services broadly means that if a service provider is authorised to carry out a service in one part of the UK, it is automatically allowed to provide that service in the whole of the UK. According to the Explanatory Notes, the principle of mutual recognition "would prohibit a services regulator (which means any organisation exercising regulatory functions that can limit or prevent someone from providing a service) from requiring an additional authorisation". (para 36)

The principle of mutual recognition already applies through the Services Regulations 2009, which implemented the EU Services Directive (2006/123/EC) on the single market in services. The Bill introduces similar rules and brings this system explicitly within the UK Internal Market system. The Internal Market White Paper describes the Services Regulations 2009 as follows:

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[103] NIAC, Unfettered Access: Customs Arrangements in Northern Ireland after Brexit', 14 July 2020, para 20
[104] *Ibid,* para 27

> These regulations have broad application and areas out of scope of this regime (such as financial, healthcare and transport services) are also out of scope of the UK Internal Market proposals. The Provision of Services Regulations 2009 set out that any authorisation scheme provided for by a UK competent authority must be justified and the objective not attainable in a less restrictive manner. The scheme itself must be based on criteria that prevent arbitrary assessment. Additionally, an authorisation issued by an authority with functions covering less than the whole UK generally permits exercise of the relevant activity throughout the whole UK.[105]

In effect, the Regulations allow for justified divergence and exceptions, – therefore allowing each nation of the UK to amend its rules if they believe it is within the public interest.[106]

Barriers to services trade between the different parts of the UK are low but the Government is keen to prevent new barriers from emerging. By replicating the rules of the Services Regulations 2009 in the Internal Market Bill it wants "to ensure the continued smooth functioning of the internal services market after the UK leaves the EU single market".[107] See Box 1.

**Box 1: Are regulatory differences affecting intra-UK trade in services?**

Research shows a high degree of regulatory alignment across all four nations of the UK. Evidence from a study commissioned by BEIS suggests that UK services providers do not face any discriminatory treatment in law, indicating an open and fair competitive environment for businesses across the UK. Regulatory differences tend to be the largest in legal services, distribution and transport services. (See Annex A to the UK Internal Market White Paper, pp 72-74). According to the Government's Impact Assessment, an emergence of new internal barriers as a result of separate regulatory regimes cannot be excluded if no new legal framework such as the UK Internal Market Bill is created.[108]

## Mutual recognition of authorisation requirements

**Clause 15** defines the authorisation requirements and regulatory requirements which are covered by the principle of mutual recognition.

## Exclusions to mutual recognition

### Excluded sectors

**Schedule 2** of the Bill lists services sectors where the principle of mutual recognition will not apply. Excluded are audiovisual services, debt collection, electronic communications and network services, financial services, gambling, healthcare, temporary work agencies, services in exercise of public duties, certain social services, and transport. In practice, the list retains the status quo under the 2009 Regulations with regard to the covered sectors.

In addition, due to the historic differences in the legal systems in the different parts of the UK, the Bill excludes legal services.

*Existing divergence*

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105 BEIS, UK Internal Market, CP278, July 2020, para 133
106 The UK Government's White Paper on a UK Internal Market: Welsh Government Analysis, 14 August 2020
107 UK Internal Market Bill: Explanatory Notes, para 33
108 BEIS, Impact Assessment from the Department for Business, Energy and Industrial Strategy, 9 September 2020, p13

The provisions of part 2 will not apply retroactively to legislative requirements which are in force before this part of the Bill is in force and to legislation that re-enacts such requirements.

The Secretary of State will have powers to alter the list of excluded services through secondary legislation, subject to the affirmative procedure.

### Non-discrimination for services

The non-discrimination principle is expected to help prevent unnecessary barriers to services provision within the UK. The non-discrimination rules will mean that any regulatory requirements on service providers must not discriminate on the basis of their place of business or residence, either directly or indirectly. The Explanatory Notes clarify the difference between direct and indirect discrimination:

> Direct discrimination would be based explicitly or obviously on where a provider is from in the UK, whereas indirect discrimination would not seek to explicitly discriminate against providers from any part of the UK, but would have the effect of putting them at a disadvantage compared to a comparable service provider from another part of the UK.[109]

Clause 19 disapplies regulatory requirements which indirectly discriminate service providers from other parts of the UK. It also includes a test to establish if a regulation puts a provider at a disadvantage.

### Exemptions to direct and indirect discrimination

#### Public health, safety and security

A regulator - a Minister of the Crown, the Scottish and Welsh Ministers, or a NI Department – can also derogate from the rules on indirect discrimination in order to meet certain “legitimate aims”. These objectives include the protection of public health, public safety and security.

The Secretary of State will have powers to alter the list of legitimate aims through secondary legislation, subject to the affirmative procedure.

#### Excluded sectors

**Schedule 2** to the Bill includes a list of services which are outside of the scope of the non-discrimination rules. Excluded are the same services sectors as those not covered by the rules on mutual recognition. In addition, postal and utility services are exempt.

### Public health emergency

There is a derogation which allows regulators to disapply the rules on mutual recognition and direct discrimination in response to a public health emergency.

## 6.3 Professional qualifications (Part 3)

The main objective of **Part 3 (clauses 22-27)** of the Bill is to pre-empt future divergence between the different parts of the UK regarding the

[109] UK Internal Market Bill: Explanatory Notes, para 37

recognition of professional qualifications, as that could create new barriers to the movement of professionals.

**Box 2: Mutual recognition of professional qualifications**

Some professions, such as a pharmacist, an architect, or an accountant, are regulated by laws, regulations or administrative provisions. A professional is allowed to practice only if in possession of a professional qualification, but requirements for that, such as specific educational degrees or relevant training, may vary between territories. Through a process of mutual recognition of professional qualifications, a professional that complies with regulation to access a certain profession in one territory, can have access to that profession in another territory.[110] Sometimes the recognition is automatic. For example, for most healthcare professions, including doctors, dentists and nurses, there is a UK-wide system of professional regulation. This common approach and set of UK-wide standards facilitates the mobility of professionals across the UK.[111]

Part 3 of the Bill introduces a unified system for the recognition of professional qualifications across the UK for professions that are regulated by law (regulated professions), based on the principles of automatic recognition and equal treatment. Both are a variation on the general principles of mutual recognition and non-discrimination described in section 2.3 of this briefing.

## Automatic recognition

Clause 22 sets out that anyone who is legally able (qualified) to practice their profession in one part of the UK, will automatically be entitled to practice in another part of the UK (without being required to requalify). Professionals seeking recognition will still have to comply with administrative measures required to register or practice those professions. Examples are fees or requirements of continuous professional development.

### Exemption for existing requirements

The principle of automatic recognition does not apply to existing requirements and provisions. The Explanatory Notes summarise:

> This principle will only apply to a profession when a new provision in respect of qualifications or experience is introduced, or when there is a change made to existing qualification or experience requirements for a profession which results in a limit to the access to a profession in a part of the UK.[112]

## Alternative process of recognition

The principle does not have to be applied if it is determined that two professional qualifications from different parts of the UK cannot be considered equivalent, due to substantial differences in the level of training and experience required. Then, an alternative process for recognition has to be set up with appropriate legal backing. The process has to be administered by the appropriate professional regulator:

> Administrations will then be able to provide for a pathway which allows differences in the requirements to be considered and a decision to be taken as to whether, and on what basis, a person

110 BEIS, Recognition of Professional Qualifications after EU Exit, 31 October 2019
111 Professional regulation in health and social care (CBP8094, September 2017), p9
112 UK Internal Market Bill: Explanatory Notes, para 45

> should be allowed access to the profession in another part of the country.[113]

### Equal treatment

**Clause 22** sets out the principle of equal treatment of UK residents practising a profession in another part of the UK. The Explanatory Notes say (para 48):

> Professionals qualified in another part of the UK cannot be treated less favourably in respect of ongoing practise requirements than those qualified in the relevant part, based on where in the UK their qualifications or experience were obtained or the type of qualifications they have (unless this is justified). This means that professionals cannot be required to meet higher ongoing requirements than locally qualified professionals as part of their ongoing practise, such as continuing professional development or insurance requirements.[114]

**Box 3: The EU system of mutual recognition of professional qualifications**

EU law on the recognition of qualifications—a central component of the free movement of people—is provided for in Directive 2005/36/EC on the Mutual Recognition of Professional Qualifications, as amended ('the MRPQ Directive'). The MRPQ Directive is implemented in UK law by the European Union (Recognition of Professional Qualifications) Regulations 2015 and sector-specific rules.

The MRPQ Directive enables EEA citizens who have obtained a professional qualification in their home country to pursue their profession in another EEA state. The MRPQ Directive and 2015 Regulations cover the vast majority of regulated professions. Some professions (e.g. lawyers) are covered by separate sector-specific legislation. A non-exhaustive list of regulated professions in the EU can be found through the European Commission's database.

The Directive provides a number of routes to recognition. As set out in a BEIS guidance, these include:

- automatic recognition based on minimum training conditions or professional experience (recognition based on minimum training conditions). This system applies to doctors, vets, pharmacists and other medical professionals.
- the 'general system' under which regulators generally must not refuse applicants who seek to practise a regulated profession if they hold the qualifications required by another EEA state. Applicants may be required to complete additional aptitude tests or go through an adaptation period before starting to practice.
- a mechanism for those who want to work on a temporary or occasional basis in another EEA state.

## 6.4 Independent advice and monitoring (Part 4)

The Government intends to establish an independent Office for the Internal Market (OIM) within the Competition and Markets Authority (CMA) (Box 4) to provide independent monitoring and reporting on the functioning of the internal market. The Government's response to the White Paper consultation stated that this decision was taken after considering a "range of potential delivery models".[115]

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[113] Impact Assessment, p16
[114] BEIS, UK Internal Market, CP278, July 2020
[115] BEIS, Government response to the consultation on the UK Internal Market, 9 September 2020, p20

The Government's response also stated that it was "committed to safeguarding the separation between the CMA and its existing market-facing enforcement activity and the OIM" and that further administrative arrangements would be set out "in due course":

> The OIM will have a distinct statutory underpinning through the UK Internal Market Bill, which contains all necessary legislative provisions to achieve an effective set of functions and bespoke governance arrangements. In parallel to this, necessary administrative arrangements will be set out in more detail in due course. In choosing this arrangement, the OIM will be able to draw on the CMA's existing expertise.[116]

The Government said that it "will ensure" that the OIM is "fully operational" by the end of 2021.[117]

### Box 4: The Competition and Markets Authority

The Competition and Markets Authority is the UK's main competition and consumer authority.

**Governance**

The CMA is a non-Ministerial department sponsored by the Department of Business Energy and Industrial Strategy (BEIS). The CMA's work is overseen by a Board and led by the Chief Executive. Decisions in some investigations are made by independent members of a CMA panel. The Chief Executive and members of the CMA Board and Panel are appointed by the Secretary of State for BEIS. They are appointed through "open competition for their experience, ability and diversity of skills in competition economics, law, finance and business".[118]

**Functions**

The CMA was established in by the *Enterprise and Regulatory Reform Act 2013* ("ERRA"), which brought together the functions of the previous Office for Fair Trading and Competition Commission. Under Section 25 of the ERRA, the CMA a statutory duty to "seek to promote competition, both within and outside the UK, for the benefit of consumers".

Existing CMA functions include:

- Investigating mergers to ensure they do not reduce competition
- Investigating markets where there are suspected competition and consumer problems
- Investigating and bringing proceedings against businesses and individuals for anticompetitive behaviour
- Enforcing a range of consumer protection legislation.

The Library briefing paper on the UK competition regime (7 October 2019) provides further information about the CMA's existing role with respect to competition law.

## Part 4: the CMA and the internal market

Part 4 of the Bill **(clauses 28–29)** would give new powers to the CMA in three main areas:

1. "Monitoring the health" of the internal market through mandatory reporting and ad-hoc reviews at the CMA's discretion (clause 29)
2. Advising on regulations and their impact on the internal market at the request of national authorities (clauses 30–32).

[116] BEIS, Government response to the consultation on the UK Internal Market, 9 September 2020, page 20.
[117] BEIS, Government response to the consultation on the UK Internal Market, 9 September 2020, page 20.
[118] Competition and Markets Authority, Our Governance [accessed 10 September 2020]; Schedule 14 *Enterprise and Regulatory Reform Act 2013*.

3 Information gathering powers in relation to exercising the above two functions, including enforcement powers (clauses 36–38).

The Explanatory Notes state that an Office for the Internal Market will be established within the CMA to ensure that the necessary functions are "carried out with sufficient independence, impartiality and visibility".[119] The Bill, however, does not mention the term the "Office for the Internal Market" nor set out any new or different governance arrangements for a new office within the CMA (see further discussion below).

The CMA's new functions would be limited to regulatory provisions that fall within the scope of the previous provisions of the Bill and which apply to one or more (but not all) of the nations (**clause 28**). Clause 28(8) excludes provisions necessary to give effect to the Northern Ireland Protocol from the CMA's remit under Part 4.

The Explanatory Notes state that "these functions will provide all administrations, legislatures, and external stakeholders with published reporting on developments in the UK internal market."[120] The Institute for Government commented that the new Office for Internal Market within the CMA has "very limited powers".[121]

### Governance and dispute resolution

The reports and advice produced by the CMA under Part 4 would be **non-binding**. The Bill does not include provisions relating to governance arrangements or dispute resolution mechanisms. The Institute for Government's explainer on the Bill noted there was a "clear gap" in the Government's plans on governance:

> There is a clear gap in the government's plans around governance of the internal market will function at the political level – although unlikely to be included in legislation – it is not clear how disputes around the functioning of the internal market will be managed.[122]

The Government's response to the White Paper stated that the Government intended to set out a "consensual approach" and that the CMA's reports are intended to "support intergovernmental collaboration and coordination".[123]

The Government stated in the press release accompanying the Bill that it would be for the respective legislatures and administrations to resolve disputes.[124] The Impact Assessment accompanying the Bill states that dispute resolution mechanisms will be "based on existing arrangements and are not anticipated to require additional resource". It notes that business and individuals could raise challenges in the courts:

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119 UK Internal Market Bill: Explanatory Notes, para 49–50.
120 UK Internal Market Bill: Explanatory Notes, para 52.
121 Institute for Government, UK Internal Market Bill, 9 September 2020 [accessed 10 September 2020]
122 Institute for Government, UK Internal Market Bill, 9 September 2020 [accessed 10 September 2020]
123 BEIS, Government response to the consultation on the UK Internal Market, 9 September 2020, page 20.
124 Cabinet Office, BEIS, UK Internal Market Bill introduced today, gov.uk press release, 9 September 2020 [accessed 9 September 2020].

> Separate to the OIM's monitoring, reporting and advisory functions, distinct intergovernmental arrangements will be developed to resolve potential disagreements and disputes to regulation. Any dispute resolution mechanisms will be based on existing arrangements and are not anticipated to require additional resource. However, these processes do not replace a potential court challenge; businesses and individuals might choose to enforce their rights in court if a UKIM matter remains unresolved, potentially incurring substantial legal costs, time and effort
>
> These instances would only occur in the event of directly or indirectly discriminatory measures, and in any case, it would be an economic decision for individuals and businesses to choose whether and how to challenge such measures.[125]

### Monitoring of the internal market (clause 29)

**Clause 29** would give the CMA power to undertake review of "any matter it considers relevant to assessing and promoting the effective operation" of the internal market. Under clause 29(2) the CMA may receive and consider any proposals made to it for undertaking a review.

Clause 29(5) and (6) set out the two categories of market monitoring that the CMA must carry out:

4. An annual report on the operation and effectiveness of the internal market. The Explanatory Notes describe this report as a "health of the market assessment that will set out broad trends and developments in the UK internal market, including levels of integration across different sectors, regions and nations".
5. At least every 5-years a review on the effectiveness of the provisions in Parts 1-3 of the Bill and their impact on the operation and development of the internal market of the UK.

The CMA must lay a copy of these reports before each House of Parliament and each of the devolved legislatures. The first of both reports must be produced no later than 31 March 2023.

Clause 29(8) states that reports under this section may consider, among other things competition, access to goods and services, volumes of trade between different parts of the UK and practical implications of differences of approach in regulatory provisions in scope that apply to different parts of the UK.

### Requests for advice on legislative provisions (clauses 30-32)

Clauses 30-32 sets out three situations where a national authority may request advice or reports from the CMA:

- On proposed legislative provisions within the authorities' own competence before the provisions is made (**clause 30**). For example, Welsh Ministers could request that the CMA provide advice on a proposed Welsh regulation.
- On regulations within an authority's own competence that have already been made (**clause 31**)

[125] Impact Assessment, page 29

- On regulations made by another authority that the requesting authority considers, is or could come to be, "detrimental" to the internal market of the UK (**clause 32**). For example, Welsh Ministers could request that the CMA consider the impact of a provision made by the Secretary of State that applies in England.

In all three cases, the CMA may decline to provide a report but if so, it must publish its reasons for declining. Requests for reports on regulatory provisions that have already been made only apply to regulatory provisions made after clause 31 and 32 of the Bill come into force.

Reports produced by the CMA under the above clauses must be published. However, only reports under clause 32 (those considered to have detrimental impact) must be laid before each of the legislatures. In this case, the responsible authority must make a statement in the relevant legislature (**clause 33**). For example, Scottish Ministers would be required to make a statement in the Scottish Parliament on a CMA report in relation to a Scottish Government regulation.

**Clause 35** would require the CMA to publish "advice or information" about how it expects to approach the exercise of its monitoring and reporting functions. There are no mandatory requirements for what the CMA should include in the statement nor any requirements for consultation when preparing the statement (see Section 6.9 below on delegated powers for further discussion).

#### Information gathering powers (clauses 36-38)

**Clauses 36** sets out the CMA's information gathering powers. **Clauses 37 to 38** set out enforcement powers and penalties. These are similar to the CMA's existing functions on mergers and anti-trust investigations. See Section 6.9 on delegated powers below for further discussion.

#### Subsidy control

This Bill does not reserve a role for the CMA with regard to UK subsidies policy. Theresa May's Government had proposed to appoint the CMA as the UK's independent state aid regulator, which would take on the functions previously carried out by the European Commission.[126] The Johnson Government withdrew the proposed regulations. The Government will decide on its policy on subsidies in the coming months (see Section 6.7 of this paper for further discussion).[127]

## 6.5 Northern Ireland Protocol (Part 5)

### Background

#### What is the Northern Ireland Protocol?

The Protocol on Ireland/Northern Ireland (the Protocol) is part of the Withdrawal Agreement (WA), which laid out the terms of the UK's exit from the EU. It sets out the relationship Northern Ireland will have with

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[126] Letter from Andrew Griffiths MP, Minister for Small Business, Consumers & Corporate Responsibility to the Chairman of the House of Lords EU Internal Market Sub-Committee, 28 March 2018

[127] BEIS, Government sets out plans for new approach to subsidy control, 9 September 2020

both the EU and Great Britain (the rest of the UK) at the end of transition period on 31 December 2020.

The principal purpose of the Protocol is to maintain the open border that currently exists between Ireland and Northern Ireland. Our briefing paper on the WA sets out in detail what is in the Protocol.

In summary, the Protocol will see Northern Ireland following EU Single Market rules for goods, apply the EU's customs code (its rules on how goods move in and out of the EU) and apply EU VAT rules, while still remaining part of the UK's customs territory and VAT area, and still able to benefit from UK trade agreements. This approach necessitates implementing new checks and controls for goods moving both from Great Britain to Northern Ireland but also, to a lesser extent, from Northern Ireland to Great Britain. There will also be a "consent mechanism", with the Northern Ireland Assembly given an opportunity to periodically vote on whether it wants this set of arrangements to continue.

**What is left to decide on the Protocol?**

The WA established a Joint Committee, which is "responsible for the implementation and application of [the] Agreement" (Article 164). Decisions need to be jointly agreed by the UK and EU. The Committee is co-chaired by the UK and the EU.

The WA did not set out the detail of all arrangements relating to the UK's withdrawal from the EU. It delegated some tasks to the Joint Committee to implement or decide upon. These include several decisions on how to implement the Protocol.

The most significant decisions the Committee has to undertake on the Protocol include:

- How to define at risk goods. Under the Protocol, goods moving from Great Britain to Northern Ireland will not be subject to customs duties (tariffs) unless they are considered "at risk" of subsequently of being moved into the EU (Article 5(1) NIP). See the state aid section for more information.
- Under what conditions fishery and aquaculture products can be brought into Northern Ireland, by NI-based boats, tariff free.
- The minimum and maximum levels of agricultural subsidies that can be given out in NI (if no decision can be made on this- these subsidies will become subject to EU state aid rules)
- How the UK will facilitate EU representatives being present during, and access information relating to, the UK's implementation of the Protocol.

Clause 43 of this Bill gives the Government powers to block state aid rules from applying to agricultural subsidies if it can't come to a decision in the Joint Committee (see the state aid section for more detail).

Although there is no direct provision for it in the Protocol, the UK Government proposed in a Command Paper in May 2020, that the Joint

Committee could make two further decisions to help ease trade between Great Britain and Northern Ireland:

- Remove the need for business in Northern Ireland to complete export or exit summary declarations (customs forms) – when they send goods to the rest of the UK; and
- Keep controls, and in particular physical checks on agri-food to a minimum, and actively seek to simplify and minimise electronic documentary requirements for this trade.
- Whether this can be done is explored in the next section**.**

Further details on all outstanding Protocol decisions can be found in Library CBP 'The UK-EU Withdrawal Agreement Joint Committee: functions and tasks'.

## Trade between Northern Ireland and Great Britain (Clauses 40-42)

### What is unfettered access?

One of the aims of the Bill, and the focus of Clause 41 is to provide "unfettered access to UK internal market for Northern Ireland goods".

The phase unfettered access was first used in agreement between the UK and EU in in December 2017, called the Joint Report. The report laid the foundations for what was to become the Northern Ireland Protocol.

The phrase is used in Article 6(1) of the Protocol, which states that:

> Nothing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market.

Unfettered market access is not defined in the Protocol. It is a general principle. However, Article 6(1) goes onto say that any EU law which would prohibit or restrict the exportation of goods:

> Shall only be applied to trade between Northern Ireland and other parts of the United Kingdom to the extent strictly required by any international obligations of the Union.

This is trying to ensure a narrow application of the EU's customs rules and other rules that apply to the movement of goods.

However, sitting alongside this principle of unfettered access is the fact that under Article 5(1) of the Protocol the EU's Customs Code applies to Northern Ireland. This means that the rules on how goods move in out of the EU, which include obligations such as producing customs declarations for goods, will apply to businesses in NI.

This principle of unfettered access only applies to goods moving from Northern Ireland to Great Britain, not in the other direction.

### What checks and procedures are required?

Export and exit summary declarations are required under the EU's Customs Code, which the Protocol states applies to Northern Ireland (Article 5(3) NIP).

The Government, however, believes that businesses in Northern Ireland shouldn't have to complete these declarations. It set out its approach on implementing the Protocol in a May 2020 Command Paper, saying there is "no requirement to submit export or exit summary declarations for goods leaving Northern Ireland for the rest of the UK."

The paper then goes onto qualify that statement by saying:

> Our view is that it **makes no sense** for Northern Ireland businesses to be required to complete an export or exit summary declaration as they send goods directly to the rest of the UK. Self-evidently goods being sent away from the Single Market cannot create a back door into it; and any such goods subsequently leaving the UK would be subject to both exit and entry checks anyway en route to their new destination. **We believe that this pragmatic approach is a sensible one and should be agreed between the UK and the EU in the Withdrawal Agreement Joint Committee. [Our emphasis]**

The Government seems to be tacitly acknowledging that while these declarations might be a requirement of EU law, the justification for these forms isn't met, and that the EU can be persuaded not to apply a strict interpretation of the law (i.e. the Customs Code).

The Northern Ireland Affairs Committee report on unfettered access argues it is not in the UK's gift to waive the need for these forms:

> Customs formalities cannot be waived by the UK unilaterally, such as the requirement for export declarations or exit summary declarations on goods leaving Northern Ireland, because those declarations inform the customs authorities that goods are to be taken out of the EU's customs territory.[128]

As the customs code applicable to Northern Ireland is a piece of EU law, it seems that it would be for the EU to decide if such a waiver could be made. While the UK could request such a waiver, it may not be something the Joint Committee can decide. Rather it would be a decision of the EU subject to its own internal procedures, if it was minded to make such a change.

As well as customs checks the UK Government acknowledges in the Command Paper that some checks on agri-food moving from Great Britain to Northern Ireland will be required. It goes on to say that the process and frequency of checks required will need to be discussed with the EU in the Joint Committee "within the context of the provision in the Protocol that both parties must use their 'best endeavours' to avoid controls at Northern Ireland ports as far as possible"[129].

Article 6 (2) NIP does state that the two sides "shall use their best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom, in accordance with applicable legislation and taking into account their respective regulatory regimes as well as the implementation thereof". This is the rationale the Government uses

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[128] NIAC, Unfettered Access: Customs Arrangements in Northern Ireland after Brexit', 14 July 2020, para 58.

[129] Cabinet Office, 'The UK's Approach to the Northern Ireland Protocol', May 2020.

to argue that the Joint Committee should be able to decide on waiving some checks and procedures.

The EU's laws on checks on agri-food are contained in Annex 2 of the Protocol and will apply to Northern Ireland (Article 5(4) NIP). Therefore, it again seems likely that the EU would need to decide if it will change the application and/or interpretation of these laws in order to avoid checks.

**How does the Bill affect these checks?**

Clause 40 places a duty on appropriate authorities to have "special regard" for several matters when exercising their duties in relation to the Northern Ireland Protocol (NIP), or in relation to the movement of goods within the UK.

The matters authorities should have special regard for are:

- a. the need to maintain Northern Ireland's integral place in the UK's internal market;
- b. the need to respect Northern Ireland's place as a part of the UK's customs territory; and,
- c. the need to facilitate the flow of goods between Great Britain and Northern Ireland.

This is a general principle to be applied by the authorities across the UK. In and of itself has little direct effect on the implementation of the Protocol.

**Clause 41**

Clause 41(1) restricts UK authorities from using their powers after the transition period in a way that might result in the introduction of checks, controls or administrative processes for goods moving from Northern Ireland to Great Britain.

This power is being introduced, according to the Explanatory Notes, to help ensure that Northern Ireland will benefit from unfettered market for goods in Great Britain, the principle enshrined in Article 6(1) of the Protocol.

Clause 41(2) provides for 3 scenarios where authorities *can* implement new checks and processes if they are necessary for

- ensuring access to GB for qualified Northern Ireland goods (see commentary on Clause 11 in section 6.1 for more details);
- where goods have been declared for a voluntary customs procedure; and
- to secure compliance with, or to give effect to, any international obligation or arrangement to which the UK is a party (whenever the UK becomes a party to it).

This last scenario will ensure that the customs system in Northern Ireland can be adapted to implement the obligations arising from, for example, new free trade agreements the UK enters and existing agreements such as the Withdrawal Agreement.

However, while Clause 41(2) says checks can be implemented to meet the UK's international obligations, subsection (2)(b) has the effect of preventing checks being implemented where regulations have been adopted under clause 42 or 43 (see next section), and where these regulations are inconsistent with international obligations as permitted by clause 45.

Clause 45 allows certain clauses of this Bill- but not including Clause 41, to take effect even if they breach domestic or international law relevant to the exercise of the powers in those clauses.

Clause 41(4)(a) defines an "NI-GB" check, control or administrative process as "one applicable to the direct movement of qualifying Northern Ireland goods from Northern Ireland to Great Britain".

Clause 41(5) is a Henry VIII power that empowers Ministers by regulation, to amend Clause 41 so that it can apply "to a type of movement to which it already applies (whether that type of movement is direct movement **or another type of movement provided for by regulations under this subsection**)".

These two sub-sections would together give Ministers a broad power to define different movements where they could block authorities from implementing checks.

However, as the powers under these clauses do not have the protection of Clause 45, this suggests that the power under Clause 41(5) would not be used to make significant changes to Northern Ireland's import regime.

That notwithstanding, the fact that Clause 41 allows UK authorities to block the introductions of checks and controls for goods moving from GB to NI Government, acknowledges that under ordinary circumstances these authorities ought to be implementing them.

**Clause 42**

Clause 42(1) gives a power to a Minister to make regulations to change how exit procedures for goods, or a description of goods, operate when moving from Northern Ireland to Great Britain.

Clause 42(2) says this power can apply to "any exit procedure that is applicable by virtue of the Northern Ireland Protocol or otherwise", so it would apply to customs checks as well as checks on agri-food and live animals, for example.

Clause 42(3) sets out two considerations for the Minister to take into account when exercising this power:

- (a) the need for Northern Ireland goods to enjoy unfettered access to the rest of the United Kingdom, and
- (b) the need to maintain and strengthen the integrity and smooth operation of the internal market in the United Kingdom.

Both considerations are, to some extent, acknowledged in the Protocol.

Unfettered access, as previously explained, is a principle acknowledged in Article 6(1).

Article 6(2) says the EU and the UK should have "regard to Northern Ireland's integral place in the United Kingdom's internal market"; and that EU and the UK "shall use their best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom". However, this should be done "in accordance with applicable legislation and taking into account their respective regulatory regimes".

The Joint Committee is tasked with keeping the rules on goods exiting NI "under constant review and shall adopt appropriate recommendations with a view to avoiding controls at the ports and airports of Northern Ireland to the extent possible".

This accommodation, as with the principle of unfettered access, is limited by the fact that the EU's Customs Code and certain Single Market goods regulations apply to Northern Ireland. The broad powers in this Clause, therefore to disapply and modify exit procedures, and state whether these procedures are applicable or not (42(4)) is incompatible with the Protocol.

This incompatibility with the Protocol is acknowledged in Clause 42(5) of the Bill, which states

> Such provision may include provision for rights, powers, liabilities, obligations, restrictions, remedies and procedures that would otherwise apply, as a result of relevant international or domestic law, not to be recognised, available, enforced, allowed or followed.

This is the second example in this Bill, where it is explicitly acknowledged that Ministers are being gifted a power that can be wielded despite obligations in international agreements the UK has freely entered into, that are ratified by Parliament, and obligations in domestic laws passed by Parliament.

Taken together, Clause 41 and 42 are inconsistent and incompatible with the Protocol and Withdrawal Agreement, as well as the domestic legislation that implements them.

**Checks on goods from Great Britain to Northern Ireland**

None of the powers in clauses 41 and 42 empower Ministers to change the arrangements for goods moving from Great Britain to Northern Ireland.

Under the Protocol, goods moving from Great Britain to Northern Ireland will not be subject to customs duties (tariffs) unless they are considered "at risk" of subsequently of being moved into the EU (Article 5(1) NIP). Article 5(2) NIP sets out broad parameters for what goods might be considered at risk, but empowers the Joint Committee to make a final decision on the definition by the end of the transition period.

The default scenario, if the Joint Committee cannot make a decision, is that all goods would be considered at risk, and potentially subject to tariffs (what tariffs will apply to different categories of goods will be decided in the future relationship agreement, if there is one).

The Financial Times has reported that this Autumn's Finance Bill could be used to "overwrite" the parts of the Protocol "covering the payment of tariffs on goods entering the region". It would be the UK authorities – HMRC – that would collect tariffs on at risk goods, and so there would be scope for the Government to affect this process (if the Government is again willing to renege on its international legal obligations).

## State aid (Clauses 43 to 44)

**Box 5: What is state aid?**

When a business enjoys government financial support in any form it has an advantage above its competitors. Such support could include tax reliefs, local authority grants, access to buying public assets below the market price, and many more. These support measures are known collectively as state aid in the EU. If such government support has a potential to distort competition and trade between EU Member States, it is prohibited under the Treaties of the EU.

However, governments may use state aid to intervene in their national economies and promote certain policies like regional economic development, research and innovation or investment in low carbon technologies. EU state aid rules limit the volume and form of such support.

Member States' authorities notify the European Commission of their planned state aid measures. This function is presently performed in the UK by the Foreign Secretary via the UK Mission in Brussels.

The Commission has strong powers to assess and declare whether state aid is compliant with EU law. It may also enforce stringent 'claw-back' mechanisms when aid is deemed unlawful.

The current UK Government generally refers to a **'subsidy regime'** or '**subsidy controls**' rather than state aid when discussing its proposals for a future domestic regime.

For more information see the State aid section of the Library CBP 'The UK-EU future relationship negotiations: Level playing field'.

### What state aid rules will apply to the UK after the transition period?

The UK had no specific legislation for state aid when it was a member state, as the EU rules applied directly. These rules continue to apply during the transition period. There is no legislation in force or before Parliament that sets out what will happen to the UK's subsidy regime after the transition period ends. State aid has proven to be a point of contention in the UK-EU negotiations on the future relationship. The two sides have different visions of what the UK's future regime should look like.

The UK has proposed that it would introduce its own regime of subsidy control but does not want the involvement of the European Commission or the CJEU.

The Government stated that it would broadly follow WTO rules on subsidies, but that the future relationship agreement should include reciprocal commitments for transparency on the award of subsidies which go beyond the requirements set out in the WTO-SCM Agreement. Both parties should notify each other every two years on subsidies granted to goods or services.

The EU in their negotiating directives set out that the future relationship agreement should ensure:

> "the application of Union State aid rules to and in the United Kingdom," and further that the UK creates "an independent, adequately resourced enforcement authority with effective powers to enforce the applicable rules which would work in close cooperation with the European Commission".

The directives call for disputes about the application of the state aid rules to be subject to dispute resolution. The text also includes a provision to ensure that UK courts apply state aid rules and make preliminary references to the CJEU.

The EU has called on the UK to publish more detailed plans for its subsidy regime.

On 9 September, a BEIS press release stated that the UK will follow World Trade Organisation (WTO) rules from 2021, with more details given before the end of the year:

> Guidance will be published before the end of the year for public authorities which explains the WTO rules, and any commitments on subsidies agreed through the UK's free trade agreements. There will also be further legislation to remove redundant EU state aid rules from the statute book at the end of the transition period, providing the necessary legal certainty for businesses.

WTO rules on subsidies apply only to goods and not services unlike EU state aid rules.[130]

Clause 48 of this Bill reserves to the UK Parliament the exclusive ability to legislate for a subsidy control regime. The Explanatory Note of this Bill states that the future UK subsidy control regime will be subject to Article 10 of the Protocol on Ireland/ Northern Ireland of the Withdrawal Agreement "whilst it applies to the UK".[131]

The Government could still change their approach to achieve an agreement with the EU on the future relationship.

For more information see the State Aid section of the Library CBP 'The UK-EU future relationship negotiations: Level playing field'.

**What does the Northern Ireland Protocol say about state aid?**

Article 10(1) of the Protocol states that EU state aid law shall apply to the United Kingdom "in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol."

Article 10 retains the powers of the European Commission to enforce state aid rules, but only with respect to NI and EU trade. The Commission will keep the UK "fully and regularly informed" of the progress and outcomes of its assessment procedures (Article 10(3)).

The phrase "measures which affect that trade between Northern Ireland and the Union" in Article 10(1), means that state aid rules would not apply solely to business activity in Northern Ireland, but could be applied to aid given to businesses and individuals in Great Britain.

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[130] For more details on the WTO subsidy rules see Commons Briefing 'The UK-EU future relationship negotiations: Level playing field', Box 3.

[131] UK Internal Market Bill: Explanatory Notes, para 72

State aid law experts George Peretz QC & Alfred Artley explain:

> EU state aid rules do not simply bite upon acts of the devolved and local government bodies in Northern Ireland, and those measures adopted by the UK government that are Northern Ireland-specific; rather they also catch all-UK measures (or measures affecting only part of the UK), whatever UK authority takes those measures, as long as they meet the test of 'affect[ing] that trade … which is subject to [the] Protocol.'[132]

**Box 6: Agricultural subsidies in Northern Ireland**

In terms of **agricultural subsidies** in Northern Ireland, full details of the new regime are still not known. The Direct Payments to Farmers (Legislative Continuity) Act 2020 provides a legal basis for direct payments to be made for the 2020 claim year. This was required because Article 137 of the Withdrawal Agreement disapplied the CAP Direct Payments Regulation for the UK in 2020. This would have meant that there was no legal basis for farmers to receive direct payments (such as the basic payment scheme, or BPS) in 2020. The Direct Payment Act therefore provides for the EU legislation governing the CAP direct payment schemes for claim year 2020 to be brought into domestic law. The Act applies to the whole UK.

The Agriculture Bill 2019-21, currently before Parliament, would provide the Northern Ireland Department for Agriculture, Environment and Rural Affairs (DAERA) with powers to extend the basic payment scheme beyond 2020, as well as make modifications to it. Agriculture policy is devolved and DAERA consulted in 2018 on possible future agricultural support arrangements. This was during the period when there was no functioning Northern Ireland Executive; now that it has been restored, decisions about any future changes to agricultural support would be expected to be taken by Northern Ireland Ministers

### Agricultural subsidies

Agricultural subsidies in Northern Ireland will not be subject to state aid rules, as long as both the UK and EU can decide through the Joint Committee (JC) the minimum and maximum levels of support allowed (Article 10(2) and Annex 6 of the Protocol). The JC will need make further decisions to adjust these levels to take account of changes in the EU's Multiannual Financial Framework (MFF). If the JC cannot make this initial decision, or a new one within a year of a new MFF being agreed, agricultural subsidies in NI will no longer be exempt from the state aid rules.

### What powers does the EU have to enforce state aid rules under the Withdrawal Agreement?

Article 12(1) makes clear that the UK is responsible for implementing EU rules that apply to NI including state aid.

However, Article 12(4) NIP states that for certain parts of the Protocol, including the provisions on state aid, that the EU institutions retain their powers of supervision and enforcement:

> the **institutions, bodies, offices, and agencies of the Union shall** in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom **have the powers conferred upon them by Union law**. **In particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties**

[132] 'State aid under the Northern Ireland Protocol', Tax Journal, 15 May 2020.

> **in this respect.** The second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect. [Our emphasis]

In short, this means that the Commission and the CJEU retain their powers of oversight that they have under EU state aid law.

To enable the exercise of these powers in the UK, Article 12(5) NIP states that

> Acts of the institutions, bodies, offices, and agencies of the Union […] **shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States**.

In addition to these provisions in the Protocol, the main body of the Withdrawal Agreement, in Article 4(1), states the same principle:

> 1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.

Article 4 also mandates that the UK will ensure its courts can disapply domestic law that is inconsistent or incompatible with this principle – Article 4(2), as well as the Courts having due regard to relevant European Court of Justice case law when they interpret the Withdrawal Agreement – Article 4(5).

This principle of the Withdrawal Agreement producing the same legal effects in UK law was effected through section 7A of the European Union (Withdrawal Agreement) Act 2020.

**How does this Bill change the application of the Protocol in UK law?**

**Clause 43** of the Bill gives the Secretary of State (SoS) an enabling power to make regulations that can interpret Article 10 of the Protocol, and further disapply and modify its effects.

Clause 43(2) not only allows the SoS to make regulations concerning the interpretation and modification of the application of Article 10, but to disapplying it entirely.

Clause 43(3) gives some examples of what this power could be used for, these examples include:

- not recovering aid
- excluding aid granted to persons in respect of activities outside Northern Ireland
- Preventing Article 10 from being interpreted—
  - in accordance with case law of the European Court; and
  - in accordance with EU laws, regulations, directives and decisions that would otherwise be binding on the UK.

While the use of these regulations could nullify any aspect of the state aid rules in Article 10, they seem to be aimed at heading off two scenarios in particular:

- Ensuring that any agricultural subsidies regime in Northern Ireland will not be subject to state aid restrictions, regardless of the outcome of the Joint Committee decision; and
- Narrowing the application of EU state aid rules to only activities in Northern Ireland, so blocking the application of state aid rules to any subsidies made in Great Britain.

Allowing the SoS to create regulations to reinterpret and disapply Article 10, and the examples listed in clause 43(3) would be in direct contravention of the relevant Articles mentioned above in the Protocol, the Withdrawal Agreement and the EU (Withdrawal) Act 2018 (as amended). Or, to put it more simply, the creation and exercise of these powers would be illegal under domestic and international law.

In order to allow the SoS to do this, Clause 45 empowers Ministers to override both international and domestic law. More details are given in the next section.

Like **clause 42**, clause 43 is similar to a Henry VIII power, but arguably with wider consequences. See section 6.8 Delegated Powers for more information.

**Notification of state aid (Clause 44)**

The Bill makes one other provision on state aid. **Clause 44** states that only the Secretary of State may notify the European Commission of state aid or proposed state aid, and give information about it, if this is required by Article 10 of the Protocol. As explained in the section on What is state aid, it is already the Foreign Secretary's role to notify the Commission of state aid, so this Clause simply maintains that function.

The Explanatory Notes, however, state that "the Secretary of State will be subject to Regulations made under clause 43(1) when interpreting Article 10".

This implies that a Minister could use the regulations in 43(1) to curtail the situations when the Secretary of State (SoS) could notify the EU of state aid or give information. For example, it could potentially include not allowing the SoS to notify aid given to companies in Great Britain, which would be consistent with the aims of Clause 43(1).

## Compatibility with international or domestic law (Clause 45)

### How is the Withdrawal Agreement & NI Protocol enacted in Domestic Law?

The Northern Ireland Protocol is an integral part of the Withdrawal Agreement as set out in Article 182 of the Agreement.

Article 4 of the Withdrawal Agreement requires the UK to ensure that directly applicable provisions of the treaty (and anything done under it) are given 'the same legal effects' in UK law as they would have in EU law and in the law of Member States. It says:

> 1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.

> Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
>
> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.

This part of the Withdrawal Agreement is given effect by section 7A of the EU (Withdrawal) Act 2018 (as amended). Section 7A gives supremacy and direct effect to the relevant provisions of the Withdrawal Agreement (and any EU law rendered applicable to the UK by the Withdrawal Agreement) in much the same way as the EU Treaties were granted supremacy and direct effect by the European Communities Act 1972, when the UK was a Member State.

Section 8C of the EU (Withdrawal) Act 2018, implements the Protocol into domestic law. Little of what is set out in the Protocol is reproduced in the Section. Instead, most of the Protocol is enacted by giving a Minister a very broad enabling power to make regulations, including regulations that have the same powers as primary legislation, including amending the Act itself (a Henry VIII power).

Article 5 of the Withdrawal Agreement, on good faith, states that the EU and UK with faithfully enact the measures to fulfil their obligations arising from the Agreement:

> The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement.
>
> They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.

**What changes does this Bill make?**

Clause 45 deals with the incompatibility with domestic law and international law that might arise from the inclusion and exercise of powers under clauses 42 and 43.

It does this through a series of extraordinary measures that build upon one another.

Clause 45(1) is a notwithstanding clause, and states that the following provisions of the Bill will be regarded as legally effective notwithstanding any incompatibility or inconsistency with "*any* relevant international or domestic law":

- (a) section 42;
- (b) any regulations made under section 42(1);
- (c) section 43;
- (d) any regulations made under section 43(1);
- (e) this section;

- (f) any other provision of this Act so far as relating to the provisions in
- paragraphs (a) to (e).
- Clause 45(1) underlines the fact that Clauses 42 and 43 authorise Ministers to breach their international legal obligations under the Protocol.

Further protection for the powers in Clauses 42 and 43 is given by Clause 45(2)(a) which states that "regulations under section 42(1) or 43(1) are not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic law".

Subclauses 45 (2) (b-d) and 45(3) pick apart the foundations of how the Withdrawal Agreement is given supremacy and direct effect in domestic legislation through the EU (Withdrawal) Act 2018.

They do this by:

- Clause 45(2)(b) in effect stops the powers and effect of section 7A of the European Union (Withdrawal) Act 2018 from being available in domestic law "so far and for as long as they are incompatible or inconsistent with" the parts of the Bill listed in Clause 45(1).
- Clause 45(2)(c) disapplies section 7C of the EU (Withdrawal) Act 2018, on the interpretation of any future agreement. This has the effect of ensuring that the powers to make regulations under clauses 42 and 43 remain valid.
- Clause 45(2)(d) states instead that the interpretation of the Withdrawal Agreement should not be incompatible or inconsistent with Clause 45
- 45(3) amends section 7A of the 2018 Act to include reference to this Clause 45(1).

Clause 45(4) defines the phrase "relevant international or domestic law" found in 45(1) as including the following:

- (a) provisions of the Northern Ireland Protocol;
- (b) other provisions in the Withdrawal Agreement;
- (c) other EU law or international law;
- (d) provisions of the European Communities Act 1972;
- (e) provisions of the *EU (Withdrawal) Act 2018*; or
- (f) retained EU law or separation agreement law.
- (g) any other legislation, convention or rule of international or domestic law whatsoever, including any order, judgment or decision of the European Court or of any other court or tribunal

This is an extraordinarily broad range of domestic and international law, underlining the fact the Government is seeking to ensure it is near impossible to challenge the use of Ministerial powers under Clauses 42 and 43.

- UK domestic courts would still have to give full force and effect to these regulations made even if those regulations were in conflict with all the laws listed in 45(4).

45(4)(g), depending on how the courts interpret this provision, potentially precludes domestic judicial review of section 42 or 43. A restriction of this kind is known as an "ouster clause". For a more detailed examination of to what extent Clause 45 limits judicial review see section 6.8 on delegated powers -subsection on 'ouster reviews'

For a fuller examination of the UK's obligations relating to international law see section 3.6 Compatibility with International Law.

**Commentary on Clause 45 and its wider impact**

Mark Elliott, Professor of Public Law at the University of Cambridge described Clause 45 as "constitutional dynamite".[133]

Kevin Armstrong, Professor of EU Law at Cambridge states that "certain provisions of the Internal Market Bill drive a coach and horses through the UK's implementation of the Withdrawal Agreement" and that "it is hard to see how this can avoid embroiling the Supreme Court in another round of Brexit litigation."[134]

Brandon Lewis, the Secretary of State for Northern Ireland, responding to a question in a Commons debate on 8 September said the Bill "does break international law in a very specific and limited way"[135]. Mr Lewis argued there were precedents for the UK overriding treaty obligations, citing the Finance Act 2013.

The Channel 4 'Factcheck' website, argues that the 2013 Act was not a precedent, as

> At the time MPs passed that bill, it was the government's expressly stated position that the legislation did not violate our international obligations. That's a different proposition to the one Mr Lewis is making to MPs now by asking them to pass a law that knowingly violates an international treaty.[136]

On 10 September, the Prime Minister, Boris Johnson, described the measures as a "legal safety net" in the House of Commons:

> My job is to uphold the integrity of the UK, but also to protect the Northern Irish peace process and the Good Friday agreement. To do that, we need a legal safety net to protect our country against extreme or irrational interpretations of the protocol that could lead to a border down the Irish sea in a way that I believe, and I think Members around the House believe, would be prejudicial to the interests of the Good Friday agreement and prejudicial to the interests of peace in our country. That has to be our priority.[137]

133 Mark Elliott, 'The Internal Market Bill – A perfect constitutional storm', Public Law for Everyone, 9 September 2020.
134 K. A. Armstrong, 'Can the UK Breach the Withdrawal Agreement and Get Away With It? – the United Kingdom Internal Market Bill', U.K. Const. L. Blog, 9th September 2019.
135 HC Deb 8 September 2020 Vol 679 c509
136 Chanel 4 Factcheck, 'Government rationale for a precedent to break international law doesn't seem to add up', 9 September 2020.
137 HC Deb 10 September 2020 Vol 679 c618

## Further provision in connection with the Northern Ireland Protocol (Clause 50)

Article 18 of the Protocol on Northern Ireland includes a "democratic consent" mechanism. Under this arrangement the Northern Ireland Assembly is invited to approve the continued force and effect of Articles 5-10 of the Protocol at four (or if cross-community support exists, eight) -yearly intervals.

Articles 5-10 are the parts of the Protocol that cover trade in goods in and out of Northern Ireland; VAT, electricity markets and state aid.

Article 18 of the NIP is supplemented by a Unilateral Declaration made by the UK Government, concerning the democratic consent mechanism. If the Northern Ireland Assembly actively withholds consent for the Protocol (in a vote on a motion) the provisions lapse two years after the relevant review period. For example, if the Assembly were to reject the Protocol shortly before the end of the first review period (e.g. in November 2024) the provisions would lapse at the end of 2026.

At the moment, the EU (Withdrawal) Act 2018 (as amended) makes provision to ensure that the Protocol can be implemented in domestic law. Clause 50 provides for those domestic legislative arrangements to lapse if the main obligations in the treaty themselves lapse.

## Reaction to Northern Ireland Protocol clauses

### Northern Ireland & Ireland

Reacting to the publication of the Internal Market Bill, Steve Aitken, the Ulster Unionist Party leader, said it did "not provide much comfort for those of us who consider the EU Withdrawal Agreement an awful document which attacks the foundations of the Belfast Agreement, undermines the integrity of the United Kingdom and leaves us in economic limbo".[138]

Four Northern Ireland political parties – Sinn Féin, the SDLP, the Alliance and the Greens – also wrote to the Prime Minister and Michel Barnier. Their letter said it was "entirely unacceptable" that the UK Government "would seek to abandon these safeguards and mitigations, which we believe would amount to a serious betrayal of an existing international treaty".[139]

The DUP's chief whip at Westminster, Sammy Wilson, believed it was not "beyond the bounds of possibility that Northern Ireland is simply being cynically used in negotiations with the EU between now and the end of the year".[140]

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[138] Steve Aitken MLA, "Instead of political grandstanding we all need to push for a level playing field across the United Kingdom", Ulster Unionist Party website, 9 September 2020.

[139] Jayne McCormack, "Brexit: No 10 must honour NI protocol, say Remain parties", BBC News online, 7 September 2020.

[140] *Ibid*

Simon Coveney, the Irish Minister for Foreign Affairs, said Northern Ireland was "too fragile and too important to be used as a pawn in the broader Brexit negotiations".[141]

Micheál Martin, the Irish Taoiseach, also expressed "very strong concerns" about the Internal Market Bill in a telephone call to the Prime Minister. He later told Sky News that the clauses relating to the Northern Ireland Protocol had eroded "trust" in the UK Government.[142]

In an interview with BBC Northern Ireland, Declan Morgan, the Lord Chief Justice of Northern Ireland, said where:

> there is an indication that a state intends to break international law, it seems to me that it may have a domestic effect on the confidence that the public may have in the legal system generally.[143]

### European Union

On 9 September 2020, Ursula von der Leyen, the President of the European Commission, tweeted that she was "very concerned" about the UK Government's stated "intentions to breach the Withdrawal Agreement". She said: "This would break international law and undermines trust. Pacta sunt servanda = the foundation of prosperous future relations."

And on 10 September, European Commission Vice-President Maroš Šefčovič said that if it became law, the Internal Market Bill "would constitute an extremely serious violation of the Withdrawal Agreement and of international law".

In a statement following an extraordinary meeting of the EU-UK Joint Committee in London, Mr Šefčovič said the:

> EU does not accept the argument that the aim of the draft Bill is to protect the Good Friday (Belfast) Agreement. In fact, it is of the view that it does the opposite.

Mr Šefčovič called on the UK Government to withdraw the Northern Ireland Protocol clauses from the Internal Market Bill "in the shortest time possible and in any case by the end of the month". He added that:

> by putting forward this Bill, the UK has seriously damaged trust between the EU and the UK. It is now up to the UK government to re-establish that trust.
>
> He reminded the UK government that the Withdrawal Agreement contains a number of mechanisms and legal remedies to address violations of the legal obligations contained in the text – which the European Union will not be shy in using.[144]

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141 *Ibid*

142 *Belfast Telegraph*, "Irish Government warns of serious implications of changes to Brexit deal", 9 September 2020.

143 RTÉ online, "Northern Ireland judge criticises UK plan to break law", 9 September 2020.

144 European Commission, "Statement by the European Commission following the extraordinary meeting of the EU-UK Joint Committee", 10 September 2020.

## 6.6 Financial Assistance (Part 6)

Part 6 of the Bill deals with new powers to provide financial assistance. **Clause 46** would create a new power for ministers to provide money to anyone in order to promote economic development, provide infrastructure, support cultural or sporting activities, or support educational activities or exchanges. **Clause 47** gives examples of the forms that this financial assistance can take, and clarifies that the new power does not replace or limit any other existing powers.

### Powers to spend money

In general, the Government can only spend money if it has been authorised to do so by legislation. Chapter 33 of Erskine May states that it is "a general principle of constitutional propriety that new functions…which are to be financed out of 'money to be provided by Parliament'…should be authorised by specific Act".[145]

This authorisation can be found in various pieces of legislation, which contain varying levels of regulation as to how money can be spent. At one end of the scale, the Government's existing power to provide financial assistance to businesses relies on sections 7 and 8 of the *Industrial Development Act 1982*. The Act places strict conditions on how this assistance must be provided – in particular, such assistance must be likely to benefit the economy of the UK (or any part of it), it must be in the national interest that assistance be provided in the way proposed, and it must not be possible for the assistance to be provided in any other way. The Act also sets a limit of £12 billion (which can be increased, with the Treasury's consent, to a final total of £16 billion) on the total amount of assistance that can be provided to all recipients.[146]

By contrast, **clause 46** of this new Bill would give the Government broad powers to provide assistance, and these powers would be subject to very few restrictions. Under clause 46(2), any measure that is likely to contribute (either directly or indirectly) to economic development would be allowed, which would cover an extremely wide range of activities. There is also no limit on the amount of assistance that could be provided.

### Replacing EU funding

The press release accompanying the Bill makes it clear that these clauses are intended to "allow the UK Government to meet its commitments to deliver replacements for EU programmes". The purposes given in clause 46(1) match up reasonably well with some of the existing EU funding schemes operating in the UK; for example, "promoting economic development" is the job of the European Regional Development Fund, and "international educational and training activities and exchanges" are covered by the Erasmus+ programme.[147]

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145 Erskine May, paragraph 33.11, Legislative authorisation for objects of expenditure

146 Other financial assistance powers can be found in a number of different Acts – some of the more recent ones include the *Railways Act 2005*, the *Housing and Regeneration Act 2008*, and the *Localism Act 2011*.

147 For more information on EU funds, see the Library's briefing paper UK funding from the EU.

The spending powers provided by the Bill are therefore meant to replace the EU's powers to distribute money. The fact that these powers are to be exercised by Government ministers in Westminster may also imply a change in the way that these funds are distributed.

When distributing its structural funds, the EU gives money to Managing Authorities (Government departments in England, and the devolved administrations in Scotland, Wales and Northern Ireland), which then spend that money. The powers provided under this Bill would give Government ministers the responsibility to distribute money, but they say nothing about whether the devolved administrations would continue to have similar responsibility in their respective nations. The press release says that the Bill "will also enable **the UK government** to provide financial assistance to Scotland, Wales, and Northern Ireland with new powers to spend taxpayers' money previously administered by the EU"[148] (emphasis added), which implies that the funding provided by these powers would come directly from Westminster rather than going to the devolved administrations.

This has long been a contentious point in discussions about the design of the forthcoming UK Shared Prosperity Fund (see chapter 3 of the Library's briefing paper on the Fund for more details). As was covered by this Library Insight post in June 2019, the UK Government can legally spend directly in Scotland (and other devolved administrations) even on devolved areas, but doing so would be controversial in the context of the devolution settlement. See also section 4.4 of this briefing about the Bill's impact on devolution.

Under the EU state aid regime, the new Government's powers to provide financial assistance would be subject to state aid controls (see Box 5 above). The Government has said that an independent UK subsidy control regime based on World Trade Organisation (WTO) rules on trade-distorting subsidies will replace the EU state aid rules at the end of the transition period. It is yet to be seen how the new powers to provide financial assistance will be affected by the UK subsidy regime.

## 6.7 Changes to devolved competence

The Bill proposes to change the "competence" of the three devolved legislatures. It does this in two key ways: by creating a new "reserved matter" and by protecting the Act itself from modification by devolved legislatures.

### Reservation of subsidy control (Clause 48)

The UK Government considers subsidy control to be a reserved matter which means that the issue is the responsibility of the UK Parliament alone and the devolved legislatures will not be able to legislate in this area. However, the existing devolution settlements do not include any general reservation for subsidy control. The devolved Administrations disagree with this approach and dispute the division of competences with the UK Government with regard to subsidies. Section 4.4 of this

[148] Gov.uk, Bill introduced to protect jobs and trade across the whole of the United Kingdom, 8 September 2020

briefing provides further discussion of the devolved authorities' responses.

**Clause 48** reserves to the UK Parliament the exclusive ability to legislate for a subsidy control regime after the EU state aid rules cease to apply. Clause 48 does this by modifying Schedule 5 of the *Scotland Act 1998*, Schedule 2 of the *Northern Ireland Act 1998* and Schedule 7A of the *Government of Wales Act 2006*.

These are the three Schedules that list the "reserved matters" for the Scottish and Welsh devolution settlements, and the "excepted matters" for the Northern Ireland devolution settlement. The new reserved/excepted matter is the same for all three devolved settlements, reserving:

> Regulation of the provision of subsidies which are or may be distortive or harmful by a public authority to persons supplying goods or services in the course of a business.

The "special reservation" in each devolution statute defines what constitutes a subsidy and what will be deemed a "distortive or harmful" subsidy for the purpose of the future UK regime:

> "Subsidy" includes assistance provided to a person directly or indirectly by way of income or price support, grant, loan, guarantee, indemnity, the provision of goods or services and any other kind of assistance, whether financial or otherwise and whether actual or contingent.
>
> A subsidy is "distortive or harmful" if it distorts competition between, or otherwise causes harm or injury to, persons supplying goods or services in the course of a business, whether or not those persons are established in the United Kingdom.[149]

This definition would allow the UK Government to introduce rules which would limit "harmful" public support measures affecting businesses established both in the UK and outside it.

The Government has said that it will set up a new, independent subsidy regime based on the WTO rules on restricting harmful subsidies. In the coming months, it will hold a consultation on whether the UK should adopt subsidy rules that go further than its international commitments. Among such commitments is the Withdrawal Agreement and its Protocol on Ireland/ Northern Ireland (in particular Article 10 on state aid) and any provisions on state aid/ subsidies in the future relationship agreement that the UK is negotiating with the EU.[150]

With regard to the future domestic rules on subsidies the Government said on 9 September 2020:

> A UK-wide subsidy control regime will ensure that subsidies do not unduly distort competition within the UK's internal market. For example, it will ensure that a Scottish firm is not unfairly undercut or disadvantaged by a subsidy decision in England, and vice-versa. It will also mean that big companies cannot play off

[149] UK Internal Market Bill, clause 48, subsections (1), (2) and (3)

[150] The Explanatory Notes to this Bill add that the future UK subsidy control regime will be subject to Article 10 of the Protocol on Ireland/ Northern Ireland of the Withdrawal Agreement "whilst it applies to the UK". UK Internal Market Bill: Explanatory Notes, para 72

> the regions, nations, towns, and cities of the UK against each other in a competition to extract taxpayer subsidy – therefore ensuring a dynamic and competitive market economy throughout the UK.[151]

For further information on state aid see Section 6.5 of this briefing.

### Protecting the Act against modification (Clause 49)

This clause modifies Schedule 4 of the *Scotland Act 1998*, Schedule 7B of the *Government of Wales Act 2006* and section 7 of the *Northern Ireland Act 1998*. These are the respective parts of the devolution Acts that "entrench" certain enactments.

An entrenched enactment is one that is protected against modification. This means the devolved legislatures cannot change those provisions even if, and to the extent that, the substance of proposed legislation concerns devolved subject matters.

Clause 49 makes "the UK Internal Market Act 2020" a protected enactment. This means the Scottish and Welsh Parliaments and the Northern Ireland Assembly cannot change or repeal the arrangements in this Bill if it is passed.

This is not the first time, in the context of Brexit legislation, that the UK Government has sought to protect Westminster statutes from modification. For example, the *EU (Withdrawal) Act 2018* was made a protected enactment in 2018. This rendered most of the Scottish Parliament's proposed "Continuity Bill" beyond competence in 2018.[152]

## 6.8 Delegated Powers

The Delegated Powers Memorandum to the Bill identifies 11 distinct delegated powers. These fall into the following categories.

### Henry VIII powers

Seven of the powers allow other provisions in the *UK Internal Market Act* (which would be an Act of Parliament) to be amended by regulations, which makes them "Henry VIII powers". Each of these is listed in the following table:

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[151] HM Government, Government sets out plans for new approach to subsidy control, 9 September 2020

[152] See *UK Withdrawal from the European Union (Legal Contniuity) Scotland Bill – Reference by the Attorney General and Advocate General for Scotland* [2018] UKSC 64

**Henry VIII clauses in the Internal Market Bill (as introduced)**

| Clause | What section can it modify? | What does it relate to? |
|---|---|---|
| 3(7) | 3(4) | The list of statutory requirements within the scope of the mutual recognition principle applying to goods |
| 6(5) | 6(3) | The list of relevant requirements for the purposes of the non-discrimination principle applying to goods |
| 8(7) | 8(6) | The list of legitimate aims for the purposes of indirect discrimination in relation to goods |
| 10(2) | Schedule 1 | The list of exclusions of certain areas of regulation from the application of the market access principles |
| 16(2) | Schedule 2 | Four lists setting out types of services which are wholly or partly exempt from service rules |
| 19(7) | 19(6) | The list of legitimate aims for the purposes of indirect discrimination in relation to services |
| 41(5) | 41 | Allows amendment of the type of "movement" of goods to which the section is deemed to apply |

### Powers to modify lists of requirements, legitimate aims, exclusions or exemptions

The first six of the Henry VIII powers are to be exercised by the Secretary of State, subject to the affirmative procedure. This means both Houses of Parliament must approve a draft statutory instrument before a Minister can make any desired changes to the relevant sections.[153]

With each of these six powers, there is a statutory list of "things" (be they requirements, conditions, legitimate aims, exclusions or exemptions). These lists underpin different aspects of how the UK internal market is intended to operate, including the scope and application of its legal principles. The regulation-making powers allow the Secretary of State to add, remove, or modify the entries on each list.

In the case of the powers under clauses 3 and 6, there is a duty to consult the devolved authorities (Scottish Ministers, Welsh Ministers and Department for the Economy in Northern Ireland) prior to making any regulations. No such consultation duty applies for the other powers.

### Power to change the type of "movement" of goods to which clause 41 applies

Clause 41 concerns the access of Northern Ireland goods to other parts of the UK internal market (and is discussed in section 6.5 of this paper). The clause relies on a default definition of "movement" of goods when prohibiting certain types of "check, control or administrative process". A Minister of the Crown may, by affirmative regulations, modify clause 41 so that its rules apply not (just) to "direct movement" (which is the

[153] Regulations under section 16 can, within 3 months of the provisions coming into force, be made under the made affirmative procedure instead.

default) but also, or instead, to other types of movement, as defined by the regulations.

## Powers to override international law/judicial review

Two of the delegated powers (also discussed in sections 3.6 and 6.5 of this paper) in the Bill are concerned specifically with the implementation of the Withdrawal Agreement's Protocol on Northern Ireland. Clauses 42 and 43 are similar to conventional Henry VIII powers, but achieve the result by overriding rather than modifying inconsistent legislation.[154] Regulations under these powers can (within the first six months of the provisions coming into force) be made under the made affirmative procedure, and thereafter must be made under the draft affirmative procedure.

However, these powers to make regulations are arguably of greater constitutional significance than normal Henry VIII powers. This is because of how the Bill says that they can be used and how they interact with both international law and domestic grounds of judicial review.

**Delegated powers that purport to be able to override international law**

| Clause | What does the provision allow the Secretary of State/Minister of the Crown to do? |
|---|---|
| 42(1) | Make provision disapplying or modifying export declarations and other exit procedures (in relation to movement of goods from Northern Ireland to GB) |
| 43(1) | Make provision about the interpretation, application and effect of Article 10 of the Northern Ireland Protocol (which concerns state aid rules) |

**Do these provisions override international law and domestic implementing legislation?**

**Clause 45** would require UK domestic courts to give full force and effect to regulations made under sections 42 and 43 even if those regulations are in conflict with:

- provisions of the Northern Ireland Protocol;
- other provisions in the Withdrawal Agreement;
- other EU law or international law;
- provisions of the *European Communities Act 1972*;
- provisions of the *EU (Withdrawal) Act 2018*; or
- retained EU law or separation agreement law.

• This statutory instruction is diametrically opposed to the UK's obligation, under Article 4 of the Withdrawal Agreement, to produce "the same legal effects" in UK law as the Withdrawal Agreement produces in the law of the Union and that of EU member states. It effectively disapplies, in the context of these regulations, sections 7A

[154] Jack Williams of Monckton Chambers calls them "Charles I" powers because they are so much broader than conventional Henry VIII powers. See Jack Williams, Clause 45 of Internal Market Bill: a striking attempt to exclude judicial review, *EU Relations Law Blog*, 10 September 2020

and 7C of the *EU (Withdrawal) Act 2018*, a provision that Parliament approved as part of the *EU (Withdrawal Agreement) Act 2020* in January of this year.

- The UK Government has already admitted that this provision would place the UK in breach of its international obligations.[155] This legislative provision, if enacted, represents a failure to implement Article 4 of the Withdrawal Agreement. Moreover, any exercise of the powers conferred by clauses 42 and 43 would risk putting the UK in breach of the Northern Ireland Protocol itself.

### An ouster clause: precluding judicial review

Clause 45 goes even further than this, however. Subsection 45(4)(g) provides that section 42 and 43 (and regulations made under them) have full force and effect even if they are incompatible with (emphasis added):

> **any other legislation, convention or rule of** international or **domestic law whatsoever**, including any order, judgment or decision of the European Court or of any other court or tribunal.

- Depending on how the courts interpret this provision, it potentially precludes domestic judicial review of section 42 or 43. A restriction of this kind is known as an "ouster clause", because it seeks to eliminate the supervisory jurisdiction of the Senior Courts. It prevents, or seeks to prevent, the judicial branch from policing the legal limits of executive power. The requirements that Ministers exercise their powers:

- in a way that is not irrational or *Wednesbury* unreasonable;
- for a proper purpose; and
- (only) taking into account relevant considerations,

are all "rules of domestic law" arising out of "judgment[s] or decision[s]" of a "court or tribunal" and therefore may be caught by the provision.

Professor Mark Elliott, Professor of Public Law at the University of Cambridge, has said of clause 45:

> the reference to 'any … rule of … domestic law' is also striking and can certainly be read as an attempt to exclude any judicial review on normal domestic law or human rights grounds of regulations made under clauses 42 and 43.[156]

However, Elliott maintains it is not clear whether the courts would accept this as a successful "ouster". He offers two possible reasons why judicial review might be preserved:

- Firstly, the courts might construe the measure narrowly (along similar lines to the *Anisminic* case) and maintain that "regulations that breach [judicial review principles] are not 'made under' the relevant clauses".[157]

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155 HC Deb 8 September 2020 Vol 679 c509

156 Mark Elliott, The Internal Market Bill - A Perfect Constitutional Storm, *Public Law for Everyone*, 9 September 2020

157 *Anisminic Ltd. v Foreign Compensation Commission* [1968] UKHL 6

- Secondly, drawing on judicial comments in the recent *Privacy International* case, the courts might "be prepared to say that Parliament *cannot* entirely oust judicial review".[158]

## Other delegated powers

The other two delegated powers in the Bill are neither Henry VIII powers nor can they be used in a way that is contrary to international law.

**Other delegated powers in the UK Internal Market Bill**

| Clause | What power does it delegate? |
|---|---|
| 37(6) and (8) | Requires the Competition and Markets Authority to prepare and publish a statement of policy regarding enforcement notices. CMA may subsequently revise and then republish the statement. |
| 38(4) | Allows the Secretary of State to specify in regulations the maximum penalties for a failure to comply with an enforcement notice. |

### Statement of enforcement notices policy (Clause 37)

The delegated power in clause 37 (also discussed I section 6.4 of the paper) is the only one in the Bill not to be delegated to a Minister. The Competition and Markets Authority must prepare and publish a policy statement in connection with enforcement notices to be issued under clause 36 of the Bill. There is also a duty to consult "persons [the CMA] considers appropriate" before making or revising the statement.

This policy statement is not a statutory instrument. It therefore does not require any Parliamentary approval. However, it does have legal effects: when deciding whether to impose a penalty on a legal person, the CMA must "have regard to" the statement of policy that was in force at the time a breach of an enforcement notice occurred.

### Setting of maximum penalties (Clause 38)

Fines for failing to comply with, or obstructing or causing undue delay in complying with, a section 36 enforcement notice, are capped by clause 38(6) at £30,000 for fixed penalties and at £15,000 per day for those calculated at a daily rate.

However, the Secretary of State may, by regulations, impose lower limits by way of regulations, exercising his powers under clause 38(4-5). Before making regulations the Secretary of State must consult the CMA and any other "appropriate" persons.

These regulations can be made subject to the negative resolution procedure, meaning that they can have effect subject to annulment by either House of Parliament. Clause 52(7) also allows them to be made as part of an affirmative instrument. For example, the Government might seek to make these regulations at the same time, and as part of the same statutory instrument, as regulations made under other powers in the *UK Internal Market Act 2020*.

[158] Mark Elliott, The Internal Market Bill - A Perfect Constitutional Storm, *Public Law for Everyone*, 9 September 2020; *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22

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