HOUSE OF LORDS Library Briefing

United Kingdom Internal Market Bill
HL Bill 135 of 2019–21

On 19 October 2020, the second reading of the United Kingdom Internal Market Bill is scheduled to take place in the House of Lords.

The existing UK internal market is supported by EU law that still has effect through the operation of the transition period. When the transition period ends on 31 December 2020, the Government has argued that legislation is required to ensure the internal market continues to function smoothly. For example, the bill includes provision for market access principles of mutual recognition and non-discrimination for goods and services.

The bill also seeks to ensure unfettered access for qualifying Northern Ireland goods to the rest of the UK market. The Government argues the EU is seeking to implement aspects of the Northern Ireland Protocol in ways that were not originally intended, in order to gain leverage in the future relationship negotiations. To create what the Government calls a "legal safety net" against this, clauses 44, 45 and 57 of the bill seek to give ministers the power to unilaterally interpret, modify the application of or disapply parts of the Northern Ireland Protocol, notwithstanding their obligations under relevant international and domestic law. These provisions have been controversial.

The Scottish and Welsh Governments have objected to the bill's proposals and argue that the bill goes against the devolution settlements. The Scottish Parliament has voted to withhold legislative consent for the bill, and the Welsh Government has recommended that the Senedd Cymru withholds consent. The Northern Ireland Assembly has indicated that it wants to oppose the bill.

The EU has launched infringement proceedings against the UK, claiming that the bill breaches the UK's obligation under article 5 of the withdrawal agreement to act in good faith in implementing the agreement.

In response to concerns about clauses 44, 45 and 47 breaching the UK's international obligations, the Government made an amendment at committee stage to introduce a 'break glass' provision so these clauses could not come into force without the Commons' approval. Government amendments on judicial review would allow a three-month window for claims to be brought against regulations made under clauses 44 and 45; the courts could make a declaration of incompatibility with the Human Rights Act 1998 in respect of such regulations, but could not strike them down. The Government also made technical and drafting amendments. No opposition amendments were made to the bill.

Table of Contents

Charley Coleman
Nicola Newson

9 October 2020

Table of Contents

---

1. What is the United Kingdom Internal Market Bill?

The United Kingdom Internal Market Bill is a government bill introduced in the House of Commons on 9 September 2020. It was considered in committee of the whole house over four days (15, 16, 21, and 22 September 2020) and had its report stage on 29 September 2020. It passed third reading on 29 September 2020. It is scheduled to have its second reading in the House of Lords on 19 October 2020.

- **Parts 1 to 4** make provision for the continuation of the UK's single market when the transition period ends on 31 December 2020. The bill would provide for the 'market access principles' of mutual recognition and non-discrimination.
- **Part 5** contains provisions that seek to give ministers the power to unilaterally interpret, modify the application of or disapply parts of the Northern Ireland Protocol, notwithstanding their obligations under relevant international and domestic law.
- **Part 6** would provide for financial assistance powers to the UK Government to allow them to provide financial assistance to people and projects in all four constituent parts of the UK.
- **Part 7** includes provisions which would make the regulation of subsidies a matter reserved to the UK Parliament. It also includes provisions that would mean the 'notwithstanding' clauses in part 5 could not come into force without the approval of the House of Commons and the tabling of a take-note debate in the House of Lords.

This House of Lords Library Briefing presents background information on the bill and its purposes; an overview of its clauses and commentary on its provisions. It also includes a summary of the bill's second reading, committee stage and report stage in the House of Commons.

2. What would parts 1 to 4 of the bill do?

2.1 Summary

Parts 1 to 4 concern the UK internal market:

- **Part 1** would introduce the market access principles of mutual recognition and non-discrimination (both direct and indirect) for goods. Broadly, this would mean that goods that meet the relevant requirements for sale in one part of the UK should be able to be sold in any other part of the UK free from any relevant requirements that would otherwise apply to the sale in the other part. The non-discrimination principle would mean that a relevant requirement would have no effect in a part of the UK receiving a good from another part, if the requirement directly

or indirectly discriminated against the incoming good.

- **Part 2** would provide similar rules for the mutual recognition of authorisation requirements by service regulators, and for non-discrimination in the regulation of services.
- **Part 3** would provide for the automatic recognition of professional qualifications in regulated professions. It would also allow for an alternative 'manual' approach to recognition.
- The Competition and Markets Authority (CMA) has been chosen by the Government to undertake monitoring of the UK internal market, through a new Office for the Internal Market which is to be established as part of the CMA. **Part 4** of the bill provides the CMA with powers for a series of reporting, advisory and monitoring functions, supported by information-gathering powers.

Exclusions would apply to the application of these rules. The clauses and exclusions are discussed in more detail in the sections below. Clause 11 (modifications in connection with the Northern Ireland Protocol) is discussed in section 3.2 of this briefing.

Additional provisions relating to the reservation of subsidy powers are contained in clause 50. Provisions granting the UK Government powers to provide financial assistance in all parts of the UK, in pursuit of a range of objectives, are contained in clauses 48 and 49.

2.2 Why are the provisions being put forward?

The existing UK internal market is supported by EU law that still has effect through the operation of the transition period. The Government has said it would need to legislate to "guarantee the continued seamless functioning" of the UK's internal market after the transition period ends.[1] Both the Scottish and Welsh Governments have expressed disagreement with the UK Government's legislative approach. They have indicated their desire to continue the UK's internal market through the use of common frameworks and not through the provisions of the bill. The common frameworks programme is a joint exercise by the UK Government and devolved administrations to reach agreement on policy frameworks to replace those that were governed by EU law during the UK's membership and the transition period, and that intersect with devolved competence.[2] The relationship between the bill and the common frameworks programme is discussed in section 2.5 of this briefing.

[1] Department for Business, Energy and Industrial Strategy, *UK Internal Market*, July 2020, CP278, para 3.
[2] Cabinet Office, *Frameworks Analysis 2020: Breakdown of Areas of EU Law that Intersect with Devolved Competence in Scotland, Wales and Northern Ireland*, September 2020, p 4.

The Government has argued that there is a risk that regulatory barriers between the UK nations could emerge.[3] This could block or inhibit trade in goods and impact services. The Government cited the example of construction, arguing that, for example, divergence between Scotland and England in building regulations could make it challenging for firms to plan construction projects across the UK.[4] It also argued that the UK's internal market would make the UK more attractive to foreign investment and "play a vital role" in supporting the Government's "long-term global trade ambitions, ensuring the UK as a whole is capable of competing on the international stage".[5] Speaking during the bill's committee stage in the House of Commons, Paul Scully, Parliamentary Under Secretary of State for Business, Energy and Industrial Strategy, said that the Government had made a "firm commitment to maintaining the UK's high standards across the board".[6] He argued that these high standards would continue in each part of the UK.[7]

The United Kingdom Internal Market Bill provides for the legislative implementation of many of the proposals in its white paper. The Government published its white paper on the internal market of the UK on 16 July 2020.[8] It ran a consultation on its proposals and published its response on 9 September 2020.[9]

2.3 Clause by clause

Part 1: Goods (clauses 1 to 15)

This section provides an overview of the provisions contained in part 1 of the bill.

Part 1 contains the bill's provisions on the operation of the UK single market as it pertains to goods. The clauses set out the principles of mutual recognition and non-discrimination for goods, alongside exclusions from these principles.[10]

Clause 1(1) sets out the purpose of part 1 stating that it "promotes the continued functioning of the internal market for goods in the United

---

[3] Department for Business, Energy and Industrial Strategy, *UK Internal Market*, July 2020, CP278, para 16.
[4] ibid, para 17.
[5] ibid, para 45.
[6] HC *Hansard*, 22 September 2020, col 895
[7] ibid.
[8] Department for Business, Energy and Industrial Strategy, *UK Internal Market*, July 2020, CP278.
[9] Department for Business, Energy and Industrial Strategy, *Government Response to the Consultation on the UK Internal Market*, 9 September 2020.
[10] Market access for services is covered by part 2 of the bill.

Kingdom by establishing the United Kingdom market access principles".

It would establish that the market access principles are the mutual recognition principle for goods and the non-discrimination principle for goods. The principles would have no direct legal effect except as provided for by part 1 of the bill.[11]

Mutual recognition: Goods

Clauses 2 to 4 set out the provisions on the mutual recognition of goods principle.

Clause 2(1) defines mutual recognition as the principle that goods which:

> (a) have been produced in, or imported into, one part of the United Kingdom ("the originating part"), and
> (b) can be sold there without contravening any relevant requirements that would apply to their sale,
>
> should be able to be sold in any other part of the United Kingdom, free from any relevant requirements that would otherwise apply to the sale.

The bill's explanatory notes give the example of a packet of crisps:

> […] 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.[12]

Clause 3 defines what a relevant requirement is, as referred to by clause 2. A relevant requirement is a statutory requirement that falls within the scope of the mutual recognition principle and which "prohibits the sale of the goods or, in the case of an obligation or condition, results in their sale being prohibited if it is not complied with" (unless excluded from being a relevant requirement by any provision of part 1).[13] A statutory requirement is defined by clause 3(11) as:

> [A]n obligation, a condition or a prohibition (however described) imposed by legislation (including legislation imposing mandatory terms into contracts for the sale of goods).

[11] Clause 1(3).
[12] Explanatory Notes, para 11.
[13] Clause 3(2)(a).

A statutory requirement would be in scope of the mutual recognition principle if it related to one or more of the following:

(a) characteristics of the goods themselves (such as their nature, composition, age, quality or performance);
(b) any matter connected with the presentation of the goods (such as the name or description applied to them or their packaging, labelling, lot marking or date-stamping);
(c) any matter connected with the production of the goods or anything from which they are made or is involved in their production, including the place at which, or the circumstances in which, production or any step in production took place;
(d) any matter relating to the identification or tracing of an animal (such as marking, tagging or micro-chipping or the keeping of particular records);
(e) the inspection, assessment, registration, certification, approval or, authorisation of the goods or any other similar dealing with them;
(f) documentation or information that must be produced or recorded, kept, accompany the goods or be submitted to an authority;
(g) anything not falling within paragraphs (a) to (f) which must (or must not) be done to, or in relation to, the goods before they are allowed to be sold.[14]

Clause 3 was amended at the bill's report stage in the House of Commons to introduce references to "manner of sale requirements" (see section 7.3 of this briefing for further information).

Clause 3 also sets out that the list of requirements in scope of mutual recognition (clause 3(3)) may be amended via regulations made by the secretary of state to "add, vary or remove" paragraphs.[15] Regulations would be made by the affirmative procedure and the secretary of state would have to consult Scottish and Welsh ministers, and the Department for the Economy in Northern Ireland before making them.[16]

Amongst its provisions, clause 4 provides that statutory requirements that related to the sale of goods in a given part of the UK would not be considered relevant requirements if they existed the day before the day on which clause 4 entered into force. The bill's explanatory notes state that therefore "in effect this means that statutory requirements meeting these conditions will be excluded from the scope of mutual recognition and remain

[14] Clause 3(3).
[15] Clause 3(8).
[16] Clause 3(9) and (10).

unaffected by it".[17] A "substantive change" after this point would bring the requirement in scope of the mutual recognition principle.[18]

Non-discrimination: Goods

Clauses 5 to 9 relate to the non-discrimination principle for goods.

Clause 5(1) defines the principle as the principle that:

> […] the sale of goods in one part of the United Kingdom should not be affected by relevant requirements that directly or indirectly discriminate against goods that have a relevant connection with another part of the United Kingdom.

Clause 5(3) would provide that a relevant requirement would have no effect in a part of the UK receiving a good from another part, if the requirement directly or indirectly discriminated against the incoming good.

Clause 5(4) defines a relevant connection with a part of the UK if the good or any of its components:[19]

(a) are produced in that part,
(b) are produced by a business based in that part, or
(c) come from, or pass through, that part before reaching the destination part.

Clause 6 defines relevant requirements for the purposes of the non-discrimination principle for goods. For example, clause 6(3) provides that a statutory provision[20] is in scope of the non-discrimination principle if it relates to one or more of the following:

(a) the circumstances or manner in which goods are sold (such as where, when, by whom, to whom, or the price or other terms on which they may be sold);
(b) the transportation, storage, handling or display of goods;
(c) the inspection, assessment, registration, certification, approval or authorisation of the goods or any similar dealing with them;
(d) the conduct or regulation of businesses that engage in the sale of certain goods or types of goods.

[17] Explanatory Notes, para 114.
[18] ibid, para 15.
[19] Clause 5(5) provides further definitions of "components" and where a business is "based".
[20] Under clause 6(8) "statutory provision" would mean a provision contained in legislation.

Clause 6 also sets out that the list of requirements in scope of the non-discrimination principle (clause 6(3)) may be amended via regulations made by the secretary of state to "add, vary or remove" paragraphs.[21] Regulations would be made by the affirmative procedure and the secretary of state would have to consult Scottish and Welsh ministers, and the Department for the Economy in Northern Ireland before making them.[22]

The bill makes a distinction between direct discrimination and indirect discrimination. The explanatory notes explain direct and indirect discrimination as follows:

- Direct discrimination is where an incoming good receives unfavourable treatment compared to a local good. For example, a requirement that incoming produce has to be chilled but local produce does not.[23]
- Indirect discrimination is where incoming goods are not directly discriminated against, but where regulation disadvantages incoming goods and distorts the market. If this distorted the market and was not justified, then it would not be enforceable due to being indirect discrimination.[24]

Clause 7 makes provisions related to direct discrimination. Amongst its provisions, clause 7(1) sets out that a relevant requirement would directly discriminate against incoming goods:

> if, for the reason that the goods have the relevant connection with the originating part, the requirement applies to, or in relation to, the incoming goods in a way—
>
> (a) in which it does not or would not apply to local goods, and
> (b) that puts the incoming goods at a disadvantage compared to local goods.

Clause 8 makes provisions related to indirect discrimination. Amongst its provisions, clause 8(1) sets out that a relevant requirement would indirectly discriminate against incoming goods if:

> (a) it does not directly discriminate against the goods,
> (b) it applies to, or in relation to, the incoming goods in a way that puts them at a disadvantage,
> (c) it has an adverse market effect, and

[21] Clause 6(5).
[22] Clause 6(6) and (7).
[23] Explanatory Notes, para 19.
[24] ibid, para 21.

(d) it cannot reasonably be considered a necessary means of achieving a legitimate aim.

A legitimate aim would mean one or a combination of the following aims:

(a) the protection of the life or health of humans, animals or plants;
(b) the protection of public safety or security.[25]

The list of aims could be amended by regulations made by the secretary of state, subject to the affirmative procedure. Clause 8(9) provides that clause 8(1)(d) should be determined with regard to (in particular):

(a) the effects of the requirement in all the circumstances, and
(b) the availability of alternative means of achieving the aim in question.

Clause 9 excludes certain statutory provisions from the principle of non-discrimination if they existed the day before the non-discrimination principle came into force.[26]

Exclusions from market access principles

Clause 10 introduces schedule 1. Schedule 1 of the bill contains exclusions to the application of the market access principles.

For example, tax, rates, duties and similar charges are specifically excluded from the market access principles by schedule 1(11). Other exclusions include certain sanitary and phytosanitary measures that relate to serious threats to animal and plant health.

Not all exclusions in schedule 1 apply to both mutual recognition and non-discrimination. For example, the following areas would be excluded from the scope of mutual recognition but included within the scope of non-discrimination:

- Chemicals in relation to authorisations and restrictions under the UK Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) regime,
- Food or feed deemed to pose a threat to the health of humans or animals,
- Pesticides in relation to the authorisation for sale of products and approval of active substances, and

[25] Clause 8(6).
[26] Explanatory Notes, para 25.

- Fertilisers in relation to safeguarding measures taken by each administration.[27]

Schedule 1 can be amended by regulations made by the secretary of state, subject to the affirmative procedure.[28]

Supplementary

Clause 11 provides for market access principles to apply to qualifying goods from Northern Ireland. This is discussed in further detail in section 3.2 of this briefing.

Clause 12 was added to the bill at its committee stage in the House of Commons. It would provide for the secretary of state to issue guidance on the operation of the UK's internal market or on the effect of any provision of part 1. Speaking to the new clause at committee, Paul Scully indicated that the guidance "[…] will explain how the internal market principles operate within the current regimes and how they apply to the product in scope".[29] He argued that the clause was "necessary to support traders and existing regulatory authorities to understand, comply with and benefit from the principles and provisions in this bill".[30]

Clause 13 would provide that:

> Nothing in this Part prevents goods produced in or imported into a part of the United Kingdom from being sold in another part of the United Kingdom if (apart from this Part) the sale complies with any requirements applicable in that other part of the United Kingdom (or there are no such requirements).

Clause 14 defines the term 'sale of goods' for the purposes of part 1. Amongst its provisions, this would mean that a "sale":

> [E]xcludes sales which are not made in the course of a business or are made in the course of a business but only for the purpose of performing a public function. "Sale" will generally exclude sales made by public bodies or authorities, except where these sales are made for commercial purposes and not for the purpose of performing a public function (other than a function related to the carrying on of commercial activities). For example, the supply of medication by the NHS to a patient through a prescription would not be covered as it is

[27] Explanatory Notes, para 28.
[28] Clause 10(2) and (3).
[29] HC *Hansard*, 22 September 2020, col 895.
[30] ibid.

> a sale made by a public authority fulfilling a public function.[31]

By virtue of clause 14(5) and (6) sales would also include other forms of "supply-related" activities for the purposes of part 1.[32] For example, supply by way of:

> (a) barter or exchange,
> (b) the leasing or hiring out of goods, hire-purchase, or bailment of goods, (c) gift (or anything else done free of charge).[33]

Clause 15 provides interpretation of other expressions used in part 1. For example, providing a definition for "goods", whether goods have been "produced in" a part of the UK or whether they have been "imported into" a part of the UK.

House of Lords Delegated Powers and Regulatory Reform Committee

The House of Lords Delegated Powers and Regulatory Reform Committee have reported on the delegated powers in part 1 of the bill and recommended that, as drafted, they should be removed from the bill.

In its delegated powers memorandum[34] published ahead of the bill's consideration in the House of Commons, the Government said the power in clause 3(7) [now clause 3(8)] to allow it to amend clause 3(4) [now clause 3(3)][35] was required to:

> […] enable the secretary of state to act swiftly and change the list of statutory requirements that are in scope of the mutual recognition principle if it becomes apparent that the existing list does not effectively deliver on the objectives for the UK internal market for goods, including unfettered access for goods moving from NI to the rest of the UK.[36]

---

[31] Explanatory Notes, para 162.
[32] ibid, para 165.
[33] Clause 14(6).
[34] The Government have published a new memorandum ahead of the bill's stages in the House of Lords (dated 2 October 2020). This is substantively like the 8 September 2020 version. This section of the briefing references the version considered by the Delegated Powers and Regulatory Reform Committee.
[35] Clause 3(3) provides a list of things that would determine whether a statutory requirement would be in scope of the mutual recognition principle for goods.
[36] Department for Business, Energy and Industrial Strategy, *UK Internal Market Bill: Memorandum from the Department for Business, Energy and Industrial Strategy (BEIS) to the Delegated Powers and Regulatory Reform Committee*, 8 September 2020, para 21.

The Delegated Powers and Regulatory Reform Committee said it found this argument "unconvincing". It asserted that because clause 3(4) [now clause 3(3)] affected all administrations in the UK it should be for Parliament to correct it, should it be defective, rather than ministers.[37] It also argued that recent events, including Brexit and Covid-19, demonstrated that Parliament was capable of responding extremely swiftly with primary legislation. The committee also stated that the scope of clause 3(7) [now clause 3(8)] was not confined to emergencies. It described the Henry VIII power in clause 3(7) [now clause 3(8)] as inappropriate and said it should be removed from the bill.

Clause 6(3) sets out a list of things that would determine whether a statutory provision would be in scope of the non-discrimination principle for goods. Clause 6(5) allows for clause 6(3) to be modified by regulations. In its explanatory memorandum the Government argued that the power was necessary to "future-proof" the operation of the non-discrimination principle.[38] It also said it would allow the secretary of state to act swiftly to changes affecting the principle and to take action in response to business about how the measures affect them in practice.

The committee raised similar concerns about clause 6(5) that it raised about clause 3(7) [now clause 3(8)]. It also argued that being able to respond to the concerns of business would come "at the cost of allowing ministers to override primary legislation by statutory instrument".[39] The committee described the Henry VIII power in clause 6(5) as inappropriate and recommended that it was removed from the bill.

Clause 8 would allow for indirect discrimination against incoming goods in circumstances where a requirement could be considered a legitimate aim. A legitimate aim is defined by clause 8(6). This can be modified through regulations under clause 8(7). Clause 20 allows for similar exceptions for regulatory requirements that indirectly discriminate against service providers. Clause 20(7) allows for the meaning of a legitimate aim to be modified by regulations.

The committee cited the Government's argument that without clause 8(7) there was no way to change the meaning of legitimate aims.[40] The committee argued that further primary legislation could change it. As with previous

---

[37] House of Lords Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill*, 17 September 2020, HL Paper 130 of session 2019–21, para 10.
[38] Department for Business, Energy and Industrial Strategy, *UK Internal Market Bill: Memorandum from the Department for Business, Energy and Industrial Strategy (BEIS) to the Delegated Powers and Regulatory Reform Committee*, 8 September 2020, para 26.
[39] House of Lords Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill*, 17 September 2020, HL Paper 130 of session 2019–21, para 12(d).
[40] See: Department for Business, Energy and Industrial Strategy, *UK Internal Market Bill: Memorandum from the Department for Business, Energy and Industrial Strategy (BEIS) to the Delegated Powers and Regulatory Reform Committee*, 8 September 2020, para 33.

clauses, the Delegated Powers and Regulatory Reform Committee described the Henry VIII powers in clause 8(7) and clause 19(7) [now clause 20(7)] as "inappropriate" and argued that they should be removed from the bill.[41]

Clause 10(2) allows the secretary of state to make regulations amending schedule 1 (which sets out exclusions from market access principles). The committee argued, as with the other powers in the bill, that the Henry VIII power was inappropriate and should be removed.[42] It again disagreed with the Government that the power was required to allow the Government to act swiftly[43] and it also said that the power did not require urgency to be used.[44]

Part 2: Services (clauses 16 to 21)

This section provides an overview of the provisions contained in part 2 of the bill, that deal with services in the UK internal market.

The bill's explanatory notes state that the Provision of Services Regulations 2009 (the 2009 regulations)[45] created a "principles-based" framework for the regulation of services in the UK and that:

> Amongst other requirements, the 2009 regulations establish a principle that an authorisation to provide a service in any part of the UK applies to the whole of the UK (unless an overriding reason related to the public interest can be shown).[46]

The explanatory notes also explain that the bill would introduce similar rules "complementing those found in the 2009 regulations", with a focus on ensuring the continued free flow of services between the four constituent parts of the UK".[47] It argues that the changes are needed to ensure the continued functioning of the UK's internal market for services when the UK leaves the transition period at the end of December 2020.

---

[41] House of Lords Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill*, 17 September 2020, HL Paper 130 of session 2019–21, para 17.
[42] ibid, para 20.
[43] See: Department for Business, Energy and Industrial Strategy, *UK Internal Market Bill: Memorandum from the Department for Business, Energy and Industrial Strategy (BEIS) to the Delegated Powers and Regulatory Reform Committee*, 8 September 2020, para 38.
[44] House of Lords Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill*, 17 September 2020, HL Paper 130 of session 2019–21, para 19.
[45] The 2009 regulations transpose Directive 2006/123/EC on services in the internal market (the Services Directive) into UK law (*Explanatory Memorandum to the Provision of Services Regulations 2009*, para 2.1).
[46] Explanatory Notes, para 32.
[47] ibid, para 33.

Clauses 16 to 21 make provision for the principles of mutual recognition and non-discrimination to apply to the provision of services in the UK's internal market, subject to several conditions and some specified exclusions.

Clause 18 provides for the application of mutual recognition to authorisation requirements. An authorisation requirement is a legislative requirement that a service provider must have the permission of a regulator to supply services in a given part of the UK.[48] If a service provider is authorised in one part of the UK, authorisation requirements in another part would not apply to them were they to supply services to that part.[49] However, the provider needs to be authorised for the whole of that part of the UK, rather than, for example, a particular local authority area.[50] Similarly, mutual recognition would not apply to authorisations restricted to particular premises, locations or pieces of infrastructure.[51] Clause 18(4) allows for a derogation from mutual recognition "to the extent that the authorisation requirement in question can reasonably be justified as a response to a public health emergency".[52]

Clauses 19 and 20 make similar provisions about the application of the non-discrimination principle (direct and indirect) relating to regulatory requirements for the provision of services.

Amongst its provisions, clause 19 would provide that a regulatory requirement that directly discriminated against a service provider "is of no effect in relation to that service provider".[53] A regulatory requirement is a legislative requirement that a service provider needs to meet in order to supply particular services.[54] A regulatory requirement directly discriminates if:

(a) it has, or would have, the effect of treating the service provider less favourably than other service providers, and
(b) the reason for that less favourable treatment is the service provider's relevant connection, or lack of relevant connection, to a part of the United Kingdom.[55]

A regulatory requirement would not be taken to directly discriminate against a service provider "to the extent the requirement can reasonably be justified as a response to a public health emergency".[56]

---

[48] Clause 16(3).
[49] Clause 18(1).
[50] Explanatory Notes, para 188.
[51] Clause 18(3).
[52] Explanatory Notes, para 190.
[53] Clause 19(1).
[54] Clause 16(4).
[55] Clause 19(2). Clause 19(4) provides a definition of "relevant connection to a part of the United Kingdom" for the purposes of clause 19.
[56] Clause 19(3).

Clause 20 relates to indirect discrimination. Amongst its provisions clause 20 would provide that a regulatory requirement that indirectly discriminated against a service provider "is of no effect in relation to that service provider".[57] A regulatory requirement indirectly discriminates if:

(a) it does not directly discriminate (within the meaning of section 19),
(b) it applies to, or in relation to, the service provider in a way that puts the service provider at a disadvantage in the part of the United Kingdom in which the requirement applies,
(c) it has an adverse market effect, and
(d) it cannot reasonably be considered a necessary means of achieving a legitimate aim.[58]

Clause 20(3) provides that a service provider is put at a disadvantage if "it is made in any way more difficult, or less attractive, to provide services in that part than if the requirement did not apply".[59] Clause 20(4) provides for a definition of "adverse market effect".

A "legitimate aim" is defined as one of, or a combination of, the following:

(a) the protection of the life or health of humans, animals or plants;
(b) the protection of public safety or security;
(c) the efficient administration of justice.[60]

The application of clause 20(2)(d) would need to be determined in regard, in particular, to:

(a) the effects of the requirement in all the circumstances, and
(b) the availability of alternative means of achieving the aim in question.[61]

The list of legitimate aims may be amended by regulations made by the secretary of state, subject to the affirmative procedure.[62]

The provisions of part 2 are subject to some exceptions and exclusions. For example, clause 16(5) sets out examples which would not be considered authorisation requirements or regulatory requirements.

[57] Clause 20(1).
[58] Clause 20(2).
[59] Clause 20(3).
[60] Clause 20(6).
[61] Clause 20(9).
[62] Clause 20(7) and (8).

This includes:

> [A] requirement that—
>
> (i) is in force, or otherwise has effect, on the day before the day on which this section comes into force and has not been substantively changed after that day, or
> (ii) comes into force, or otherwise takes effect, on or after the day on which this section comes into force if it re-enacts or replicates (without substantive change) a legislative requirement in force or having effect immediately before that day;[63]

However, this is also subject to exceptions:

> Subsection (5)(c) does not exclude (and, accordingly, references to authorisation requirements do include) an authorisation requirement that applies in a part of the United Kingdom if, after the relevant day[64], a corresponding[65] authorisation requirement in another part of the United Kingdom is substantively changed.[66]

Schedule 2, introduced by clause 17, includes a list of services to which mutual recognition and/or non-discrimination would not apply. The explanatory notes explain that in practical terms this would "match the status quo in respect of services" which:

> (a) were out of scope of the 2009 regulations altogether;
> (b) use the current derogation to the mutual recognition rules in the 2009 regulations, which is not replicated in the Bill; or
> (c) were otherwise exempted from other parts of the 2009 regulations.[67]

Legal services would be exempted from the mutual recognition principle to recognise the "historic differences" between legal systems in different parts of the UK.[68]

Clause 17(2) would require the secretary of state to keep the contents of schedule 2 under review and would allow them to modify schedule 2 through regulations, subject to the affirmative procedure. However, within

---

[63] Clause 16(5)(c).
[64] "The "relevant day" is the day before the day on which this section comes into force" (clause 16(7)(a)).
[65] "An authorisation requirement corresponds to another authorisation requirement if it relates to the same, or substantially the same, services" (clause 16(7)(a)).
[66] Clause 16(6).
[67] Explanatory Notes, para 35.
[68] ibid, para 36.

the first three months of clause 17 being in force regulations could be made via the made affirmative procedure.[69]

House of Lords Delegated Powers and Regulatory Reform Committee

In its delegated powers memorandum the Government argued the power to amend schedule 2 in clause 16(2) [now clause 17(2)] was needed to reflect new service sectors and regulations that could arise in the future.[70] The power would give "regulatory certainty" to business by enabling the Government to modify schedule 2 accordingly. The Government argued the time-limited ability to use the made affirmative procedure was proposed to allow it to respond swiftly following the end of the transition period. The Government also stated that the process of listing services on this schedule was "very detailed" and of an administrative nature which was more appropriate in a schedule and updated in regulations.[71]

The House of Lords Delegated Powers and Regulatory Reform Committee disagreed with the Government. It argued that schedule 2 did not contain "the sort of minor, technical or administrative provision that makes it appropriate to be amended, perhaps frequently, by ministerial regulations".[72] It also argued that certainty could equally be provided by amending the schedule using primary legislation. The committee also said that "arguably" this would provide greater certainty "because regulations can be invalidated in the courts in ways that Acts of Parliament cannot be".[73] The committee recommended that the Henry VIII power in clause 16(2) [now clause 17(2)] was inappropriate and should be removed from the bill.

Part 3: Professional qualifications (clauses 22 to 27)

This section provides an overview of the provisions contained in part 3 of the bill.

Clauses 22 to 27 of the bill introduce provisions for a system for the recognition of professional qualifications across the UK internal market.

The bill's explanatory notes state that the effect of part 3 would be to allow a qualified professional to practise their profession in another part of the UK

---

[69] Clause 17(4).
[70] Department for Business, Energy and Industrial Strategy, *UK Internal Market Bill: Memorandum from the Department for Business, Energy and Industrial Strategy (BEIS) to the Delegated Powers and Regulatory Reform Committee*, 8 September 2020, para 47.
[71] ibid, para 48.
[72] House of Lords Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill*, 17 September 2020, HL Paper 130 of session 2019–21, para 23.
[73] ibid, para 24.

without the need to requalify.[74] Part 3 is only concerned with access to professions that are regulated by law.[75]

The explanatory notes argue that there is a risk that future divergence between the nations of the UK could increase the limitations on professionals working in different places. They state that "there is currently no overarching system or consistent approach for the recognition of professional qualifications between the nations making up the UK internal market".[76] They also state that the main objective of part 3 is to provide for an overarching system for the mutual recognition of professional qualifications across the UK.[77]

Clause 22(1) and (2) introduce the automatic recognition principle.[78] This means that an individual who is qualified to practise a profession in one of the four UK nations "will be automatically recognised in respect of the equivalent profession in another part of the UK, without needing to requalify".[79] However, the explanatory notes state that:

> 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.[80]

Clause 22(3) provides that UK residents would still need to comply with requirements such as continuous professional development when working in another part of the UK.[81]

Part 3 also provides for an alternative process for recognition, as set out in clause 24. The explanatory notes state that this would have to have legislative backing and be administered by the relevant professional regulator (or the UK Government or the devolved administration responsible for the profession if there is no such regulator).[82] Such a process would have to comply with principles set out in clause 24(4). For example, this includes the ability of the applicant to demonstrate the necessary knowledge and skills to the satisfaction of the regulatory body. This could be through a test or assessment.[83] However, the regulator would not have to offer a test "in effect […] where the gaps in the applicant's knowledge and skills are such

---

[74] Explanatory Notes, para 40.
[75] ibid, para 41.
[76] ibid, para 44.
[77] ibid, para 45.
[78] Clause 23 provides for definitions relevant to this, such as a "qualified" UK resident.
[79] Explanatory Notes, para 46.
[80] ibid.
[81] ibid, para 211.
[82] ibid, para 47.
[83] ibid, para 224.

that an individual assessment would be just as demanding as doing whatever would be needed for the applicant to obtain the qualifications or experience that are normally needed to access the profession".[84]

Clause 26 makes provision for equal treatment as regards professional qualifications:

> This clause provides that a UK resident practising a profession in a part of the UK with qualifications or experience obtained in another part of the UK, must be treated on the same basis, in respect of ongoing professional requirements, as a locally qualified professional.[85]

Part 4: Independent advice and monitoring (clauses 28 to 41)

This section provides an overview of the provisions contained in part 4 of the bill.

The Competition and Markets Authority (CMA) has been chosen by the Government to undertake monitoring of the UK internal market. Part 4 of the bill provides the CMA with powers for a series of reporting, advisory and monitoring functions, supported by information-gathering powers.

The Government will establish an Office for the Internal Market (OIM) within the CMA to carry out these responsibilities to ensure "that necessary functions are carried out with sufficient independence, impartiality and visibility".[86]

In a press release announcing the publication of the bill, the Government said that the reporting and monitoring role undertaken by the OIM would be "non-binding".[87] It said that if there was a dispute it would be for the UK Parliament and the devolved legislatures to determine how to respond to reports from the OIM:

> Where there is a matter of 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.[88]

---

[84] Explanatory Notes, para 225.
[85] ibid, 234.
[86] ibid, para 51.
[87] Office of the Secretary of State for Scotland et al, 'UK Internal Market Bill introduced today', 9 September 2020.
[88] ibid.

Clause 29 was added at the bill's Commons report stage (see section 7.3 of this briefing). The new clause would require the CMA to have regard to a new objective when carrying out its functions under part 4. The objective would be:

> […] to support, through the application of economic and other technical expertise, the effective operation of the internal market in the United Kingdom (with particular reference to the purposes of Parts 1, 2 and 3).[89]

Also added at report in the Commons were clause 30 and the corresponding schedule 3 (see section 7.3 of this briefing). Schedule 3 of the bill would make amendments to schedule 4 of the Business, Enterprise and Regulatory Reform Act 2013 to allow for the constitution of an OIM panel and OIM task groups. Clause 30 would allow the CMA to authorise such an OIM task group to "do anything required or authorised to be done by the CMA under this part (and such an authorisation may include authorisation to exercise the power conferred on the CMA by this subsection)".[90]

Clause 28 sets out which matters fall within the CMA's monitoring and reporting roles for the purposes of part 4 of the bill. This provides that regulatory provisions that apply to one or more, but not all, of the UK nations are in scope for the purposes of part 4 if the regulatory provision meets requirements set out in clause 28(2). The explanatory notes explain that "a regulatory provision is defined to cover relevant requirements for trade in goods and services, as well as the recognition of professional qualifications within the UK internal market".[91]

Clauses 31 to 34 provide the CMA with several reporting and review powers under different circumstances:

- **Clause 31** would allow the CMA, subject to conditions, to undertake reviews of matters it considers relevant in assessing or promoting the effective operation of the UK internal market.[92]
- **Clause 32** would allow the CMA, subject to conditions, to give advice or provide a report on a proposed regulatory provision at the request of a relevant national authority.[93]
- **Clause 33** would allow the CMA, subject to conditions, to

[89] Clause 29(2).
[90] Clause 30(1).
[91] Explanatory Notes, para 242.
[92] It would also provide a requirement for the CMA to produce annual reports. Every five years, it would have to report on the effectiveness of the operation of parts 1 to 3 of the bill.
[93] Defined by clause 41(6) as any of the following: the secretary of state, Scottish or Welsh ministers or a Northern Ireland department.

provide a report on the impact of a regulatory provision on the effective operation of the UK internal market, at the request of relevant national authority.

- **Clause 34** would allow the CMA, subject to conditions, to provide a report on the economic impact of a regulatory provision[94] that a relevant national authority considered was detrimental on the operation of the UK internal market.

In the case of clause 34, the CMA would be required to lay the report before both Houses of the UK Parliament, the Scottish Parliament, Senedd Cymru and the Northern Ireland Assembly. Clause 35 would require the responsible authority and the appropriate authority to make statements to the relevant parliament. Clause 37 would require the CMA to publish general advice on how it would expect to exercise its functions under clauses 31 to 34.

Clause 38 would provide the CMA with various information-gathering powers to assist in its role under clauses 31 to 34. It would have to prepare and publish a statement of policy in relation to enforcement notices given under clause 38.[95] Clause 39 would allow the CMA to impose penalties on people for not complying with requests under clause 38 or obstructing or delaying the CMA in certain circumstances under that clause.

Clause 40 provides for such penalties. The explanatory notes state that the provision "directly mirrors section 174 of the Enterprise Act 2002, ensuring consistency across the CMA's functions".[96] The explanatory notes also explain that:

> Subsections (2) to (4) state that the penalty can be a single, fixed amount, a daily rate or both.[97] In any of these cases, the secretary of state must specify maximum amounts through secondary legislation not exceeding £30,000 for a fixed amount and £15,000 for the daily rate. As stated in subsection (7), the secretary of state must consult the CMA and any other relevant persons before deciding on the maximum amounts and daily rates.[98]

Such regulations would be subject to the negative procedure.[99]

---

[94] Which was passed or made after the day on which clause 34 came into force.
[95] Clause 39(6).
[96] Explanatory Notes, para 286.
[97] In the case of penalties under clause 39(2), the penalty must be a fixed amount (clause 40(3)).
[98] Explanatory Notes, para 287.
[99] Clause 40(7).

2.4 Devolution and legislative consent

Legislative consent

The Sewel Convention states that the UK Parliament will not normally legislate on devolved matters without the consent of the devolved parliaments.[100] Whilst the convention can be found within the Scotland Act 2016 and the Wales Act 2017, the Supreme Court has concluded that the Sewel Convention does not give rise to a legally enforceable obligation.[101] The UK Parliament has legislated in the absence of legislative consent, for example the Scottish Government withheld its consent to the European Union (Withdrawal) Act 2018.[102]

The explanatory notes to the bill explain that as the bill contains provisions which cover devolved subject areas, the Government is seeking legislative consent for the clauses in the bill.[103]

Both the Scottish and Welsh Governments have recommended that their respective legislatures withhold consent for the United Kingdom Internal Market Bill. On 7 October 2020, the Scottish Parliament agreed to a motion not to consent to the United Kingdom Internal Market Bill by 90 votes to 28.[104] At the time of writing, the Northern Ireland Executive had not published a legislative consent memorandum on the bill. However, on 22 September 2020, the Northern Ireland Assembly agreed to a motion which referenced the bill and stated that:

> That this Assembly recognises that a trade deal between the United Kingdom and the European Union is critical in protecting the interests of everyone living in Northern Ireland; expresses deep concerns about the UK Government's approach to negotiations and the terms of the United Kingdom Internal Market Bill; rejects any argument that the Bill is necessary to protect the Good Friday Agreement; further rejects the unilateral move to undermine the authority of the devolved institutions contained in this Bill; affirms its commitment to upholding international law; mandates the First Minister and deputy First Minister to take a formal position opposing the UK Internal Market Bill; and calls on the Prime Minister to respect the will of the people of Northern Ireland and the principles of devolution.[105]

---

[100] UK Parliament website, 'Glossary: Sewel Convention', accessed 6 October 2020.
[101] Supreme Court, *Press Summary—R (On the Application of Miller and Another)(Respondents) v Secretary of State for Exiting the European Union (Appellant)*, 24 January 2017.
[102] Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, September 2020, para 22.
[103] Explanatory Notes, para 92.
[104] Scottish Parliament, *Official Report*, 7 October 2020.
[105] Northern Ireland Assembly, *Official Report*, 22 September 2020.

The Scottish Government has characterised the provisions as ones that "would fundamentally overwrite, and undermine, a material part of the system of devolution that has operated in the UK for more than two decades and has been endorsed by the people of Scotland".[106]

The Scottish Government has argued that the bill is not necessary and does not reflect Scottish interests and concerns. It has asserted that the bill undermines the devolution settlement. It has also expressed concern that the bill would not achieve its stated aim and could lead to deregulation:

> Contrary to its stated intention, it risks more uncertainty and confusion for business and consumers, and encourages harmful deregulation without democratic accountability or proper Parliamentary scrutiny. In addition, the Bill explicitly gives UK ministers wide new powers in currently devolved areas of economic support and allows for breaches of international law.[107]

The Welsh Government has said that it does not accept that the bill's measures are "in any way" proportionate to the objectives as stated by the UK Government.[108] Whilst it has stated it is not opposed to the principle of an internal market or a UK-wide subsidy scheme, the Welsh Government argues that the provisions go beyond what would be needed and would undermine the Welsh devolution settlement:

> [T]he proposals in the Bill go far beyond the structure that may be needed to ensure economic and regulatory cooperation between the nations of the UK and, if enacted, would undermine the long-established powers of the Senedd and Welsh ministers to regulate in relation to matters within devolved competence.[109]

At report stage the UK Government stated that it still wished to achieve legislative consent.[110]

Scotland: Legislative consent memoranda

The Scottish Government has described the effect of the bill[111] as "in effect, a new, blanket constraint or test [that] would be placed on the powers of

---

[106] Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, September 2020, para 116.
[107] ibid, para 7.
[108] Welsh Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, 25 September 2020, para 72.
[109] ibid.
[110] HC *Hansard*, 29 September 2020, col 188.
[111] As set out in paragraph 74 of an earlier version of the Explanatory Notes (as introduced to the House of Commons).

the Scottish Parliament and Scottish ministers".[112]

The Scottish Government illustrated its argument using the example of sugar content in food. It stated that whilst it would be within the competence of the Scottish Parliament to set a limit, under the bill it could not apply this requirement to imports from other parts of the UK:

> [I]f the Scottish Parliament chose to pass a law to limit the sugar content of goods produced in Scotland to tackle the problem of obesity, a choice currently within competence, it could not impose those standards on goods coming into Scotland from other parts of the UK, nor could it prevent those goods from entering the Scottish market, provided these satisfy regulations set anywhere in the UK.[113]

Whilst the Scottish Parliament could still legislate in this way, the Scottish Government has argued that the effects of the bill would undermine the intended effect of the policy. It asserted that this in effect would prevent the Scottish Parliament "from exercising its devolved competence in this area, for which it is democratically elected, and accountable".[114]

The Scottish Government has also expressed concern that the exception for pre-existing provisions risked such provisions, such as minimum unit pricing for alcohol, coming within scope of the bill when they were updated.[115] The Scottish Government has argued this amounts to a freezing of existing provisions, rather than as a protection for them. It raised similar concerns about the protections relating to the non-discrimination principle.[116]

The Scottish Government has also argued that the secretary of state could use powers under the bill to amend the exceptions set out in schedule 1 so as to "add exceptions which the UK Government wished to regulate in England without being obliged to recognise devolved regulations of the same type".[117] It argued that these provisions "amend the competence" of the Scottish Parliament "not by reserving matters in schedule 5 of the Scotland Act in a manner coherent with the general scheme of that act, but by providing that provisions of acts of the Scottish Parliament, or Scottish statutory instruments, must conform to the principles of the bill or else they "do not apply" or have "no effect"".[118]

---

[112] Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, September 2020, para 39.
[113] ibid, para 46.
[114] ibid.
[115] ibid, para 47.
[116] ibid, para 53.
[117] ibid, para 55.
[118] ibid, para 42.

The Scottish Government has argued that the provisions of part 2 have similar implications for devolution as part 1.

It also said that whilst the white paper indicated that the UK Government intended to largely replicate the 2009 regulations, the Scottish Government had concerns that the bill deviated from them. For example, the Scottish Government stated that:

> Under the 2009 regulations, authorisation schemes in member states have to be complied with in a defined set of circumstances: an authorisation scheme can only be imposed if, broadly speaking: the scheme is non-discriminatory; it can be justified by an overriding reason relating to the public interest, such as public policy, public security or public health; and the objective of the authorisation cannot be attained by less restrictive means.[119]

The Scottish Government argued that the only exclusion to the application of the mutual recognition principle to services was the public health emergency exception in clause 17(4) [now clause 18(4)].[120]

The Scottish Government summarised its concerns as follows:

> [T]he bill removes the power of regulators to require authorisation where a service provider is authorised elsewhere in the UK, by introducing comprehensive mutual recognition. It gives the UK Government the power to decide what service sectors are in and out of the scope of the bill (without consultation), expands the definition of discrimination. It also transfers power to the UK Government to decide on 'legitimate aims' […][121]

On part 3 of the bill, the Scottish Government has said it is not clear to what extent existing intra-UK recognition routes would comply with the manual approach of the bill.[122] It also argued that the provisions of part 3 would add "extra processes and [undermine] devolution by risking the autonomy of the Scottish Government, [Scottish] Parliament and regulators in setting standards, processes and determining eligibility for 'automatic' recognition".[123]

---

[119] Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, September 2020, para 66.
[120] ibid, para 67.
[121] ibid, para 71.
[122] ibid, para 77.
[123] ibid, para 80.

The Scottish Government has said the provisions of part 4 could have the potential to constrain devolved competence because the provisions would:

> [I]ntroduce new compliance obligations on Scottish ministers and devolved agencies in respect of the overall internal market regime introduced by the bill, which are protected from modification by Act of the Scottish Parliament.[124]

Wales: Legislative consent memoranda

The Welsh Government has said that it objects to parts 1 to 3 of the bill because they would "automatically" apply market access principles in a comprehensive way.[125] It said that the bill lacked a requirement to maintain high standards and did not require intergovernmental agreement to be reached (in the first instance) through common frameworks. The Welsh Government argued that the provisions requiring mutual recognition risked reducing standards:

> These elements of the bill open the door to a 'race to the bottom' *inter alia* in terms of setting environmental standards and standards relating to food safety and quality.[126]

The Welsh Government has said that whilst it is open to the establishment of an Office for the Internal Market it did not believe that the CMA, as currently constituted, was a suitable vehicle for it.[127]

The Welsh Government said that it was working on proposed amendments to the bill which would address its concerns. It has said that it would publish them in due course.[128]

2.5 What is the relationship between the bill and common frameworks?

The common frameworks programme is a joint exercise by the UK Government and devolved administrations to reach agreement on policy frameworks to replace those that were governed by EU law during the UK's membership and the transition period, and that intersect with devolved competence.[129]

---

[124] Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, September 2020, para 83.
[125] Welsh Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, 25 September 2020, para 75.
[126] ibid.
[127] ibid, para 76.
[128] ibid, para 81.
[129] Cabinet Office, *Frameworks Analysis 2020: Breakdown of Areas of EU Law that Intersect with*

In its white paper on the internal market, the UK Government described the common frameworks programme as the most advanced mechanism, in its development, to address the issue of regulatory coherence across the UK.[130] It said that common frameworks were designed to support the functioning of the UK internal market.

However, the Government argued that common frameworks alone could not "guarantee the integrity" of the whole UK internal market.[131] It asserted that common frameworks would be too specific and would not address issues related to the influence of EU institutions and treaty rights on the UK internal market:

> Frameworks on their own cannot guarantee the integrity of the entire internal market. As they tend to be sector-specific, they do not address the totality of economic regulation or the cumulative effects of divergence, ie the consequences of regulatory difference in one sector that affects other sectors. Finally, they do not fully address the question of how best to substitute the wider EU ecosystem of institutions and treaty rights had on the UK internal market.[132]

The Government has argued that the legislation discussed in the white paper (implemented by the bill) would complement common frameworks "by providing a baseline level of regulatory coherence across a wider range of sectors". The Government states that this will ensure that areas without a common framework would have a degree of regulatory alignment:

> This means that the areas without a common framework will still benefit from a low-level regulatory coherence underpinning. Crucially, market coherence will be provided for issues that fall around or between individual sector-focused frameworks.[133]

The Scottish Government disagrees with the UK Government, and argues that the bill undermines the existing process for negotiating and agreeing common frameworks.[134] It believes that common frameworks are capable of providing for all the "claimed objectives" of the bill whilst respecting devolved competence. The Scottish Government argues that this would avoid the risk of "competitive deregulation" and give producers and consumers certainty and clarity. The Scottish Government has also asserted

---

Devolved Competence in Scotland, Wales and Northern Ireland, September 2020, p 4.
[130] Department for Business, Energy and Industrial Strategy, *UK Internal Market*, July 2020, CP278, para 20.
[131] ibid, para 21.
[132] ibid.
[133] ibid, para 22.
[134] Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, September 2020, para 15.

the bill would in fact increase complexity:

> By contrast, the bill would effectively allow four regulatory systems to exist simultaneously in each part of the UK, with different effects on different producers depending on which part of the UK they operate in: the opposite of the certainty and clarity the bill claims to achieve.[135]

The Scottish Government has argued that "good progress" has been made on developing the common frameworks.

The Welsh Government has said that it objects to the bill automatically applying market access principles in a comprehensive way without requiring "intergovernmental agreement be reached in the first instance, through common frameworks".[136]

3. How would the bill relate to the Northern Ireland Protocol?

3.1 What is the Northern Ireland Protocol?

Part 5 of the bill contains provisions relating to Northern Ireland, in light of the protocol on Ireland/Northern Ireland that is part of the withdrawal agreement agreed between the EU and the UK in October 2019 and ratified in January 2020. In the bill, the protocol is referred to simply as the Northern Ireland Protocol. For ease of reference to the bill, this briefing also refers to the protocol as the Northern Ireland Protocol.

A key element of the Brexit negotiations has been finding an agreeable solution that would see the UK leave the EU single market and customs union without creating either a hard border on the island of Ireland or a border between Northern Ireland and the rest of the United Kingdom. The solution reached in the withdrawal agreement and the protocol is that:

- the UK as a whole leaves the EU, including the single market and customs union, and
- Northern Ireland remains part of the UK's customs territory but will continue to apply the EU's customs code, VAT rules and single market rules for goods. A consent mechanism means that after an initial four-year period from the end of the transition period, these provisions can only continue to apply with the consent of the Northern Ireland Assembly.

---

[135] Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, September 2020, para 15.
[136] Welsh Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, 25 September 2020, para 75.

In October 2019, the Prime Minister, Boris Johnson, said the revised protocol he had just agreed with the EU was "a good arrangement, reconciling the special circumstances in Northern Ireland with the minimum possible bureaucratic consequences at a few points of arrival into Northern Ireland".[137] The Conservative Party won the December 2019 general election on a manifesto that included promises to "get Brexit done" on the basis of the Prime Minister's "great new deal" with "no more renegotiations", and to "ensure that Northern Ireland's businesses and producers enjoy unfettered access to the rest of the UK and that in the implementation of our Brexit deal, we maintain and strengthen the integrity and smooth operation of our internal market".[138]

Some aspects of the implementation of the protocol were left to be decided by the Joint Committee, a joint EU-UK body established under the withdrawal agreement to oversee the implementation of the withdrawal agreement, including the protocol.[139] One of the key decisions for the Joint Committee to take is how to define which goods that enter Northern Ireland from the rest of the UK are "at risk" of subsequently moving from Northern Ireland into the EU. These "at risk" goods would be subject to customs duties, ie tariffs. Goods moving from Great Britain to Northern Ireland would not be subject to customs duties if they were not deemed to be "at risk" of then moving into the EU. UK goods moving to the EU will not be subject to tariffs if the UK and the EU reach agreement on a deal that includes zero-tariff, zero-quota trading arrangements.

The background to the introduction of the bill is the Government's claim that the EU is seeking or may seek to implement aspects of the protocol in ways that were not originally intended, to gain leverage in the future relationship negotiations. Writing in a newspaper article after the bill's introduction, Boris Johnson said:

> It is [in the Joint Committee] that things risk coming unstuck. We are now hearing that unless we agree to the EU's terms, the EU will use an extreme interpretation of the Northern Ireland Protocol to impose a full-scale trade border down the Irish Sea. We are being told that the EU will not only impose tariffs on goods moving from Great Britain to Northern Ireland, but that they might actually stop the transport of food products from GB to NI.[140]

He expanded on this point at the bill's second reading:

> […] in recent months the EU has suggested that it is willing to go to

[137] HC *Hansard*, 19 October 2019, col 572.
[138] Conservative Party, *Conservative Party Manifesto 2019*, November 2019, pp 5 and 44.
[139] For more detail about the Joint Committee, see: House of Commons Library, *The UK-EU Withdrawal Agreement Joint Committee: Functions and Tasks*, 2 September 2020.
[140] Prime Minister's Office, 'Prime Minister's article in the *Telegraph*', 12 September 2020.

> extreme and unreasonable lengths, using the Northern Ireland Protocol in a way that goes well beyond common sense simply to exert leverage against the UK in our negotiations for a free trade agreement. To take the most glaring example, the EU has said that if we fail to reach an agreement to its satisfaction, it might very well refuse to list the UK's food and agricultural products for sale anywhere in the EU. It gets even worse, because under this protocol, that decision would create an instant and automatic prohibition on the transfer of our animal products from Great Britain to Northern Ireland. Our interlocutors on the other side are holding out the possibility of blockading food and agricultural transports within our own country.[141]

Mr Johnson argued in his newspaper article that: "This interpretation cannot have been the real intention of those who framed the protocol (it certainly wasn't ours)—and it is therefore vital that we close that option down".[142] He said that in the United Kingdom Internal Market Bill, the Government had "devised a legal safety net" that would "clarify the position [and] sort out the inconsistencies".

Part 5 of the bill contains provisions that seek to give ministers the power to unilaterally interpret, modify the application of or disapply parts of the protocol. Its provisions specifically seek to allow ministers to do this in relation to:

- export declarations for goods travelling from Northern Ireland to Great Britain; and
- the application of EU state aid rules to measures that affect the trade between Northern Ireland and the EU that is covered by the protocol.

It specifically seeks to allow ministers to do this notwithstanding their obligations under international and domestic law to implement the protocol. Brandon Lewis, the Northern Ireland Secretary, acknowledged before the bill's introduction that the bill would "break international law in a very specific and limited way".[143] This aspect of the bill has been controversial.

Sections 3.2 and 3.3 of this briefing look at the specific provisions that make up part 5 of the bill. Section 3.2 also looks in more detail at the Government's justifications for clauses 44, 45 and 47. Section 3.3 covers responses to part 5 of the bill, including from the EU, devolved administrations, and House of Lords committees.

---

[141] HC *Hansard*, 14 September 2020, cols 42–3.
[142] Prime Minister's Office, 'Prime Minister's article in the *Telegraph*', 12 September 2020.
[143] HC *Hansard*, 8 September 2020, col 509.

Tariffs on 'at risk' goods

The bill does not specifically address the issue of defining 'at risk' goods that could be subject to tariffs. The Government had intended to include measures in the Finance Bill to "make clear that no tariffs will be payable on goods moving from Great Britain to Northern Ireland unless those goods are destined for the EU market or there is a genuine and substantial risk of them ending up there".[144] It had been expected that a budget would be delivered in November, followed by a Finance Bill. However, the Treasury confirmed on 23 September 2020 that because of the coronavirus situation, there will be no budget this autumn.[145]

Food products and third country listing

On the issue raised by the Prime Minister about the possibility of the EU preventing food products being transported from Great Britain to Northern Ireland, Michael Gove, Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster, said on 23 September 2020 that progress had been made, thanks to the Prime Minister's having drawn attention to it.[146] A Cabinet Office spokesperson said:

> The EU has now said that normal processes will be followed on third-country listings. So there are no obstacles to listing our food and agricultural products as our food standards rules will be exactly the same as the EU's.[147]

The Cabinet Office said the UK would notify the EU of any changes to its food standards "in the usual way with plenty of lead time, exactly as with dozens of other countries listed by the EU".

A European Commission spokesperson said on 17 September 2020 that Michel Barnier, the EU's chief negotiator, had "clearly stated that the EU is not refusing to list the UK as a third country for food imports".[148] However, the spokesperson said the EU was still waiting for "comprehensive information on what the UK's future rules will be, in particular for imports, after 31 December 2020 and when these rules will be adopted" and that listing could take place in a matter of days once it had that information.

---

[144] HC *Hansard*, 21 September 2020, col 648.
[145] Alain Tolhurst, 'Rishi Sunak has cancelled the Budget and will reveal a furlough replacement scheme tomorrow instead', Politics Home, 23 September 2020.
[146] HC *Hansard*, 23 September 2020, col 976.
[147] Cristina Gallardo, 'UK satisfied EU won't block food exports after Brexit', Politico (£), 23 September 2020.
[148] James Crisp, 'Britain backs down in Brexit 'food blockade' row', *Telegraph* (£), 17 September 2020.

3.2 Part 5 clause by clause

Clauses 42, 43 and 11: Unfettered access

The bill seeks to ensure that Northern Ireland businesses enjoy "unfettered access" to the UK internal market although they are subject to the EU's customs code and regulatory regime for goods. The concept of "unfettered access" dates back to a joint report agreed between the UK and EU negotiators in December 2017. This document stated that: "In all circumstances the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market".[149]

The protocol itself states, in article 6(1) dealing with protection of the UK internal market, 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.[150]

Article 6(1) of the protocol also seeks to limit the way that EU law would apply to trade between Northern Ireland and the rest of the UK:

> Provisions of [European] Union law made applicable by this protocol which prohibit or restrict the importation 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.

The Government committed in the 'New Decade, New Approach' deal reached in January 2020 to restore devolved government in Northern Ireland that it would legislate to "guarantee unfettered access for Northern Ireland's businesses to the whole of the UK market" and that this legislation would be in place by 1 January 2021.[151]

At committee stage in the House of Commons, Robin Walker, Minister of State at the Northern Ireland Office, said the clauses that are now numbered 11, 42 and 43 would give effect to the Government's commitment

---

[149] Department for Exiting the European Union, *Joint Report on Progress During Phase 1 of the Negotiations under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union*, 8 December 2017, para 50.
[150] HM Government, *Agreement on Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, 19 October 2019, Protocol on Ireland/Northern Ireland.
[151] Northern Ireland Office and Irish Ministry of Foreign Affairs, *New Decade, New Approach*, January 2020, p 47.

to give unfettered access to Northern Ireland goods to the whole UK internal market, in line with the protocol.[152]

Clause 11: Modifications in connection with the Northern Ireland Protocol

Clause 11 sets some conditions for applying the market access principles for goods being sold in Great Britain:

- The mutual recognition principle applies to all "qualifying Northern Ireland goods" as if they were produced in, or imported into, Northern Ireland.
- Goods that were produced in, or imported into, Northern Ireland that are not "qualifying Northern Ireland goods" do not benefit from the mutual recognition principle. The exception to this is if they move from Northern Ireland to England, Wales or Scotland in the same way as goods being imported into England, Wales or Scotland from outside the UK.
- Goods that are not "qualifying Northern Ireland goods" do not have a relevant connection with Northern Ireland for the purposes of the non-discrimination principle for goods.

Explaining this clause at committee stage, Robin Walker, Minister of State at the Northern Ireland Office, said it would ensure that qualifying Northern Ireland goods will benefit from mutual recognition and are not discriminated against.[153] By implication, it would mean that goods moving from Northern Ireland to Great Britain that are not "qualifying Northern Ireland goods" could be discriminated against and generally would not benefit from mutual recognition.

The Government stated in its command paper on its approach to the protocol that arrangements for unfettered access for Northern Ireland goods to the rest of the UK market "will not cover goods travelling from Ireland or the rest of the EU being exported to Great Britain".[154] It noted that the European Union (Withdrawal Agreement) Act 2020 included provision for the Government to define a qualifying status for goods and businesses in Northern Ireland benefiting from unfettered access. The 2020 act inserted provisions into the European Union (Withdrawal) Act 2018 that allow ministers to make regulations to define "qualifying Northern Ireland goods".[155] However, the Government has not yet made such regulations.

The House of Lords European Union Committee suggested it would be

[152] HC *Hansard*, 21 September 2020, col 650.
[153] ibid.
[154] Cabinet Office, *The UK's Approach to the Northern Ireland Protocol*, May 2020, CP226, p 11.
[155] Section 8C(6).

necessary to find a way to distinguish between qualifying Northern Ireland goods, and goods originating in Ireland or the rest of the EU "in order to avoid Northern Ireland becoming a back door for goods entering the UK market from the EU without checks".[156]

Clause 42: Northern Ireland's place in the UK internal market and customs territory

Clause 42 provides that when they are exercising functions relating to implementing the Northern Ireland Protocol or the movement of goods within the UK, public authorities, including devolved authorities, must have regard to:

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

The Government has stated that this provision "seeks to support the streamlining of trade in line with the obligations set out in the protocol".[157] Article 6(2) of the protocol says:

> Having regard to Northern Ireland's integral place in the United Kingdom's internal market, the [European] Union and the United Kingdom 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 and the implementation thereof.

Clause 43: Unfettered access to UK internal market for Northern Ireland goods

Clause 43 seeks to ensure unfettered access to the UK internal market for qualifying Northern Ireland goods by preventing any new barriers being created. Under clause 43, after the end of the transition period on 31 December 2020, UK and devolved authorities could not introduce or use any new checks, controls or administrative processes on qualifying Northern Ireland goods moving directly from Northern Ireland to Great Britain. Equally, they could not use for the first time, for a new purpose or to a new extent any checks, controls or administrative processes that existed

---

[156] House of Lords European Union Committee, *The Protocol on Ireland/Northern Ireland*, 1 June 2020, HL Paper 66 of session 2019–21, para 174.
[157] Explanatory Notes, para 56.

immediately before the end of the transition period.

However, clause 43 would allow a new check, control or process if it was necessary:

- for facilitating access for qualifying Northern Ireland goods to the UK internal market;
- to comply with or give effect to any international obligation or arrangement to which the UK is a party (whenever the UK becomes a party to it);
- where goods have been declared for a voluntary customs procedure;
- for the purposes of VAT or excise duty in consequence of the Northern Ireland Protocol; or
- for dealing with a threat to biosecurity in Great Britain.

Clause 43(3) specifies that the exemption for complying with or giving effect to international obligations in particular authorises the introduction of new checks, controls or administrative procedures if it is necessary to comply with or give effect to article 6(1) of the Northern Ireland Protocol. However, if an international obligation or arrangement has ceased to have effect by virtue of regulations made using the powers in the bill, or by virtue of clause 47, then clause 43 cannot be used to implement such an international obligation. As explained below in this briefing, the Government intends clauses 44, 45 and 47 to operate as a "safety net" that would enable the UK not to comply with international obligations in certain circumstances.

The exemptions on VAT and excise duty and on biosecurity threats were added by government amendments to the bill at committee stage in the House of Commons. Robin Walker, Minister of State at the Northern Ireland Office, said they would allow the Government to address cases of double taxation and non-taxation created by the Northern Ireland Protocol; to close down opportunities for tax evasion; and to respond to specific biosecurity threats arising from the movement of animals and high-risk plants.[158]

Clause 43(8) would allow the Government to make regulations amending the type of movement to which this clause applies. This would be subject to the affirmative procedure. The Government said this power was necessary in case it needed in future to redefine "qualifying Northern Ireland goods", for example to include indirect as well as direct movements of goods from Northern Ireland to Great Britain.[159] The House of Lords Delegated Powers

[158] HC *Hansard*, 21 September 2020, col 656.
[159] Department for Business, Energy and Industrial Strategy, *Delegated Powers Memorandum*, 2 October 2020, para 73.

and Regulatory Reform Committee said this delegated power was "too wide for its stated purpose".[160] It recommended the power should either be redrafted to make clear it could only be used to change the definition of qualifying Northern Ireland goods, or should be removed from the bill.

Clause 44: Power to disapply or modify export declarations and other exit procedures

The Northern Ireland Protocol means that certain exit procedures to which the UK Government objects would apply to goods moving from Northern Ireland to Great Britain. The Government acknowledges in the explanatory notes to the bill that:

> The Northern Ireland Protocol provides that certain EU customs legislation applies to and in the UK in respect of Northern Ireland, not including the territorial waters of the UK. Without modification, this would include export declarations for goods leaving Northern Ireland and travelling to Great Britain.[161]

However, the Government believes that, to ensure unfettered access to the UK internal market for Northern Ireland goods, there should be no requirement to submit export or exit summary declarations for goods leaving Northern Ireland to go to the rest of the UK.[162] In a command paper published in May 2020 on its approach to the protocol, the Government argued it made "no sense" to apply this requirement to goods moving from Northern Ireland to Great Britain because "[s]elf-evidently goods being sent away from the [EU] single market cannot create a back door into it".[163] The Government argued the "pragmatic and sensible" approach of not requiring export declarations for goods going from Northern Ireland to the rest of the UK should be agreed between the UK and the EU in the Joint Committee established to oversee implementation of the withdrawal agreement.

In response to the command paper, Michel Barnier, the EU's chief negotiator, said in June 2020 that avoiding exit declarations on goods moving from Northern Ireland to Great Britain was "incompatible with the legal commitments accepted by the UK in the protocol".[164]

In its report on unfettered access published in July 2020, the House of

---

[160] House of Lords Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill*, 17 September 2020, HL Paper 130 of session 2019–21, paras 28–9.
[161] Explanatory Notes, para 59.
[162] Cabinet Office, *The UK's Approach to the Northern Ireland Protocol*, May 2020, CP226, p 10.
[163] ibid.
[164] European Commission, 'Statement by Michel Barnier following round 4 of the negotiations for a new partnership between the European Union and the United Kingdom', 5 June 2020.

Commons Northern Ireland Affairs Committee said that it was "ultimately a matter for the EU whether it grants that concession" of waiving export declarations and exit summary declarations for goods going from Northern Ireland to Great Britain, but these customs formalities "cannot be waived by the UK unilaterally".[165]

In the explanatory notes to the bill, the Government said that it was continuing to discuss the disapplication of the requirement for export declarations with the EU in the Joint Committee.[166] However, it argued that clause 44 would give it "the ability to act as necessary if a negotiated outcome in the Joint Committee should not be possible".

Clause 44 would give ministers the power to make regulations about the application of exit procedures to goods moving from Northern Ireland to Great Britain. Clause 44(2) makes explicit that this would include any exit procedure that is applicable because of the Northern Ireland Protocol.

When making regulations using this power, clause 44(3) says that ministers may bear in mind:

- the need for Northern Ireland goods to enjoy unfettered access to the rest of the UK; and
- the need to maintain and strengthen the integrity and smooth operation of the internal market in the UK.

Clause 44(4) specifies that regulations made under clause 44 could make provision to disapply or modify the application of an exit procedure, or state what an exit procedure does or does not apply to. Clause 44(5) makes explicit that:

> 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.

"Relevant international or domestic law" is defined in clause 47 (see below).

Clause 44 therefore seeks to enable ministers to make provisions relating to exit procedures without being constrained by provisions in international or domestic law that would otherwise apply. Clause 44 forms part of what the Government calls a "legal safety net".

---

[165] House of Commons Northern Ireland Affairs Committee, *Unfettered Access: Customs Arrangements in Northern Ireland after Brexit*, 14 July 2020, HC 161 of session 2019–21, pp 20–21.
[166] Explanatory Notes, para 60.

Clause 44(6) and (7) mean that for the first six months after clause 44 came into force, ministers could make regulations under it using the 'made affirmative' procedure. This would mean the regulations could come into force without first being approved by Parliament, but they would need retrospective parliamentary approval to remain in force. After the first six months, regulations would be subject to the affirmative procedure, meaning they could only be made with the approval of both Houses.

Background to clauses 45 and 46: State aid

Article 10(1) of the protocol provides that EU law on state aid shall apply to the UK "in respect of measures which affect that trade between Northern Ireland and the [European] Union which is subject to this protocol". State aid is an advantage, such as a subsidy or a tax break, that national authorities confer selectively, for example only to specific companies or industry sectors.[167] EU law generally prohibits state aid where it would distort or threaten to distort competition between member states.[168]

In its May 2020 command paper on its approach to the protocol, the Government set out its understanding of how state aid provisions would operate:

> This does not mean that state aid rules will apply to Northern Ireland as they do today. State aid provisions only apply to trade 'subject to the protocol'. The protocol is limited in scope to the movement of goods and wholesale electricity markets. Northern Ireland will therefore enjoy new flexibilities with respect to support for its service industries.[169]

However, in introducing the bill, the Government has emphasised its concerns that state aid provisions of the Northern Ireland Protocol could be interpreted more broadly. Speaking at the bill's committee stage in the Commons, Robin Walker, Minister of State at the Northern Ireland Office, explained:

> There is a risk that a maximalist interpretation of article 10 of [the] protocol by the EU, which was never intended but is none the less a risk we must protect against, could give the European Commission extensive jurisdiction over subsidies granted in the rest of the UK, known as reach-back. All the subsidies granted to the services sector in Northern Ireland could be caught even if there is no link, or only a

[167] European Commission, 'State aid control', 14 February 2019.
[168] For more information about EU state aid rules, see: House of Commons Library, *EU State Aid Rules and WTO Subsidies Agreement*, 16 September 2020.
[169] Cabinet Office, *The UK's Approach to the Northern Ireland Protocol*, May 2020, CP226, p 10.

> trivial one, to a goods provider.[170]

The House of Lords European Union Committee noted in its report on the protocol, published in June 2020, that its expert witnesses believed the scope of the protocol's provisions on state aid could be broadly interpreted:

> The effect of article 10 and annex 5 is also to apply EU state aid rules to the UK in any instance in which the support at issue affects trade in goods between Northern Ireland and the EU27. Our expert witnesses agree that this could mean that a UK state aid provision applying to the UK in general, which is above the minimum threshold provided by EU law, would be subject to the application of EU state aid rules under the protocol, and potentially to EU intervention and judicial review.[171]

The committee concluded that "the only way for the UK to avoid EU intervention in its state aid decisions would be to ensure that its independent state aid policy does not allow for the level of support available to industry to exceed that available under the EU regime".[172]

Clause 45: Regulations about article 10 of the Northern Ireland Protocol

In clause 45, the Government is seeking to give itself the power to unilaterally determine the interpretation of article 10 of the protocol. The Government states in the explanatory notes to the bill that EU state aid law will apply in UK domestic law "to the extent that it is consistent with any interpretation that the Government may set forth in regulations".[173]

Clause 45 would allow the secretary of state to make regulations in connection with article 10 of the protocol, including about its interpretation, disapplying it or modifying its effect. Clause 45(3) specifies that this could include provision to, among other things:

- set out when article 10 does or does not apply to state aid granted in respect of activities outside Northern Ireland; or
- allow article 10 not to be interpreted in accordance with EU legislation or the case law of the European Court.

Like with clause 44, clause 45 seeks to enable ministers to make provisions relating to state aid without being constrained by provisions in international or domestic law that would otherwise apply. Clause 45(3)(e) makes explicit

---

[170] HC *Hansard*, 21 September 2020, col 652.
[171] House of Lords European Union Committee, *The Protocol on Ireland/Northern Ireland*, 1 June 2020, HL Paper 66 of session 2019–21, p 51.
[172] ibid.
[173] Explanatory Notes, para 62.

that regulations made using the power in clause 45 can include provision for:

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

"Relevant international or domestic law" is defined in clause 47 (see below).

Clause 45 forms part of what the Government calls a "legal safety net".

The same parliamentary procedure would apply to regulations made under clause 45 as apply to those made under clause 44. For the first six months after clause 45 came into force, ministers could make regulations under it using the 'made affirmative' procedure. This would mean the regulations could come into force without first being approved by Parliament, but they would need retrospective parliamentary approval to remain in force. After the first six months, regulations would be subject to the affirmative procedure, meaning they could only be made with the approval of both Houses.

Clause 46: Notification of state aid for the purposes of the Northern Ireland Protocol

Clause 46 would provide that only the secretary of state, and no other public authority, may comply with EU law requirements applied to the UK by article 10 to give the European Commission notifications or information about state aid. Under EU law, the European Commission must generally (with some exceptions) be notified of new aid measures, and member states cannot put the measure into effect until they have had approval from the European Commission.[174]

The explanatory notes to the bill say that this reflects the status quo, as this function is currently carried out by the Foreign Secretary via the UK Mission in Brussels.[175] The whole of the UK is subject to EU state aid rules during the transition period.

Clause 47: Further provision related to sections 44 and 45 etc

Clause 47 would bolster the effect of clauses 44 and 45. The Government has stated that it is seeking to ensure the provisions in clause 44 and clause 45 (giving ministers powers to unilaterally interpret, modify the application of, or disapply parts of the protocol) "are able to have effect

[174] European Commission, 'State aid procedures', 29 May 2015.
[175] Explanatory Notes, para 310.

notwithstanding any relevant or international law with which they may be incompatible or inconsistent".[176] Clause 47 forms part of what the Government calls a "legal safety net".

Clauses 44 and 45 both contain similar provisions to each other that seek to allow for "rights, powers, liabilities, 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 approach is bolstered by clause 47, which contains further provisions intended to allow clauses 44 and 45 to override any provisions in international or domestic law that would prevent ministers from unilaterally interpreting, modifying or disapplying the protocol.

Clause 47(1) specifically provides that "notwithstanding any relevant international or domestic law with which they may be incompatible", the following would have effect:

(a) section 44;
(b) any regulations made under section 44(1);
(c) section 45;
(d) any regulations made under section 45(1);
(e) this section [ie section 47 itself];
(f) any other provision of this Act so far as relating to the provisions in paragraphs (a) to (e).

Clause 47(8) defines "relevant international or domestic law" as follows:

> "relevant international or domestic law" includes—
>
> (a) any provision of the Northern Ireland Protocol;
> (b) any other provision of the EU withdrawal agreement;
> (c) any other EU law or international law;
> (d) any provision of the European Communities Act 1972;
> (e) any provision of the European Union (Withdrawal) Act 2018;
> (f) any retained EU law or relevant 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,
>
> but does not include the convention rights within the meaning of the Human Rights Act 1998 (see section 1(1) of that act).

[176] Explanatory Notes, para 65.

Clause 47(2) reinforces clause 47(1) with a series of further provisions that set out some consequences that follow from clause 47(1). Subsection (a) states that regulations made under clauses 44(1) and 45(1) "are not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic law". It also provides that section 6(1) of the Human Rights Act 1998 does not apply in relation to the making of regulations under clauses 44(1) and 45(1). This section of the Human Rights Act would usually make it unlawful for a public authority to act in a way which is incompatible with a "convention right". "Convention rights" are the rights and fundamental freedoms set out in specific articles of the European Convention on Human Rights (ECHR) and its protocols.[177]

Clause 47(2)(b) and (c) seek to ensure that provisions of the bill could override provisions of the European Union (Withdrawal) Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2020, that implemented the withdrawal agreement and Northern Ireland Protocol in domestic law.

Section 7A of the 2018 Act provides that the rights, powers, liabilities, obligations and restrictions created or arising under the withdrawal agreement, and the remedies and procedures provided for by the withdrawal agreement apply directly in domestic law. Section 7A gives effect to article 4 of the withdrawal agreement, which provides that the provisions of the withdrawal agreement and the provisions of EU law made applicable by the withdrawal agreement "shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the [European] Union and its member states". Article 4 also states that legal and natural persons shall be able to rely directly on provisions contained or referred to in the withdrawal agreement which meet the conditions for direct effect under EU law. Article 4(2) creates an obligation for the UK to ensure compliance with this. Article 4 also requires:

- The disapplication of provisions of domestic law which are incompatible with the withdrawal agreement; and
- Provisions of the withdrawal agreement referring to EU law and its concepts to be interpreted and applied in the UK using the methods and general principles of EU law.

However, clause 47(2)(b) would mean that these rights, powers, liabilities, obligations, restrictions, remedies and procedures would cease to have effect in domestic law "so far and for as long as they are incompatible or inconsistent" with the provisions of the bill listed in clause 47(1).

[177] Section 1 of the Human Rights Act 1998. The European Convention on Human Rights was established by the Council of Europe, not the European Union. The EU's member states are all members of the Council of Europe.

Section 7C of the 2018 Act requires any question as to the validity, meaning or effect of relevant separation agreement law to be interpreted in accordance with the withdrawal agreement.[178] But clause 47(2)(c) seeks to override this: it says that section 7C would cease to have effect "so far and for as long as" it would require any such questions to be decided "in a way which is incompatible or inconsistent" with the provisions of the bill listed in clause 47(1).

The final provision in clause 47(2) is subsection (d) which states that "any other provision or rule of domestic law that is relevant international or domestic law ceases to have effect so and for as long as it is incompatible or inconsistent" with the provisions of the bill listed in clause 47(1).

The Government has acknowledged that the 'notwithstanding' provision of clause 47 partially disapplies article 4 of the withdrawal agreement because it removes the possibility of challenge before domestic courts to enforce the rights and remedies provided for in the withdrawal agreement.[179] This would disapply the concept of direct effect. It notes that this is the case regardless of whether any regulations made under clauses 44 or 45 of the bill are in fact incompatible with the withdrawal agreement.

Judicial review provisions in clause 47

It was suggested that as originally drafted, clause 47 could preclude judicial review of clauses 44 and 45.[180] The Government made amendments to the bill at committee and report stage in the House of Commons to address the issue of judicial review.

Clause 47(5) now provides that in relation to a "relevant claim or application", the standard time limits for seeking judicial review may not be extended. Clause 47(8) defines a "relevant claim or application" as one brought for the purpose of questioning the validity or lawfulness of regulations under sections 44(1) or 45(1). Clause 47(6) states that the jurisdiction and powers of a court or tribunal in relation to a relevant claim or application would be subject to clause 47(1) and 47(2). These provisions were added at committee stage.

---

[178] "Relevant separation agreement law" is defined in section 7C(3) of the European Union (Withdrawal) Act 2018. This definition applies both to that act and to the bill. Very broadly speaking, it is domestic law that relates to the withdrawal agreement or to the EEA EFTA separation agreement or the Swiss citizens' rights agreement.

[179] HM Government, *HMG Legal Position: UKIM Bill and Northern Ireland Protocol*, 10 September 2020.

[180] See: House of Commons Library, *The United Kingdom Internal Market Bill 2019–21*, 14 September 2020, pp 72–3. The number of clauses in the bill has changed since this briefing was published. Where it refers to clause 42, this is now clause 44. Clause 43 is now clause 45. Clause 45 is now clause 47.

Robin Walker, Minister of State at the Northern Ireland Office, said the amendments "make it clear that any regulations made under clauses 42 or 43 [now numbered as clauses 44 and 45] would, of course, be subject to judicial review, contrary to some of the claims that have been made over recent weeks".[181] Mr Walker said that setting a three-month time limit for bringing a judicial review claim would ensure that any challenge to the regulations would be subject to a "timely resolution", which was "essential" to provide certainty to Northern Ireland businesses and investors.

Joanna Cherry, the SNP Justice Spokesperson, said that these amendments "appear to acknowledge that judicial review claims could still be brought in certain limited circumstances".[182] She questioned on what grounds a judicial review claim could be brought—whether it would include the normal grounds of illegality, irrationality or procedural impropriety, or whether it would also include review on the grounds of human rights.

Further government amendments potentially relevant to the issue of judicial review on human rights grounds were made to clause 47 at report stage in the Commons:

- Clause 47(2)(a) now provides that section 6(1) of the Human Rights Act 1998 does not apply in relation to the making of regulations under clauses 44(1) and 45(1). This section of the Human Rights Act would usually make it unlawful for a public authority to act in a way which is incompatible with a "convention right".
- Clause 47(3) now provides that regulations under clauses 44(1) or 45(1) are to be treated for the purposes of the Human Rights Act 1998 as if they were within the definition of "primary legislation" in section 21(1) of that act.
- Clause 47(4) now provides that no court or tribunal may entertain any proceedings for questioning the validity or lawfulness of regulations under clauses 44(1) or 45(1) other than proceedings on a relevant claim or application.
- Clause 47(8) explicitly states that convention rights within the meaning of the Human Rights Act do not fall within the definition of "relevant international or domestic law".

Moving the amendments at report stage, Paul Scully, Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy, said they would ensure the higher courts could declare that regulations under clauses 44 and 45 were incompatible with the Human Rights Act but would not be able to quash them.[183] He argued this was "the

[181] HC *Hansard*, 21 September 2020, col 656.
[182] ibid, col 696.
[183] HC *Hansard*, 29 September 2020, col 190.

right balance in terms of a remedy, in the unlikely event of a breach of convention rights".

Mark Elliot, professor of public law at the University of Cambridge, has argued that: "Taken together, it appears that these amendments seek [to] produce an extremely odd outcome":[184]

> The exclusion of ECHR rights from the definition of 'relevant law' in clause 45 [now clause 47] means that the provision in clause 45(1) [now clause 47(1)]—that regulations made under clauses 42 and 43 [now clauses 44 and 45] have effect notwithstanding incompatibility with relevant law—would no longer apply in respect of convention rights. On its own, this would unambiguously reinstate the possibility of judicial review of relevant regulations on [Human Rights Act] grounds. However […] by requiring regulations made under clauses 42 and 43 [now clauses 44 and 45] to be treated as if they were primary legislation for [Human Rights Act] purposes, such regulations would, on this view, be shielded from the possibility of being struck down if they were found to breach convention rights. Instead a court would only be able to issue a declaration of incompatibility under section 4 of the [Human Rights Act].[185]

The Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland said these government amendments "undermine the Belfast (Good Friday) Agreement commitment to ensure incorporation of the ECHR, including access to courts and remedies for breach of the ECHR rights".[186] The commissions also expressed concern that the amendments "risk diminishing the commitment in article 2(1) of the Ireland/Northern Ireland Protocol to ensure there is no diminution of rights, safeguards or equality of opportunity as the UK leaves the EU".

Clauses 44, 45 and 47 as a 'safety net': Government justification

The Government has acknowledged that the bill "does break international law in a very specific and limited way".[187] At the same time, it has sought to portray any breach of international law as a necessary "legal safety net". For example, Prime Minister Boris Johnson said at second reading that "by

---

[184] Mark Elliot, 'One step forward, two steps back? Judicial review and the Government's amendments to the Internal Market Bill', Public Law for Everyone blog, 25 September 2020.
[185] ibid. Professor Elliot suggested a possible alternative interpretation, whereby the courts would remain free to strike down regulations that were incompatible with the Human Rights Act, by reasoning that regulations that breached convention rights would be made "not under, but beyond" the powers granted by clauses 44 and 45 and therefore not covered by the requirement to be treated as primary legislation. However, he concluded it was "hard to say" whether any court would be "bold enough" to adopt this approach.
[186] Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, *Briefing on the Internal Market Bill*, September 2020, p 2.
[187] HC *Hansard*, 8 September 2020, col 509.

creating a legal safety net taking powers in reserve, whereby ministers can guarantee the integrity of our United Kingdom", the bill was seeking to "insure and protect this country against the EU's proven willingness […] to use this delicately balanced protocol in ways for which it was never intended".[188]

Legal position statement

The Government has published two statements seeking to justify its approach. In a legal statement published on 10 September 2020, the Government said that the "established principle of international law that a state is obliged to discharge its treaty obligations in good faith" would remain the "key principle in informing the UK's approach to international relations".[189] However, it argued that parliamentary sovereignty could take precedence over international treaty obligations:

> 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. This 'dualist' approach is shared by other, similar legal systems such as Canada, Australia and New Zealand. Under this approach, treaty obligations only become binding to the extent that they are enshrined in domestic legislation. Whether to enact or repeal legislation, and the content of that legislation, is for Parliament and Parliament alone. This principle was recently approved unanimously by the Supreme Court in *R (Miller)* v *Secretary of State for Exiting the European Union* [2017] UKSC 5.
>
> The legislation which implements the withdrawal agreement including the Northern Ireland Protocol is expressly subject to the principle of parliamentary sovereignty. Parliament's ability to pass provisions that would take precedence over the withdrawal agreement was expressly confirmed in section 38 of the European Union (Withdrawal Agreement) Act 2020, with specific reference to the EU concept of 'direct effect'.

Legal commentators have argued that this only takes into account the position in domestic law and ignores the position in international law. Responding to the Government's statement, the Law Society and the Bar Council said:

> This analysis is correct viewed exclusively as a matter of pure domestic UK law but it does not address the points that are of concern to the

[188] HC Hansard, 14 September 2020, cols 45–6.
[189] HM Government, *HMG Legal Position: UKIM Bill and Northern Ireland Protocol*, 10 September 2020.

> Law Society and Bar Council, that the proposed approach is directly incompatible with the discharge of the legal obligations of the UK under international law.
>
> […] The Law Society and the Bar Council are of the view that the proposed adoption of legislation that is deliberately designed to confer powers on ministers to act incompatibly with international law and to prohibit compliance with obligations imposed by an international treaty ratified by the UK and endorsed by Parliament, constitutes a clear breach of those aspects of the rule of law.[190]

This interaction of domestic and international law was the subject of some debate during the bill's passage through the House of Commons. For instance, Sir William Cash (Conservative MP for Stone), chair of the House of Commons European Scrutiny Committee, argued that section 38 of the European Union (Withdrawal Agreement) Act 2020 made parliamentary sovereignty "inviolate".[191] He said that "[n]ational and constitutional law, in certain circumstances—where it affects sovereignty, as in this case in the United Kingdom—can prevail against international law".[192] He argued that the UK's dualist system supported this:

> With regard to *Miller* 1, the Supreme Court unanimously confirmed that, under the dualist approach, treaty obligations only become binding in the UK system to the extent that they are carried out in domestic legislation, and that whether to enact or repeal legislation, and the content of that legislation is for Parliament alone.
>
> […] Parliament, in the exercise of its sovereignty, is free to legislate in any way it sees fit, including contrary to the UK's international obligations.[193]

He cited examples where he said Parliament had previously done this.[194]

Others contested this interpretation. For example, Joanna Cherry, the SNP's justice spokesperson, rejected as "legally illiterate" the idea that the doctrine of parliamentary sovereignty "somehow trumps international law".[195] She cited the Supreme Court judgment in *Miller* 1 that "treaties between sovereign states have effect in international law and are not governed by the

---

[190] Law Society and Bar Council, *Parliamentary Briefing: Internal Market Bill Report Stage—House of Commons*, 29 September 2020.
[191] HC *Hansard*, 21 September 2020, col 673.
[192] HC *Hansard*, 29 September 2020, col 216.
[193] ibid.
[194] ibid, col 215.
[195] HC *Hansard*, 21 September 2020, col 695.

domestic law of any state".[196]

'Notwithstanding' clauses statement

The Government published a second statement on the 'notwithstanding' clauses (now numbered clauses 44, 45 and 47) on 17 September 2020, in which it set out that it would ask Parliament to support using them "only in the case of, in our view, the EU being engaged in a material breach of its duties of good faith or other obligations, and thereby undermining the purpose of the Northern Ireland Protocol".[197] It gave a list of examples of such behaviour:

(a) insistence that GB-NI tariffs and related provision such as import VAT should be charged in ways that are not related to the real risk of goods entering the EU single market;
(b) such insistence under (a) leading to a failure to reach agreement in the Joint Committee, with the result that the default provisions on tariffs between GB and NI apply;
(c) insistence on paperwork requirements (export declarations) for NI goods going to GB, thereby compromising the principle of "unfettered access" in article 6 of the protocol;
(d) insistence that the EU's state aid provisions should apply in GB in circumstances when there is no link or only a trivial one to commercial operations taking place in NI; and
(e) refusal to grant third country listing to UK agricultural goods for manifestly unreasonable or poorly justified reasons.

It said that "in parallel" with using the provisions in the bill, it would also "always activate appropriate formal dispute settlement mechanisms with the aim of finding a solution through this route".

The withdrawal agreement establishes a dispute settlement process for where the UK and EU disagree over the interpretation or application of the withdrawal agreement after the end of the transition period.[198] Where there is a dispute, the UK and EU will initially seek to resolve it within the Joint Committee. Where this is not possible, the dispute may be referred to an arbitration panel that can make binding rulings. The Court of Justice of the European Union (CJEU) will provide interpretations of questions of EU law to the panel. Failure to comply can result in the imposition of a lump sum or ongoing penalty payment, and non-compliance would ultimately entitle the

---

[196] HC *Hansard*, 21 September 2020, col 695; and *R (Miller)* v *Secretary of State for Exiting the European Union* [2017] UKSC 5, para 55.
[197] Prime Minister's Office, 'Government statement on notwithstanding clauses', 17 September 2020.
[198] For further details, see: House of Commons Library, *The UK-EU Withdrawal Agreement: Dispute Settlement and EU Powers*, 2 October 2020.

complainant to suspend certain treaty obligations or elements of other UK-EU agreements.

Article 16 of the Northern Ireland Protocol says that if the application of the protocol leads to "serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the [European] Union or the United Kingdom may unilaterally take appropriate safeguard measures". If either party is considering taking safeguard measures, it must notify the other party and the Joint Committee, and immediately enter into consultations in the Joint Committee with a view to finding a commonly acceptable solution.

The Government has been criticised for seeking to take its own unilateral measures instead of, or in addition to, invoking the dispute resolution measures provided for in the withdrawal agreement. For instance, Geoffrey Cox (Conservative MP for Torridge and West Devon), the former Attorney General, said that "however provoked or frustrated they may feel", ministers should not "take or use powers permanently and unilaterally to rewrite portions of an agreement into which this country freely entered just a few months ago".[199] He said that the Government should use the "clear and lawful responses available":

> These include triggering the agreed independent arbitration procedure set out in the withdrawal agreement and, in extremis, these might legitimately extend to taking temporary and proportionate measures, where they are urgently necessary to protect the fundamental interests of the UK (in my view if, and only if, specifically approved at the time by the House of Commons) for the period until that arbitration has concluded.

Hilary Benn (Labour MP for Leeds Central), chair of the House of Commons Future Relationship with the European Union Committee, argued the Government's proposition that it would use formal dispute settlement procedures "in parallel with" the powers in the bill "drives a coach and horses" through what the Government signed up to in the withdrawal agreement.[200] He drew attention to article 168 of the withdrawal agreement, which states that for any disputes arising under the withdrawal agreement, the EU and the UK "shall only have recourse to the procedures provided for in this agreement". He suggested the issue of exit summary declarations should be resolved in the Joint Committee through the article 16 process. Likewise, if the EU were to deny the UK third country listing and prevent food products being sent from Great Britain to Northern Ireland, he believed the UK could launch legal proceedings against the EU or invoke article 16 of the protocol.[201]

---

[199] Geoffrey Cox, 'Honour rests on keeping our word', *Times* (£), 13 September 2020.
[200] HC Hansard, 21 September 2020, col 701.
[201] ibid, col 703.

'Break glass' provision

The Government also introduced what it calls a 'break glass' provision relating to clauses 44, 45 and 47—an apparent reference to the phrase "break glass in case of emergency". Following a government amendment at committee stage, clause 56(4) now contains an extra requirement for commencing clauses 44, 45 and 47. The secretary of state could not bring these clauses into force unless:

- The House of Commons had approved a motion that the relevant sections on or after a specified date.
- A motion to take note of the specified date had been tabled in the House of Lords.

Robin Walker, Minister of State at the Northern Ireland Office, said this ensured the Government would seek the consent of the Commons before exercising the powers in the Government's 'safety net'.[202] He said the government's amendment was substantially the same as one tabled by Sir Robert Neill (Conservative MP for Bromley and Chislehurst and chair of the House of Commons Justice Committee), although the Government had also added the requirement for a debate to be tabled in the House of Lords.[203]

Sir Robert Neill had tabled his amendment as a "parliamentary lock" to ensure that the Government would "think very hard and carefully" about using the bill's provisions to override international law.[204] There was media speculation that up to 30 Conservative MPs might vote in favour of Sir Robert's amendment.[205] At committee stage, Sir Robert said the government's amendment enabled him to support clauses 44, 45 and 47, "on the understanding that there is a specific parliamentary lock that bad faith on the counter-party's [ie the EU] side must be proven to the House before these powers are brought into operation".[206] Sir Robert's amendment was not put to a formal decision, and the Government's amendment was agreed to without a vote.

Other MPs argued that the government amendment did not address their underlying objections to clauses 44, 45 and 47. For example, Paul Blomfield, Shadow Minister for Brexit and EU Negotiations, described it as a "so-called compromise" and a "sticking plaster to salve consciences", but said it did

---

[202] HC Hansard, 21 September 2020, col 650.
[203] ibid, col 655.
[204] Andrew Woodcock, 'Brexit: EU will not 'be shy' in taking legal steps against UK and says Boris Johnson's draft bill endangers Irish peace deal', *Independent*, 11 September 2020.
[205] Simon Murphy, Daniel Boffey and Owen Bowcott, 'Tory rebellion widens over Boris Johnson's bill to override Brexit deal', *Guardian*, 13 September 2020.
[206] HC *Hansard*, 21 September 2020, col 655.

"not resolve the issue: the breach of international law".[207] Theresa May (Conservative MP for Maidenhead), the former prime minister, said that "to the outside world, it makes no difference whether a decision to break international law is taken by a minister or by this Parliament: it is still a decision to break international law".[208]

3.3 Responses to part 5 of the bill

European Union

The EU has launched infringement proceedings against the UK over the bill. Maroš Šefčovič, the EU co-chair of the Joint Committee, called for an extraordinary meeting of the UK-EU Joint Committee to request the UK Government to respond to the EU's "serious concerns" about the bill.[209] In a statement released after the meeting, Mr Šefčovič said that "timely and full implementation" of the withdrawal agreement, including the protocol was a legal obligation that Boris Johnson, his Government and the UK Parliament had all agreed to less than a year ago. He stated:

> The European Union expects the letter and spirit of this agreement to be fully respected. Violating the terms of the withdrawal agreement would break international law, undermine trust and put at risk the ongoing future relationship negotiations.[210]

The EU's position is that the bill would breach the UK's obligations in the following ways:

> If adopted as proposed, the draft bill would be in clear breach of substantive provisions of the protocol: Article 5(3) and (4) and article 10 on customs legislation and state aid, including among other things, the direct effect of the withdrawal agreement (article 4). In addition, the UK Government would be in violation of the good faith obligation under the withdrawal agreement (article 5) as the draft bill jeopardises the attainment of the objectives of the agreement.[211]

Calling on the Government to withdraw the measures from the bill by the end of September at the latest, he said the EU would "not be shy in using" mechanisms and legal remedies in the withdrawal agreement to address any violations of its provisions.

---

[207] HC *Hansard*, 21 September 2020, cols 661–2.
[208] ibid, col 667.
[209] European Commission, 'Statement by the European Commission following the extraordinary meeting of the EU-UK Joint Committee', 10 September 2020.
[210] ibid.
[211] ibid.

On 1 October 2020, the European Commission announced that it was launching infringement proceedings against the UK.[212] The Commission argued that the UK's failure to withdraw the contentious parts of the bill meant it had "breached its obligation to act in good faith, as set out in article 5 of the withdrawal agreement". The European Commission's letter of formal notice to the UK gives it until the end of October to respond.

The normal process for infringement proceedings is as follows:

> The infringement procedure begins with a request for information (a "Letter of Formal Notice") to the member state concerned, which must be answered within a specified period, usually two months.
>
> If the Commission is not satisfied with the information and concludes that the member state in question is failing to fulfil its obligations under EU law, the Commission may then send a formal request to comply with EU law (a "Reasoned Opinion"), calling on the member state to inform the Commission of the measures taken to comply within a specified period, usually two months.
>
> If a member state fails to ensure compliance with EU law, the Commission may then decide to refer the member state to the Court of Justice […] If the Court rules against a member state, the member state must then take the necessary measures to comply with the judgment.[213]

The withdrawal agreement enables the European Commission to bring infringement proceedings and refer potential breaches of EU law to the CJEU, as if the UK is a member state, until the end of the transition period (and for four years after the end of the transition period for breaches committed before the end of the transition period).[214] It also extends this power to apply in relation to alleged breaches of the withdrawal agreement during the transition period.

Kenneth Armstrong, professor of European law at the University of Cambridge, has argued that in this case there could be practical difficulties for the EU to enforce any remedies against the UK:

> […] what is particularly striking about today's letter of formal notice is that the action complained of is the introduction of a new bill into the UK Parliament. That has implications for what remedies the European

---

[212] European Commission, 'Withdrawal Agreement: European Commission sends letter of formal notice to the United Kingdom for breach of its obligations', 1 October 2020.
[213] European Commission, 'Infringements: Frequently Asked Questions', 17 January 2012.
[214] For further details, see: House of Commons Library, *The UK-EU Withdrawal Agreement: Dispute Settlement and EU Powers*, 2 October 2020.

> Commission might seek and obtain from the Court of Justice should the UK fail to amend the legislation within the one month time period the European Commission has set before adopting a 'reasoned opinion' (the formal legal step before bringing a matter before the Court of Justice). In particular, the Commission might seek interim remedies against the UK. How things develop, however, may depend on what happens within the domestic arena.
>
> Domestic enforcement of any order of the Court of Justice providing interim remedies would confront some obvious obstacles. Firstly, who would bring any domestic proceedings and against whom? Secondly, if the bill was not yet enacted, an obvious objection to any domestic proceedings might be that it constituted an impermissible interference with proceedings in Parliament. Thirdly, if the bill is enacted and enters into force, UK courts would be forced to confront the attempt in what is now clause 47 of the bill […] to exclude judicial review. A clash between EU and national courts or between UK courts and the UK Government might then ensue.[215]

The conflict between the UK and the EU over the bill did not prevent the ninth formal round of negotiations on the future relationship going ahead between 29 September and 2 October 2020. In a joint statement after the negotiating round, Boris Johnson and Ursula Von Der Leyen, President of the European Commission, agreed on "the importance of finding an agreement, if at all possible, as a strong basis for a strategic EU-UK relationship in future", but said "significant gaps remained", notably (but not only) over fisheries, the level playing field and governance.[216]

A deal agreed between the UK and the EU would need to be approved by the European Parliament before it could be ratified. The leaders of the political groups in the European Parliament and the European Parliament's UK coordination group have stated that "should the UK authorities breach—or threaten to breach—the withdrawal agreement, through the United Kingdom Internal Market Bill in its current form or in any other way, the European Parliament will, under no circumstances, ratify any agreement between the EU and the UK".[217]

---

[215] Kenneth Armstrong, 'Why is the European Commission taking action against the UK before the Internal Market bill becomes law?', EU Relations Law Blog, 1 October 2020.
[216] Prime Minister's Office, 'Joint statement by the Prime Minister and the President of the European Commission', 3 October 2020.
[217] European Parliament, 'Statement of the UK Coordination Group and the leaders of the political groups of the EP', 11 September 2020.

Devolved administrations

The Scottish Government cited provisions in part 5 of the bill amongst the reasons why it would not recommend granting legislative consent:

> The bill places a number of obligations on the Scottish ministers which may conflict with the obligations that the Scottish ministers would expect to be obliged to follow in the withdrawal agreement. The Scottish Government cannot recommend that the Parliament consent to a bill that contains provisions that directly contradict the fundamental principle, reflected in the ministerial code, that ministers do not knowingly break the law, including international law.[218]

Similarly, the Welsh Government has stated that it objects to part 5 of the bill "on the basis that clauses in that part breach international law".[219] This is one of the reasons for which the Welsh Government is not recommending legislative consent unless the bill is substantially amended.

The Northern Ireland Executive has not published a legislative consent memorandum on the bill. When Arlene Foster, the First Minister and leader of the Democratic Unionist Party, was asked about whether the 'notwithstanding' clauses in the bill were appropriate, she said "the hope is that there will still be a negotiated settlement through the Joint Committee and, in particular, a free trade agreement in totality".[220] The Democratic Unionist Party (DUP) has described the bill as "a mammoth step by the Government to mitigate the threat to Northern Ireland traders and consumers from the withdrawal agreement".[221] Michelle O'Neill, Deputy First Minister and vice president of Sinn Féin, said that: "the British Government's breaking of international law threatens the Good Friday Agreement and […] what has been agreed with the EU must be implemented".[222]

On 5 October 2020, the Northern Ireland Assembly voted by a majority of eight in favour of a motion calling on the British Government to respect the rule of law and honour its obligations in full as set out in the withdrawal agreement.[223]

---

[218] Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, September 2020, para 93. Footnote 4 of the memorandum implies this is a reference to the Scottish Ministerial Code.
[219] Welsh Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, 25 September 2020, para 77.
[220] Northern Ireland Assembly, *Official Report*, 14 September 2020.
[221] Democratic Unionist Party, 'Wilson—"UK Internal Market Bill is a step in right direction"', 14 September 2020.
[222] Sinn Féin, 'O'Neill raises Covid-19, legacy and Brexit at Hillsborough meeting', 30 September 2020.
[223] Northern Ireland Assembly, *Official Report*, 5 October 2020, pp 60–1.

House of Lords Constitution Committee

Baroness Taylor of Bolton, chair of the House of Lords Constitution Committee, wrote to the Lord Chancellor on behalf of the committee to set out the committee's concerns about the bill and the way it "appears to be in tension with the constitutional principle of the rule of law".[224] She argued that it was "irrelevant" whether the bill would breach international law in a "specific and limited" way because any breach of international law "threatens to undermine confidence in future treaty commitments made by the UK Government and increases the likelihood that the governments of other countries will breach their international law obligations".

Baroness Taylor also argued that the bill "puts the entire withdrawal agreement, and the other related agreements, at risk, potentially unravelling the policy of the European Union (Withdrawal Agreement) Act 2020". This is because a material breach of a bilateral treaty could be grounds for the other party to terminate or suspend the operation of the treaty in whole or in part.[225]

The letter also expressed concerns that the bill would "confer powers at odds" with duties under the ministerial code, the cabinet manual and the civil service code to comply with the law, "modifying and possibly eroding" these duties.

House of Lords Delegated Powers and Regulatory Reform Committee

The House of Lords Delegated Powers and Regulatory Reform Committee concluded that the provisions in what are now clauses 44 and 45 that would give ministers the power to make regulations that disregard relevant international law or domestic law should be removed from the bill. The committee said they were of "unprecedented width" and contained "inappropriate delegations of power".[226] The committee commented that in allowing ministers to make regulations disregarding international or domestic law, the bill "potentially represents an unprecedented challenge to the United Kingdom's commitment to the rule of law".[227]

---

[224] House of Lords Constitution Committee, *Letter from Baroness Taylor of Bolton to the Rt Hon Robert Buckland QC MP, Lord Chancellor, on the Rule of Law and the UK Internal Market Bill*, 11 September 2020.
[225] Baroness Taylor referred to the Vienna Convention on the Law of Treaties (VCLT) in relation to this point. The UK is party to this convention, but the EU is not as it is not a state. However, the VCLT is held to reflect the principles of customary international law. For more about the VCLT and principles of customary international law, see: House of Commons Library, *The United Kingdom Internal Market Bill*, 14 September 2020, pp 16–19; and *Principles of International Law: A Brief Guide*, 21 September 2020.
[226] House of Lords Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill*, 17 September 2020, HL Paper 130 of session 2019–21, paras 38–9.
[227] ibid, para 38.

Resignations

Lord Keen of Elie resigned as Advocate General for Scotland over the bill. In his resignation letter, he said he had found it increasingly difficult to reconcile his obligations as a law officer with the Prime Minister's policy intentions for the bill.[228] Jonathan Jones, permanent secretary at the Government Legal Department, also reportedly resigned over his concerns about the bill.[229]

4. What does part 6 say about financial assistance powers?

The explanatory notes to the bill state that the UK Government currently lacks a "single, comprehensive statutory power" to provide financial assistance across policy areas throughout the whole of the UK.[230]

The Government has said that it intends to use the powers to assist it in replacing EU structural funds:

> The proposals will allow the UK Government to meet its commitments to deliver replacements for EU programmes, such as a UK Shared Prosperity Fund, replacing bureaucratic EU structural funds and at a minimum match the size of those funds in each nation.[231]

4.1 Part 6 clause by clause

Clauses 48 and 49 provide a power to provide financial assistance "to any person for, or in connection with" the following purposes:

(a) promoting economic development in the United Kingdom or any area of the United Kingdom;
(b) providing infrastructure at places in the United Kingdom (including infrastructure in connection with any of the other purposes mentioned in this section);
(c) supporting cultural activities, projects and events that the minister considers directly or indirectly benefit the United Kingdom or particular areas of the United Kingdom;
(d) supporting activities, projects and events relating to sport that the minister considers directly or indirectly benefit the United

---

[228] *Guardian*, 'Advocate General's resignation letter suggests he was not confident PM only viewed internal market bill as last resort', 17 September 2020.
[229] Sebastian Payne, George Parker, Peter Foster and Jim Pickard, 'Top UK government lawyer quits over Brexit withdrawal agreement changes', *Financial Times* (£), 8 September 2020.
[230] Explanatory Notes, para 66.
[231] Office of the Secretary of State for Scotland et al, 'UK Internal Market Bill introduced today', 9 September 2020.

Kingdom or particular areas of the United Kingdom;

(e) supporting international educational and training activities and exchanges; (f) supporting educational and training activities and exchanges within the United Kingdom.[232]

Infrastructure is defined as including:

(a) water, electricity, gas, telecommunications, sewerage or other services (for example, the provision of heat),
(b) railway facilities (including rolling stock), roads or other transport facilities,
(c) health, educational, cultural or sports facilities,
(d) court or prison facilities, and
(e) housing;[233]

Financial assistance could take different forms, including grants or loans; could be subject to conditions; provided under contract; and could be provided to an investment fund for onward investment.[234]

Clause 49(2) states that the power in clause 48 is in addition to (and does not limit or replace) any other powers for a minister to provide financial assistance. The explanatory notes state the UK Government has a number of existing statutory powers to provide financial assistance, including the Industrial Development Act 1982 which "allows the secretary of state to provide financial assistance to industry in relevant circumstances".[235] It also has other powers to provide financial assistance that "extend to some, but not all, of the UK, for example section 31 of the Local Government Act 2003 which only extends to England and Wales".[236]

The explanatory notes state that the Government intends the power to be used to provide funding to "local authorities, sectoral organisations, community groups, educational institutions and other bodies and persons in order to support and promote these policy areas across the UK".[237]

4.2 What have the devolved authorities said?

The Scottish Government has described the powers as "extensive".[238] It has said that provisions would allow "the UK Government to spend money

[232] Clause 48(1).
[233] Clause 48(2)
[234] Clause 49(1).
[235] Explanatory Notes, para 69.
[236] ibid, para 70.
[237] ibid, para 68.
[238] Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, September 2020, para 96.

including in devolved areas without the consent or input of the Scottish ministers, or the approval of the Scottish Parliament".[239] It has also expressed concern that the powers in part 6 would not be constrained to replacing EU programmes.[240] It has described the provisions as a "further source of uncertainty and confusion in the bill, as well as potentially removing from the Scottish Government its current role in EU funding".[241]

It has also said that it believes there is a risk of powers leading to an uncoordinated and "potentially incoherent" approach to spending in devolved areas where both the UK and Scottish Governments have programmes in the same areas.[242] The Scottish Government has argued that the need for it to coordinate would constrain its current devolved decision making. It argued that the clause should be removed from the bill.[243]

The Welsh Government has also argued that the provisions should be removed from the bill.[244] It has stated that there is "no mechanical link" between the market access principles in parts 1 to 4 of the bill and the powers in part 6. It has described the powers as unnecessary and said that they would undermine spending decisions made by the Senedd Cymru and by Welsh ministers.[245]

5. What would the rest of the bill do?

5.1 Part 7: Final Provisions

Clause 50: Regulation of distortive or harmful subsidies

In its white paper on the internal market, the Government argued that a single UK-wide subsidy control regime would provide certainty and clarity for businesses. It would protect them from "unfair competition" and mitigate against the risk of "harmful subsidy races between nations, regions and cities, whilst promoting a dynamic and competitive market economy throughout the UK".[246] The UK Government restated its view that the regulation of state aid was a reserved matter.[247] It stated that it was seeking to specifically reserve subsidy control to ensure that it could legislate for a single subsidy

[239] Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, September 2020, para 99.
[240] ibid.
[241] ibid, para 100.
[242] ibid, para 106.
[243] ibid.
[244] Welsh Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, 25 September 2020, para 78.
[245] ibid.
[246] Department for Business, Energy and Industrial Strategy, *UK Internal Market*, July 2020, CP278, para 172.
[247] ibid, para 173.

control regime in the future:

> However, while this reservation would be sufficient to encompass an approach to subsidy control that mirrored the EU state aid regime in the UK, the existing devolution settlements do not contain any general reservation for subsidy control. To guarantee that a single, unified subsidy control regime could be legislated for in the future, we will legislate to expressly provide that subsidy control is a reserved matter (or 'excepted', in line with the terminology used in Northern Ireland).[248]

Clause 50 would amend the Scotland Act 1998, the Government of Wales Act 2006 and the Northern Ireland Act 1998, to make the regulation of distortive or harmful subsidies a 'reserved matter' in the case of Scotland and Wales and an 'excepted matter' in the case of Northern Ireland.[249] This would prevent the devolved legislatures from legislating in this area by making it an exclusive competence of the UK Parliament.[250]

In its response to the white paper consultation, the Government said that the details of subsidy control would be subject to a separate regime which it would set out in due course.[251] On 9 September, Alok Sharma, Secretary of State for Business, Energy and Industrial Strategy, said that from 1 January 2021 the Government would follow the World Trade Organisation (WTO) rules for subsidy control.[252] He also said that "in the coming months" the Government would publish a consultation on whether it "should go further than those existing commitments, including whether legislation is necessary".

What have the devolved authorities said?

The Scottish Government has argued that the regulation of the provisions of subsidies is a devolved matter, and not reserved. It has stated that:

> This is a new reservation of a previously devolved matter. The European Commission acted as regulator of state aid while the UK was a member state of the EU and each public authority in the UK was able to make its own funding decisions within the EU's rules.[253]

---

[248] Department for Business, Energy and Industrial Strategy, *UK Internal Market*, July 2020, CP278, para 173.
[249] Explanatory Notes, para 320.
[250] ibid, para 322.
[251] Department for Business, Energy and Industrial Strategy, *Government Response to the Consultation on the UK Internal Market*, 9 September 2020, p 16.
[252] House of Commons, 'Written Statement: Business Update', 9 September 2020, HCWS443. The House of Commons Library have published a briefing that includes an overview of the WTO Agreement on Subsidies and Countervailing Measures: *EU State Aid Rules and WTO Subsidies Agreement*, 16 September 2020.
[253] Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*,

The Scottish Government has said it is concerned that any future UK-led subsidy framework may not reflect Scotland's specific needs.

The Welsh Government has said that it favours the creation of a UK-wide subsidy system.[254] However, it has said that it objects to amending the Government of Wales Act 2006 to reserve state aid. The Welsh Government argues that a future regime "should be achieved through discussion and negotiation between the four parts of the UK".[255]

Clause 51: Protection of act against modification

Clause 51 would amend the Scotland Act 1998, the Government of Wales Act 2006 and the Northern Ireland Act 1998, to prevent devolved authorities from modifying the United Kingdom Internal Market Act 2020.

What have the devolved authorities said?

The Scottish Government has said it is "deeply" concerned at the increased use of adding enactments to schedule 4 of the Scotland Act 1998, especially in the absence of legislative consent.[256] The Scottish Government has argued doing so is like adding reservations to schedule 5 of that act:

> Adding enactments to schedule 4 has a similar effect to adding reservation to schedule 5 in that the legislative competence of the [Scottish] Parliament is permanently reduced and there are no measures the Scottish Parliament can take to recover its powers; only further primary legislation in the UK Parliament can achieve that. In addition, the operation of schedule 4 to prevent "modification" of the relevant provisions is less clear than the well understood operation of reservations under schedule 5, introducing, in the Scottish Government's view, significant levels of uncertainty in discerning the limits of devolved competence in considering future legislation in the Scottish Parliament.[257]

The Welsh Government also objects to the bill being made a protected enactment by clause 49 [now clause 51].[258] It has argued that such protections should only operate on a narrow basis and should be based on agreement between the legislatures.

September 2020, para 110.
[254] Welsh Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, 25 September 2020, para 79.
[255] ibid.
[256] Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, September 2020, para 114.
[257] ibid, para 114.
[258] Welsh Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, 25 September 2020, para 80.

Clause 52: Further provision in connection with the Northern Ireland Protocol

Article 18 of the Northern Ireland Protocol contains a democratic consent mechanism. The Northern Ireland Assembly will hold a consent vote every four years from 2024 (four years after the end of the transition period) to decide whether articles 5 to 10 of the protocol should continue to apply.[259] The interval between consent votes is increased to eight years if there is cross-community support within the Assembly for the provisions' continued application. If there is no majority in favour of articles 5 to 10 continuing, they would cease to apply two years later.

Clause 52 of the bill reflects this consent mechanism by providing that clause 11 and part 5 (clauses 42 to 47) of the bill would cease to apply if articles 5 to 10 ceased to apply.

Clause 52 also makes some provisions in relation to section 8C of the European Union (Withdrawal) Act 2018. Section 8C gives ministers the power to make regulations to implement the Northern Ireland Protocol. Clause 52 specifies that nothing in the bill limits that power, except that it can be used to modify the operation of clause 43 of the bill only in the ways set out in clause 52(3). This exception would cease to have effect if articles 5 to 10 of the protocol ceased to apply.

Clause 53: Regulations—general

Clause 53 provides that all regulations made under the act, except commencement regulations made under section 56(3), could amend, repeal or otherwise modify legislation.

The House of Lords Delegated Powers and Regulatory Reform Committee noted that seven Henry VIII powers in the bill (those that are now numbered 3(8), 6(5), 8(7), 10(2), 17(2), 20(7) and 43(8)) allow ministers to amend or repeal significant provisions of the bill itself once it is enacted.[260]

The committee said it was not convinced that all the Henry VIII powers were justified. The committee's comments about specific powers are discussed in this briefing in sections 2.3, 3.2 and 3.5.

---

[259] Articles 5 to 10 cover: customs and movement of goods; protection of the UK internal market; technical regulations, assessments, registrations, certificates, approvals and authorisations; VAT and excise; the single electricity market; and state aid.

[260] House of Lords Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill*, 17 September 2020, HL Paper 130 of session 2019–21. The numbering of the relevant clauses has changed since the committee's report was published. Henry VIII powers are powers that enable ministers to amend or repeal provisions in acts of Parliament using secondary legislation.

Clause 54: Regulations—references to parliamentary procedure

Clause 54 sets out the parliamentary procedure that would apply making regulations under the bill using the affirmative, made affirmative and negative procedure.

Clause 55: Interpretation—general

Clause 55 provides definitions of terms used in the bill.

Clause 56: Extent, commencement and short title

Clause 56 provides for the extent, commencement and short title of the bill. The bill extends to England and Wales, Scotland and Northern Ireland.

Clause 56 would come into force on the day on which the bill is passed. The other provisions would be brought into force by the secretary of state making commencement regulations. However, clause 56(4) contains an extra requirement for commencing clauses 44, 45 and 47. The secretary of state could not bring these clauses into force unless:

- The House of Commons had approved a motion that the relevant sections on or after a specified date.
- A motion to take note of the specified date had been tabled in the House of Lords.

This requirement was added as a government amendment to the bill at committee stage in the House of Commons. This is covered further in section 3.2 of this briefing.

6. How did the House of Commons react to the bill at second reading?

The United Kingdom Internal Market Bill had its second reading in the House of Commons on 14 September 2020.[261]

Introducing the bill, the Prime Minister said its fundamental purpose was to ensure the UK's single market continued to operate after the end of the transition period.[262] He argued that the bill would provide legal certainty to businesses and was essential to guarantee the economic and political integrity of the UK.

---

[261] HC *Hansard*, 14 September 2020, cols 41–143.
[262] ibid, col 41.

The Prime Minister suggested that the EU might seek to obstruct the "transfer of our animal products from Great Britain to Northern Ireland".[263] He argued the bill's provisions that related to the Northern Ireland Protocol in the withdrawal agreement were "an insurance policy" against this kind of eventuality.[264] The bill's provisions as they relate to the Northern Ireland Protocol are discussed in further detail in section 3 of this briefing.

On devolution the Prime Minister argued that the bill would help deliver "the single biggest transfer of powers" to the devolved administrations since their creation.[265] He said that each administration would be "fully and equally" involved in the oversight of the UK internal market through the Office for the Internal Market (OIM). The Prime Minister also argued that the bill would "maintain our common cause of high standards, where we already go beyond the EU in areas ranging from health and safety to consumer and environmental protections".[266]

Responding for the official opposition, Ed Miliband, Shadow Secretary of State for Business, Energy and Industrial Strategy, said that Labour agreed with the Government that it was responsible for safeguarding the internal market.[267] However, he argued the UK's devolution settlements reflected a decision to share power across the UK. He said that Parliament should legislate for an internal market "but in a way that respects the role and voice of devolved governments in setting those standards".[268] Mr Miliband argued that the Government's approach did not respect the devolution settlements and also risked a lowering of standards:

> From across the UK, we have heard that the Government are not doing that; that they want to legislate with a blunderbuss approach that does not do that and simply says that the lowest standard in one Parliament must become the standard for all, with no proper voice for devolved Governments. If the Westminster Government decided to lower standards, there would be no voice for the devolved nations, even in a discussion about those standards because the Government have decided not to legislate for common frameworks.[269]

On the bill's provisions on the Northern Ireland Protocol, Ed Miliband said that he "never thought that respecting international law would be a matter of disagreement" in his lifetime.[270] He said that he did not believe the provisions in the bill were necessary.

---

[263] HC *Hansard*, 14 September 2020, col 42.
[264] ibid, col 42.
[265] ibid, col 45.
[266] ibid, col 45.
[267] ibid, col 47.
[268] ibid.
[269] ibid.
[270] ibid, col 48.

Mr Miliband said that the Government should "remove the provisions breaking international law and ensure that the Bill works in a way that respects the devolution settlements".[271]

Ian Blackford, the SNP's leader at Westminster, described the bill as the "greatest threat" to devolution that Scotland has faced since the Scottish Parliament was re-established.[272] He argued that the bill was a "naked power grab".[273] Mr Blackford stated that the powers in clauses 2 to 9 (those that provide for the market access principles) could "compel" Scotland to accept lower standards set elsewhere in the UK. He also asserted that the establishment of the Office for the Internal Market would lead to an unelected body passing "judgment on devolved laws, directly over the heads of the Scottish people's chosen Government".[274]

Ian Blackford described the bill's provisions reserving state aid as "one of the most blatant power grabs" in the bill. He expressed concern that the state aid provisions would mirror those of the World Trade Organisation and make a deal with the EU "even more difficult". Mr Blackford argued that the provisions on financial assistance powers for the UK Government were the "ultimate insult and the ultimate attack" on devolution. He said it would give powers to the UK Government to design and impose replacements for EU spending programmes in areas of devolved competence.

On the bill's provisions on the Northern Ireland Protocol, Ian Blackford described the issue as a matter of principle and that "we should not breach our legal obligations".[275]

Sammy Wilson, the DUP spokesperson on Brexit, said that he welcomed the bill if it were an attempt to "undo some of the damage done by the withdrawal agreement".[276] However, Mr Wilson said that the bill did "not go the whole way or address all the issues that need to be addressed". He said that he did not accept the argument that the bill would affect peace in Northern Ireland. Mr Wilson also argued that the withdrawal agreement required both the EU and the UK to act in good faith to ensure there was unfettered access between Northern Ireland and Great Britain. He said that he believed that the bill was the Government, in part, fulfilling its obligations to Northern Ireland and that was why the DUP would support the bill.

Colum Eastwood (SDLP MP for Foyle) expressed concern that the bill would damage the Good Friday Agreement. He argued that the bill "rips up" the agreement's principles that there would not be a hard border in Ireland and

[271] HC *Hansard*, 14 September 2020, col 54.
[272] ibid, col 55.
[273] ibid, col 57.
[274] ibid, col 58.
[275] ibid, col 57.
[276] ibid, col 67.

that "local people will make local decisions for local communities".[277] Mr Eastwood argued that the protocol was there to protect Northern Ireland from a hard border. He also expressed concern that the Government's actions would put a future trade deal with the US at risk.

Stephen Farry (Alliance MP for North Down) argued that the people of Northern Ireland "pragmatically recognise the need for the protocol, despite its challenges".[278] He asserted that if the UK defaulted on the protocol it risked a return to a hard border.

Liz Saville Roberts (Plaid Cymru MP for Dwyfor Meirionnydd) said that the bill was damaging for Wales "without precedent".[279] She thought the bill would "render Wales powerless" to prevent low-quality produce from entering Welsh supermarkets and undercutting Welsh farmers on cost. Ms Saville Roberts also argued that "it would invalidate 'buy local' policies in Wales by making it illegal to place goods from another part of the UK at a disadvantage compared with local goods in Wales". She expressed concern about the impact of the bill's provisions on trade asserting that it "holds up the spectre of no trade deal with the UK due to the Prime Minister breaking international law".[280] Ms Saville Roberts said that devolution was not an experiment and that Welsh democracy had been growing in the last "two decades and more, in confidence and in power".[281]

Ed Davey, leader of the Liberal Democrats, said that his party would oppose the bill.[282] He argued that the bill broke the Government's promise to 'Leave' voters of a "global Britain" because if the Government breached international law it would weaken Britain's ability to exercise influence in the world.

Labour moved a reasoned amendment to the motion to give the bill second reading:

> That this House notes that the UK has left the EU; calls on the Government to get on with negotiating a trade deal with the EU; recognises that legislation is required to ensure the smooth, effective working of the internal market across the UK; but declines to give a second reading to the Internal Market Bill because this bill undermines the withdrawal agreement already agreed by Parliament, re-opens discussion about the Northern Ireland Protocol that has already been settled, breaches international law, undermines the devolution settlements and would tarnish the UK's global reputation as a

[277] HC *Hansard*, 14 September 2020, col 76.
[278] ibid col 108.
[279] ibid, col 114.
[280] ibid, cols 114–15.
[281] ibid, col 115.
[282] ibid, col 94.

> law-abiding nation and the UK's ability to enforce other international trade deals and protect jobs and the economy.[283]

Labour's reasoned amendment to the motion for the bill to be read a second time was defeated by 349 votes to 213.[284]

The bill passed second reading by 340 votes to 263.[285]

7. How did the bill change in the House of Commons?

7.1. Committee stage government amendments

Committee stage took place over four days on 15, 16, 21 and 22 September 2020. The Government made over 30 amendments to the bill during its committee stage in the House of Commons. These were all agreed to without division. The amendments included clarifying and technical amendments. Other amendments included:

- A new clause, now clause 12 (guidance to part 1), which provided for the secretary of state to issue guidance relating to the practical operation of the UK market access principles and the effect of any of the provisions of part 1. This clause is discussed in section 2.3 of this briefing.
- Amendments were made to what is now clause 42 to add VAT or excise duty in connection with the Northern Ireland Protocol, and biosecurity threats to the list of reasons for which new checks, controls or processes would be allowed. This is discussed in section 3.2 of this briefing.
- A government amendment to require Commons approval for the commencement of clauses 44, 45 and 47 was agreed to without division. This is covered in section 3.2 of this briefing.
- Government amendments relating to judicial review were made at committee stage to what is now clause 47. These were agreed to without division. These amendments are discussed further in section 3.2 of this briefing.

This briefing's part by part discussion of the bill (sections 2 to 5 of this briefing) looks at the bill as amended at committee and report in the House of Commons.

---

[283] House of Commons, 'Votes and Proceedings', 14 September 2020.
[284] HC *Hansard*, 14 September 2020, cols 131–4.
[285] ibid, cols 135–8.

7.2 Committee stage divisions

Six opposition amendments were defeated on division, as follows:

- An SNP amendment intended to exempt from the operation of part 4 regulatory provisions applying in Scotland which did not apply to the whole of the UK was defeated by 351 votes to 51.[286]
- Labour new clause 2 intended to put common frameworks on a statutory footing and prevent ministers from overriding an agreed common framework through secondary legislation to impose lower standards on devolved nations was defeated by 356 votes to 195.[287]
- A Labour amendment intended to provide a policy framework for the allocation of financial assistance under clause 46 (which is now numbered clause 48) was defeated by 330 votes to 208.[288]
- A cross-party amendment intending to provide a safeguard to ensure that any actions under part 5 of the bill must be consistent with relevant existing international and domestic law commitments, including the withdrawal agreement and the Ireland/Northern Ireland Protocol, was defeated by 346 votes to 255.[289]
- A DUP amendment intended to require the consent of the Northern Ireland Assembly before new requirements for goods traded from Great Britain to Northern Ireland could come into force, and to protect Northern Ireland businesses from paying for any new administrative costs was defeated by 350 votes to 6.[290]
- A cross-party amendment intended to prevent powers being reserved to Westminster by the bill without the consent of the devolved legislatures was defeated by 350 votes to 63.[291]

'Stand-part' votes were held on several clauses (to agree that that they should remain in the bill), as follows:

- Clause 46 [now clause 48]. The clause was agreed to stand part by 340 votes to 51.[292]
- Clauses 42 to 44 [now clauses 44 to 46]. The clauses were agreed to stand part by 332 votes to 257.[293]

---

[286] HC *Hansard*, 15 September 2020, cols 271–3.
[287] ibid, cols 275–7.
[288] HC *Hansard*, 16 September 2020, cols 446–9.
[289] HC *Hansard*, 21 September 2020, cols 747–50.
[290] ibid, cols 752–3.
[291] HC Hansard, 22 September 2020, cols 905–7.
[292] HC *Hansard*, 16 September 2020, cols 442–4.
[293] HC *Hansard*, 21 September 2020, cols 756–9.

- Clauses 45 and 50 [now clauses 47 and 52]. The clauses were agreed to stand part by 338 votes to 254.[294]

7.3 Report stage government amendments

Report stage took place on 29 September 2020.

The Government tabled amendments to different areas of the bill. This included two new clauses and a new schedule along with amendments designed to improve the bill's drafting. All these amendments were agreed without division.

New clause 4: Objectives for the CMA

New clause 4 [now clause 29] would make provision in relation to the objectives and general functions of the Competition and Markets Authority (CMA) under part 4 of the bill. Specifically, the new clause would require the CMA to have regard to a new objective when carrying out its functions under part 4. The objective would be:

> […] to support, through the application of economic and other technical expertise, the effective operation of the internal market in the United Kingdom (with particular reference to the purposes of Parts 1, 2 and 3).[295]

New clause 4 would also provide that section 25(3) of the Enterprise and Regulatory Reform Act 2013 (duty to seek to promote competition), and sections 6(1)(b) (function of giving information or advice to the public) and 7 (provision of information and advice to ministers etc) of the Enterprise Act 2002 do not apply in relation to the carrying out of the CMA's functions under part 4.

Speaking to new clause 4 at report, Paul Scully, Parliamentary Under Secretary of State for Business, Energy and Industrial Strategy, said that it would give the CMA the objective of supporting the effective operation of the UK internal market "through the provision of economic and technical advice and expertise".[296] Mr Scully said that this objective would exist in parallel to the CMA's existing objective to promote competition for the benefit of consumers.

---

[294] HC *Hansard*, 21 September 2020, cols 761–4.
[295] Clause 29(2).
[296] HC *Hansard*, 29 September 2020, col 188.

New clause 5 and new schedule 1: OIM task groups

New schedule 1 [now schedule 3] would make amendments to schedule 4 of the Business Enterprise and Regulatory Reform Act 2013 to allow for the constitution of an Office for the Internal Market (OIM) panel and OIM task groups. New clause 5 [now clause 30] would allow the CMA to authorise such an OIM task group to "do anything required or authorised to be done by the CMA under this part (and such an authorisation may include authorisation to exercise the power conferred on the CMA by this subsection)".[297]

Speaking to new clause 4 at report, Paul Scully said that the new schedule reflected existing provisions:

> New clause 5 enables Competition and Markets Authority functions under part 4 of the Bill to be carried out by an Office for the Internal Market task group and introduces a new schedule setting out the Government's arrangements for the Office for the Internal Market panel and task groups. That mirrors the existing arrangements for the establishment of panels and groups that it has in place.[298]

Mr Scully also stated that new schedule 1 would establish a panel of experts to lead the work of the OIM. He said that the secretary of state would appoint a chair and further members after consulting ministers from the three devolved administrations.[299]

Amendment 1: CMA—protection from defamation

Amendment 1 amended clause 28 to insert a new sub-section 6A which stated that:

> For the purposes of the law relating to defamation, absolute privilege attaches to any advice given, or report made, by the CMA (or a person acting on the CMA's behalf) in the exercise of any functions of the CMA under this Part.[300]

Paul Scully said that this would give the CMA "absolute privilege" against defamation when carrying out its functions under part 4.[301] He said this would ensure that the CMA could report and provide advice independently. It would not need to use resources to prepare against litigation and would mean that "businesses with deep pockets cannot sue or threaten to sue the

---

[297] Clause 30(1).
[298] HC *Hansard*, 29 September 2020, col 188.
[299] ibid.
[300] Clause 28(7).
[301] HC *Hansard*, 29 September 2020, col 189.

CMA to obstruct it from carrying out its functions".

Amendments 31 to 34: Manner of sale requirements

Amendment 32 inserted new sub-sections into clause 3 of the bill (relevant requirements for the purposes of section 2, the mutual recognition principle for goods). This would introduce the concept of a 'manner of sale requirement', defined as:

> […] a statutory requirement that governs any aspect of the circumstances or manner in which the goods are sold (such as where, when, by whom, to whom, or the price or other terms on which they may be sold).[302]

Manner of sale requirements would not be in scope of the mutual recognition principle unless new subsection 4C [now clause 3(6)] applied.[303] Amendment 31 was consequential on amendment 32. Amendments 33 and 34 made amendments to the wording of clause 6(4)(a)[304] to bring it into line with the changes made by amendment 32 to clause 3.[305]

Speaking to the amendments, Paul Scully said that they would put "beyond any possible doubt" that alcohol minimum unit pricing-type regulation were not in scope of the mutual recognition principle, unless they were to amount in practice to a complete ban on a good being sold.[306]

Several SNP MPs raised the issue of minimum alcohol pricing during the bill's committee stage in the House of Commons. For example, Anne McLaughlin (SNP MP for Glasgow North East) argued that:

> None of the new rules would apply to alcohol imported from elsewhere in the UK, so cheap high-strength alcohol from England, Wales and Northern Ireland could flood the market in Scotland and a bulldozer would again be driven through all of our good work.[307]

---

[302] Clause 3(5).
[303] This would provide that a statutory requirement that was worded as a manner of sale requirement but "appears to be designed artificially to avoid the operation of the mutual recognition principle in relation to what would otherwise be a requirement within the scope of that principle", would still be regarded as a relevant requirement, despite new subsection 4A [now clause 3(4)].
[304] Which related to relevant requirements for the purposes of the non-discrimination principle set out in clause 5.
[305] House of Commons, *Consideration of Bill (Report Stage): United Kingdom Internal Market Bill, as Amended*, 29 September 2020, p 9.
[306] HC *Hansard*, 29 September 2020, col 189.
[307] HC *Hansard*, 22 September 2020, col 866.

Responding to the Government's amendments at report, Drew Henry, SNP spokesperson for business, energy and industrial strategy, argued that the amendments supported the SNP's concerns that as previously drafted the bill could have affected minimum unit pricing.[308] He also argued that the "non-discriminatory aspects of the amendment make it completely useless anyway".[309]

Replying, Paul Scully said that the amendment would "ensure we take that political football totally off the table".[310]

Further amendments

Mr Scully stated that:

- Amendments 2 to 11, 24, 27, 28 and 35 to 38 were amendments to improve drafting.[311]
- Amendments 19 and 21 provided "a fuller clarification that a wide range of agricultural processes are considered to be in scope when we refer to the production of goods".[312]
- Amendment 20 "ensures that the UK Government and devolved administrations can continue to respond to specific biosecurity threats arising from the movement of animals and high-risk plants and that they are excluded from the mutual recognition and non-discrimination principles of the bill".[313]
- Amendments 22 and 23 "clarify the meaning of clause 16 that a change to the conditions attached to an authorisation requirement would bring it in scope of part 2 of the bill".[314]
- Amendment 26 "ensures that the exemption in clause 23 covers the replication of non-statutory rules as well as a re-enactment of legislation".[315]

The Government also made amendments to clause 21 through amendment 25 to "deal with a case where a regulator has an obligation to apply discriminatory requirements".[316]

---

[308] HC *Hansard*, 29 September 2020, col 189.
[309] ibid.
[310] ibid.
[311] ibid.
[312] ibid.
[313] ibid, cols 189–90.
[314] ibid, col 190.
[315] ibid.
[316] House of Commons, *Consideration of Bill (Report Stage): United Kingdom Internal Market Bill, as Amended*, 29 September 2020, p 11.

Amendments 12 to 15: Judicial review and the Human Rights Act 1998

Government amendments relating to judicial review were made at report stage to what is now clause 47. These were agreed to without division. These amendments are discussed further in section 3.2 of this briefing.

7.4 Report stage divisions

Four opposition amendments were defeated on division at report stage, as follows.

New clause 1 and amendment 16

Labour moved new clause 1, which it said was intended to replace the clauses that are now numbered 44, 45 and 47.[317] New clause 1 would have required authorities exercising functions under part 5 of the bill to:

- Respect the rule of law;
- Allow for the possibility of judicial review;
- Use the provisions of article 16 of the protocol to safeguard the UK's interests. Article 16 states that: "If the application of this protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to a diversion of trade, the [European] Union or the United Kingdom may unilaterally take appropriate safeguard measures";
- Comply with the UK's obligations under international law;
- Comply with specified requirements in the withdrawal agreement to act in good faith;
- Comply with the Good Friday (Belfast) Agreement; and
- Comply with the Human Rights Act 1998.

Lucy Powell, Shadow Minister for Business and Consumers, said the bill was "a bad bill that is not in the national interest" and that Labour would "work to try to improve it".[318] She was critical of the Government's argument that it "only breaks the law in a 'limited and specific way'".[319] She said the Prime Minister, the Foreign Secretary and the Chancellor of the Duchy of Lancaster had all spoken on previous occasions of the importance of upholding the rule of law to the UK's international reputation.[320] She argued the concession the Government made at committee stage—the so-called 'break glass' provision that clauses 44, 45 and 47 cannot come into force

[317] House of Commons, *Consideration of Bill (Report Stage)*, 29 September 2020, p 3 (member's explanatory statement).
[318] HC *Hansard*, 29 September 2020, col 199.
[319] ibid, col 200.
[320] ibid, col 201.

without the Commons' approval—did "not change the fundamentals that this bill itself breaks the [withdrawal] agreement and breaks international law".

Stephen Farry (Alliance MP for North Down) moved an amendment to remove the clause that is now numbered 47, the so-called 'notwithstanding' clause, from the bill altogether. The Liberal Democrats, Plaid Cymru, the SDLP and the Green Party supported this amendment. Mr Farry described clause 47 as "offensive and dangerous".[321] He said the "vast majority" of people and businesses in Northern Ireland did not want to see the Government breaking or threatening to break international law on their behalf. He argued that doing so would undermine the Good Friday Agreement, which is itself part of international law, and would create a more uncertain legal situation for businesses in Northern Ireland. He said that amendments to "put hurdles in place to make the prospect of breaking the law more difficult or push it further down the line" were not sufficient because they would leave the threat of breaking international law on the table.

Paul Scully, Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy, addressed new clause 1 and Stephen Farry's amendment together. He said that the clauses that are now numbered 44, 45 and 47 provided a safety net of powers in reserve, powers that the Government would only use if it could not reach agreement with the EU in the Joint Committee.[322] He argued that the Government had already addressed many of the points in new clause 1 on judicial review, dispute resolution and acting in good faith:

> First, the Government have been clear that regulations made under clauses 42 or 43 [now numbered 44 and 45] would be subject to judicial review on general public law grounds, while ensuring that any claims must be brought within three months […]
>
> Secondly, on article 16 of the protocol, which new clause 1 mentions, in the event that regulations were made under clauses 42 or 43 [now numbered 44 and 45], we have been clear that we would activate appropriate dispute settlement mechanisms to find a solution in parallel to domestic legislation. Thirdly, the UK Government will continue as we have always done, to negotiate with our friends and partners in the EU in good faith.[323]

Mr Scully emphasised that the Government was committed to implementing the withdrawal agreement and the protocol and had already taken practical

[321] HC *Hansard*, 29 September 2020, col 227.
[322] ibid, col 193.
[323] ibid.

steps to do so.

New clause 1 was defeated by 350 votes to 256.[324] Amendment 16 was defeated by 354 votes to 256.[325]

New clause 6: Economic development—climate and nature emergency impact statement

Caroline Lucas (Green Party MP for Brighton, Pavilion) moved new clause 6, supported by MPs from Alliance, the SDLP, Plaid Cymru, and the SNP.

New clause 6(1) would have required any financial assistance provided under part 6 of the bill (now clauses 48 and 49) to consider the "overarching need for a sustainable strategy aimed at long-term national well-being".[326]

Under new clause 6(2) any proposal for "financial assistance under this Act" would have to be accompanied by a climate and nature emergency impact statement. The applicant for the financial assistance would have to produce the impact statement.[327] Responsibility to assess the impact assessments would lie with ministers who would have to publish the assessments for any successful proposals.[328] Impact statements "should take account of any carbon budget, climate, nature and environmental goals approved by the relevant Parliament" (for example the House of Commons and House of Lords for a person in England, or the Scottish Parliament for a person in Scotland and the same for Senedd Cymru and the Northern Ireland Assembly).

Responding to the amendment, Paul Scully said that the Government was committed to "ambitious climate targets" and that it was crucial for the UK to meet domestic obligations under the Climate Change Act 2008.[329] He stated that the act required governments to set five-year carbon budgets towards meeting a target of net-zero greenhouse gas emissions by 2050. He argued that any net emissions increase that came from a particular policy or project were therefore managed within the Government's existing strategy for achieving net-zero by 2050. He also referenced powers to set legally binding environment targets under the Environment Bill. He said that:

> Given the Government's strong commitment already to meeting their ambitious climate targets, and the frameworks established under the Climate Change Act and proposed under the Environment Bill, I do

[324] HC *Hansard*, 29 September 2020, cols 255–60.
[325] ibid, cols 274–8.
[326] New clause 6(1).
[327] New clause 6(2).
[328] New clause 6(3).
[329] HC *Hansard*, 29 September 2020, col 198.

> not think that it is necessary to put such a legislative requirement in this bill.[330]

Speaking to new clause 6, Caroline Lucas said its intention was to ensure that people seeking public money for economic development under the bill would be obliged to undertake a climate and nature emergency impact assessment.[331]

Ms. Lucas said the powers in part 6 were subject to very few restrictions. She said that her amendment was designed to be a "genuinely constructive" suggestion to "help ministers see the serious gap in the legislation, and to help them to assess and decide whether the money they are dishing out is trashing the environment or supporting its restoration".[332] Caroline Lucas said references by ministers to existing overarching legal and policy frameworks was "not good enough".[333] She argued that "we need commitments that would make those fine words actually bite when it comes to the wide financial assistance decisions set out in the bill".[334]

New clause 6 was defeated on division by 351 votes to 258.[335]

New clause 7: Unfettered access

The DUP moved new clause 7, co-sponsored by Labour and Alliance. New clause 7 would have required the Government to publish a yearly assessment of any impact on businesses and consumers of the effect of the protocol on trade in both directions between Great Britain and Northern Ireland. The assessment would have had to include an assessment of the impact of any actual or proposed regulatory or trade policy divergence on Northern Ireland's place in the UK internal market. New clause 7 would also have required the Government to develop mitigations to safeguard the place of Northern Ireland businesses and consumers in the UK internal market.

Speaking for the DUP, Gavin Robinson (DUP MP for Belfast East), said the operation of the protocol meant there would be "distinct differences" in Northern Ireland compared to the rest of the UK.[336] He said this disadvantaged Northern Irish businesses as having "one foot in the GB market and one in the European Union single market" would place additional burdens on them and make them less competitive.[337] He said the new clause sought to "indemnify businesses in Northern Ireland who are unduly, unfairly

---

[330] HC *Hansard*, 29 September 2020, col 198.
[331] ibid, col 222.
[332] ibid.
[333] ibid, col 223.
[334] ibid.
[335] ibid, cols 260–5.
[336] ibid, col 220.
[337] ibid, col 218.

and uncompetitively put at a disadvantage to their colleagues and counterparts in GB".[338] He argued it would not undermine the protocol, but would show businesses in Northern Ireland the Government would stand with them if they suffered negative impacts.

Paul Scully said he had considerable sympathy for the underlying aims of new clause 7, but argued it was unnecessary.[339] He said the bill gave effect to the Government's commitment to ensure unfettered access for Northern Ireland goods to the whole of the UK internal market. Clause 42 (as currently numbered) already contained "significant provisions" to cement Northern Ireland's integral place in the UK. He said the Government would continue to provide Parliament with information on implementation of the withdrawal agreement, including the protocol. He re-stated the Government's commitment to carry out an annual review of new procedures arising from the application of EU customs rules to goods entering Northern Ireland and if they should turn out to impose a disproportionate burden on goods moving wholly within the UK, to consider how to further reduce or remove that burden.[340] For these reasons, Mr Scully argued that a statutory reporting requirement was not necessary.[341]

New clause 7 was defeated by 342 votes to 264.[342]

8. House of Commons third reading debate and vote

The bill's third reading took place directly after report stage on 29 September 2020. Alok Sharma, the Secretary of State for Business, Energy and Industrial Strategy, characterised it as a "business bill" and an "economic continuity bill".[343] He said the legislation was vital to ensure the cost of doing business in the UK stayed as low as possible without damaging and costly regulatory barriers emerging between different parts of the UK.[344] He maintained the bill reaffirmed the Government's commitment to devolution by "supporting one of the biggest transfers of power to the devolved administrations".[345] By allowing the Government to "invest further in communities" across the whole UK, he said the bill was about "levelling up […] and strengthening our precious Union".

---

[338] HC *Hansard*, 29 September 2020, col 220.
[339] ibid, col 195.
[340] The Government originally made this commitment in a command paper on *The UK's Approach to the Northern Ireland Protocol*, May 2020, CP226, p 12.
[341] HC *Hansard*, 29 September 2020, col 196.
[342] ibid, cols 265–70.
[343] HC *Hansard*, 29 September 2020, cols 283 and 284.
[344] ibid, col 283.
[345] ibid, col 285.

Mr Sharma said that the bill's provisions on the Northern Ireland protocol had attracted a "disproportionate amount of interest and commentary".[346] He said the bill delivered on the Government's manifesto commitments to ensure Northern Ireland businesses and producers enjoyed unfettered access to the rest of the UK.[347] The powers the Government was taking in the bill in relation to the Northern Ireland Protocol were a "legal safety net" to ensure the Government could deliver on these commitments in the event no agreement could be reached with the EU on implementing the protocol.

Ed Miliband, Shadow Secretary of State for Business, Energy and Industrial Strategy, said Labour supported the principle of the internal market, but believed there were two "profound flaws" at the heart of the bill.[348] Firstly, he said the bill sought to centralise power, rather than sharing it across the Union. He argued it would "impose the rule that the lowest regulatory standard in one parliament must be the standard for all without a proper voice for the devolved administrations".

Secondly, citing the responses of the EU and both main US parties, Mr Miliband said "on international law, nobody should be any doubt about the damage already done by the bill".[349] He argued that the clauses that are now numbered 44, 45 and 47 were unnecessary, as the protocol already contained dispute resolution mechanisms. Calling into question the Government's motivations for including measures that may breach international law, he said the Government's argument that it was "necessary to prevent the blockade of goods from GB into NI" was a "fig-leaf", as these measures did not deal with the issue of trade from Great Britain to Northern Ireland.[350] He said the Government's subsequent "excuse" was that this would be dealt with in the Finance Bill, but there would not be a Finance Bill as planned following the decision to delay the budget. He therefore lamented that the bill would cause "all this grief, all this damage to our international reputation, and the central argument on which it is based is not even covered by any legislation".[351]

Mr Miliband acknowledged that the bill would pass the House of Commons, but he sought to draw the attention of the House of Lords to the "deep concern" across the Commons about the bill.[352] He called on the Lords to "bring the bill into compliance with the rule of law and salvage our reputation".

---

[346] HC *Hansard*, 29 September 2020, col 284.
[347] ibid.
[348] ibid, col 285.
[349] ibid, col 286.
[350] ibid, cols 286–7.
[351] ibid, col 287.
[352] ibid.

Ian Blackford, Westminster leader of the SNP, moved a reasoned amendment to the bill's third reading motion, declining to give the bill a third reading on the grounds it "contains provisions which allow the Government to break commitments it has made under international law and because it does not have the agreed consent to legislate within the competencies of the devolved legislatures which is contrary to the established devolution settlement".[353]

Mr Blackford said there had been "a total failure to engage with the devolved governments".[354] He declared it was "telling" that on a bill which sought to secure the Union, the Government had "failed to gain the consent of even a single part of that Union". He argued that as well as breaking international law, the bill "breaks devolution". He feared there would be "a race to the bottom in accepting the lowest standards", with "not a single thing" the devolved authorities could do about it.[355] He also said the bill "undermined the settled will of the people of Scotland" who had voted in the independence referendum on the basis of the Scottish Parliament "having control over spending in devolved matters".[356]

The SNP reasoned amendment was defeated by 348 votes to 256, a majority of 92.[357] The bill received its third reading by 340 votes to 256, a majority of 84.[358]

[353] HC *Hansard*, 29 September 2020, col 289.
[354] ibid, col 290.
[355] ibid, col 293.
[356] ibid, col 296.
[357] ibid, cols 298–302.
[358] ibid, cols 304–7.