

The UK Internal Market White Paper and Northern Ireland

A primer in light of the Protocol on Ireland/Northern Ireland

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The UK Government has launched its [White Paper on the UK Internal Market](#) for public consultation (until 13 August). The paper is long (104pp.) but actually the substantive detail is on pages 30-58, where some of the details on its proposals are outlined. This brief primer outlines the context for this White Paper, key proposals in it and particular issues it raises with respect to Northern Ireland in light of the obligations of the [Protocol on Ireland/Northern Ireland](#).ⁱⁱ

The paper defines the UK internal market (UKIM) as the '**total set of trading relationships** that exists across the UK' (para.7). The purpose of the white paper propositions is the 'preserve the *coherence*' of this internal market. This is quite a vague definition on both fronts.ⁱⁱⁱ This allows for stretch when it comes to claims that particular initiatives/acts either undermine or protect the UK internal market; such ambiguity brings risks as well as necessary flexibility.^{iv}

The Internal Market proposals set out in this Paper will therefore provide the overarching architecture for the Internal Market, with some necessary adaptation to take into account the requirements of the Protocol and commitments on unfettered access. (para. 121)

As the above extract from the White Paper recognises, the nature of the NI/IRL Protocol is such that it requires **adjustments** to the legislative framework for the UK internal market that the UKG seeks to construct. The over-riding question for Northern Ireland is *whether the primary effect of these adjustments is to exclude or to include Northern Ireland*. Unfortunately, the answer to this question will not be clear, even in part, until the current UK-EU negotiations conclude.

What the White Paper is

The EU had provided regulations and directives to enable free movement of goods, services, capital and labour across the EU single market, including within the UK. This included 160 policy areas that were within the competence of the devolved legislatures (e.g. agri-food, environment, health, education). As these powers are 'returned' to the devolved legislatures, leaving the EU has opened the prospect of increasing divergence within the UK over time.

As Nicola McEwen, Dan Wincott and I have explained in a simple table, there are [four possible approaches](#) to managing the potential challenges that this poses:

1. UK-wide legislation to ensure mutual recognition and avoid market distortions
2. Scrutiny and oversight from a UK body to monitor the UKIM
3. Common frameworks in place of EU legislation
4. No frameworks, legislation or regulatory supervision ('Do nothing')

The UK White Paper is clearly option 1, but with elements of 2 and 3 included. As we note, such UK-wide legislation is not workable in full for Northern Ireland unless the rest of the UK remains aligned with EU internal market regulations for goods.

As I discuss in more detail below, the White Paper proposes to protect the UK internal market through four types of measure:

- (i) Common Frameworks
- (ii) A Market Access Commitment: based on principles of mutual recognition and non-discrimination.^v
- (iii) A uniform subsidy control regime legislated for by the UK Parliament
- (iv) An independent advisory group and intergovernmental responsibilities

The evidence base for the proposals comes in a paper in Annex A (pp.61-91) which sets out, among other things, the costs of regulatory divergence. I have often said that Northern Ireland, with its close integration to Ireland as well as Britain, exemplifies the real challenges of Brexit. As such, it is notable that many of the arguments set out in this UKIM about avoiding disruption to supply chains etc. were made already vis-à-vis the need to avoid a hard border on the island of Ireland through Brexit.^{vi} The upshot of that was the Protocol on Ireland/Northern Ireland.

The Protocol on Ireland/Northern Ireland

Avoiding such disruption as would arise from regulatory divergence on the island of Ireland means that Northern Ireland is to remain aligned to a tranche of EU legislation covering the production, composition, safety and technical standards of goods (some 290 legislative instruments, in the 33 pages of Annexes to the Protocol). The [regulatory environment](#) of NI as regards 'technical regulations, assessments, registrations, certificates, approvals and authorisations' in areas covered by the Protocol will be governed by EU law.

Article 6 of the Protocol is on the **'Protection of the UK internal market'**. This commits the EU and UK to use their 'best endeavours' to 'facilitate trade between Northern Ireland and other parts of the United Kingdom... taking into account their respective regulatory regimes'. This will be kept 'under constant review' by the Joint Committee; but, notably, this is 'with a view to avoiding controls and ports and airports in Northern Ireland to the extent possible' rather than, say, with a view to ensuring that GB goods can be placed on the market in Northern Ireland.

The main effect of that Article is to confirm that nothing in the Protocol will prevent the UK from:

- (a) 'ensuring unfettered market access for goods moving from NI to other parts of the UK', or
- (b) regulating for the placing of goods from NI (which meet EU standards) on the market in GB, including labelling them as being of UK origin.

The White Paper allows for both of these things, but that is the extent to which the Protocol can be said to actively 'protect' the UKIM. Specifically, the White Paper notes 'we will ensure that where Northern Ireland traders gain product approvals and certification for the Northern Ireland market from EU authorities and bodies, the UK will recognise those for the purpose of placing goods on Great Britain's market' (para. 120). This implies an NI mark that will be recognised in the rest of the UK.

The position of Northern Ireland

Paragraph 5 of the White Paper states that the economic importance of the UK for Northern Ireland was respected in the 1998 Good Friday (Belfast) Agreement, which introduced the current form of devolution to NI. It states:

the legislation underpinning the devolution settlement of 1998 continues to offer protection for the single market in goods and services within the United Kingdom.

This is not quite what the Northern Ireland Act (1998) does, or at least not in so many ways. Sections 14 and 26 of the NI Act (1998) state that if the Secretary of State for NI 'considers' that a bill passed by the NI Assembly /subordinate legislation passed by a NI Minister would have 'an adverse effect on the operation of the single market in goods and services which exists in the United Kingdom', (s)he *may* decide not to submit it for Royal Assent/*may* revoke it.

In most substantive terms, the White Paper refers often to the [UK Command Paper](#) of May 2020 with regard to how it intends to implement the Protocol. As I have [discussed](#) elsewhere, that paper was more a set of principles and aspirations than procedures. As such, the most useful parts of that command paper were the commitments that the UKG made in it. I outline below the ***commitments made by the UKG*** in that Command Paper that are specifically relevant to the UK internal market:

- i. Legislation for unfettered access for NI to GB to be in force by 1 January 2021 (paras. 10,19)
- ii. Further guidance will be provided by the UKG for NI traders placing certain highly regulated goods on the GB market (para. 39)
- iii. The Government needs to define a qualifying status for goods and businesses in NI to benefit from unfettered access, as per the EU (Withdrawal Agreement) Act 2020 (para. 24)
- iv. The UKG 'will produce full guidance to business and third parties before the end of the transition period' (para. 28) on the movement of goods GB into NI
- v. The UKG 'will provide further information on how these (state aid) provisions should be operated by public authorities before the end of the transition period' (para. 40)
- vi. UKG 'will review these new procedures [for goods entering NI from GB] on an annual basis' (para. 29)

This White Paper repeats commitments to (i) and (ii) – notably these are the points specifically covered in Article 6 of the Protocol – but provides no more detail as to how this will happen.

There can be little doubt that the biggest challenge to the coherence of the UK internal market arises from what the Protocol means for goods crossing from GB into NI. The EU has [made it clear](#) that it understands that the Protocol means: 'All goods entering or leaving Northern Ireland must fully comply with relevant Union rules and standards'. Thus, if the UKG legislative framework does not maintain equivalent standards with the EU, we face the prospect of certain GB goods not being able to go on the market in NI.

This is, I should stress, the worst case scenario. For the UK to set standards lower than that of the EU in highly regulated areas to come into effect 1 January 2021 will bring no obvious immediate benefit, and would immediately encounter resistance in Westminster as well as from the devolved

governments. What is more, the paper makes several strong commitments not to legislate to lower standards in such highly regulated areas as food and animal welfare, e.g. ‘We will not lower our standards nor put the UK’s biosecurity at risk as we negotiate new trade deals’ (para. 34).

The scope and purpose of the White Paper

The White Paper proposes to protect the UK internal market through four measures.

Common Frameworks

The Common Frameworks programme enables officials from across the UK to work together to manage regulation, thus ‘providing high levels of regulatory coherence in specific policy areas through close collaboration’ (para. 28). [Cabinet Office analysis](#) in 2019 showed some 78 policy areas were thought to be in need of common ways of working that could be achieved by a non-legislative common framework agreement (e.g. driver licensing, rail technical standards, biodiversity). This could include concordats or MOUs, for example.

In some of these areas, it was presumed that ‘[consistent fixes to retained EU law](#)’ made through secondary legislation in Westminster would be a way of creating ‘a unified body of UK law’. This came under [Section 12](#) of the EU Withdrawal Act (2018), which made those areas of EU law which fall under devolved competence pass back to the devolved nations and regions by default.^{vii} Section 12 also put temporary restraints on the capacity of devolved legislatures to modify retained EU law. The capacity for the NI Assembly to modify such laws is restrained not by the Westminster legislation but by the fact that some of these areas are covered by the NI Protocol (e.g. waste management; manufacture, sale and presentation of tobacco; PPE; equal treatment directive). If there are consistent fixes by all the UK to such laws, this should pose no issue for the UK internal market.

Other policy areas where EU and devolved competences overlapped were assessed by the UKG to be vital and in need of legislative frameworks to ensure commonality across the UK. There were [21 such areas](#) that related to Northern Ireland, and 17 of these are covered by the Protocol. These include highly regulated areas, most particularly agri-food, e.g.:

Relevant NI Dept.	Area of policy	Consequences for the UK’s internal market
Dept of Agriculture, Environment and Rural Affairs (DAERA)	Implementation of EU Emissions Trading System (EU ETS)	Disadvantage to NI businesses having to pay these tariffs
DAERA	Production and standards of organic farming	Higher standards to be met by NI (more costs) and greater restrictions on imports; Potential of labelling differences
DAERA	GMOs : Traceability and labelling of GMOs and of food and feed products produced from GMOs	
DAERA	Animal welfare, Inc breeding, slaughter, conditions	
Food Safety Authority	Food and feed safety and hygiene- all stages of production and distribution	
DAERA	Pesticides – use and authorisation	
DAERA	REACH: Registration, Evaluation, Authorisation & Restriction of Chemicals: Manufacture, authorisation, sale and use	

DAERA and DfHealth	Medicines: authorisation and supervision of medicinal products for human and veterinary use	Products authorised in UK cannot be sold in NI [UKG assumed constant fix to EU retained law in UK-wide legislation]
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Table 1. Examples of areas of Northern Ireland policy competence identified as being in need of a UK-wide legislation but now covered by the Protocol (source: [Hayward, 2020](#))

Paragraph 29 of the White Paper on the UK-wide legislative framework which is intended to cover such policy areas states:

The Government’s aim is to ensure this legislative underpinning operates on a full UK-wide basis, taking into account the obligations that apply under the Northern Ireland Protocol.

It is somewhat unclear what ‘taking into account’ means in this case, i.e. whether it will have the effect of incorporating (by matching EU standards) or excluding Northern Ireland in these areas. One presumes that, at this stage of the process (including negotiations) this ambiguity is realistic and perhaps necessary.

State aid

The UK White Paper proposes ‘a single uniform subsidy control regime’ for the UK. Subsidy control will be reserved to the UK Parliament. In NI, EU state aid provisions will continue to apply as relevant to the movement of goods and wholesale electricity. This is recognised in the UK Command Paper (para. 40). As the [EU sees it](#), the UK has ‘committed to comply with:

- applicable notification and stand-still obligations in respect of relevant new aid;
- any reporting obligations in respect of relevant aid measures; and
- any decision adopted by the Commission addressed to the United Kingdom.’

This means that the ceiling put on state aid by the EU still applies in Northern Ireland in relation to trade and also that the UKG will have to have Commission approval for new aid measures. Any UK-wide subsidy control regime will apply to Northern Ireland with respect to services, but when it comes to goods there will have to be exceptions for Northern Ireland. In this respect, a certain degree of compatibility between the UK and EU state aid regimes would ease NI’s position.

Mutual recognition

The White Paper seeks to establish a mutual recognition regime which will ‘cover mandatory requirements relating to lawful sale’ (para. 133). This include product standards and related processes such as labelling. As noted above, all goods produced in, entering and leaving Northern Ireland will have to comply with EU rules. If the intention of a mutual recognition regime is to ensure that goods placed on the market in one territory can be lawfully sold in another, then any such UK-wide regime would have to bear in mind that GB goods would need to meet EU standards if they are to be lawfully sold in NI. Legislation would, of course, always be setting the baseline rather than the ceiling of standards, and there is nothing to prevent producers or manufacturers meeting higher standards.

Non-discrimination

The principle of non-discrimination is the second part of the Market Access Commitment to be put into action. It means that it would be 'unlawful for a government to regulate in any way that affords less favourable treatment to goods, professionals or service providers from another territory' (para. 132)

The Protocol means that there are two dimensions to this for Northern Ireland. First, NI goods and services etc. shall not be discriminated against in GB. This, as we have seen, is something that the Protocol does not prevent the UK from legislating for. On the other hand, this principle cannot apply in full with respect to Northern Ireland because a core tenet of the Protocol is, in some sense, the ability to discriminate between NI and GB goods. What this means in practice and the consequences of it will depend in large part on:

- (a) the Joint Committee decisions on implementing the Protocol,
- (b) the UK-EU Agreement (especially with respect to trade, inc. mutual recognition), and
- (c) future UK-wide legislation in the relevant areas.

There is also the possibility that it could depend on dynamic alignment of NI to relevant EU policy, for example if standards are increased in a particular area within the scope of the Protocol.

Governance

The evolution and overall shape of the UK internal market is to be 'overseen by the UK Parliament', according to the White Paper (this is its very rationale, after all). But the White Paper stresses the scope for expanded intergovernmental arrangements, which will have the two functions of (i) monitoring and reporting on the 'health' of the UKIM, and (ii) gathering views and an 'evidence base' for advice on its development (paras. 52-54).^{viii} In addition, there is brief mention of 'an independent advisory body' which the UKG would consider tasking to report to the UKG on the subject. These ideas are not fully developed at this stage, and we know that a review of [intergovernmental arrangements](#) is still in progress.

Something not mentioned but important for Northern Ireland is that the governance of the UKIM will need some mechanism for feeding into the Specialised Committee on the Protocol.^{ix} This is especially the case given the monitoring responsibility of the UK-EU Joint Committee in relation to Article 6 of the Protocol.

Looking ahead

The UKG has posed four questions that it wishes people to address in the consultation.^x These are not specific to NI. What NI needs clarity and progress on vis-à-vis access to the GB market has long been known and remains outstanding (see p.3), including legislation on unfettered access. And when it comes to movement of goods from GB into NI, UK legislation cannot guarantee this outwith the final UK-EU Agreement. If there is no such deal, the uncertainties Northern Ireland would face would be far greater than the scope of any White Paper.

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ⁱⁱ As in the UK Command Paper on the Protocol, this White Paper stresses that the Protocol is 'not codified as a permanent solution' (para. 117) and that its alignment provisions may be temporary (para. 121). This does not, however, mitigate the straightforward ramifications of the Protocol, i.e. the greater divergence there is between the UK and EU with respect to goods in future, the greater the barriers to trade between GB and NI.

ⁱⁱⁱ For example, we might compare it to the definition of the [European Single Market](#): 'The single market refers to the EU as one territory without any internal borders or other regulatory obstacles to the free movement of goods and services.'

^{iv} For example, an act that the NI Executive claims is in NI's best economic interests and thus to make a positive contribution to the 'total set of trading relationships' could, potentially, equally be claimed by the UKG to undermine it.

^v Paragraph 9 claims that 'This will guarantee the continued right of all UK companies to trade unhindered in every part of the UK.'

^{vi} And thus why it is misleading to only frame the significance of the GB market to NI in terms of its relative size, and the value of external sales and purchases.

^{vii} These are the areas which the UKIM White Paper describes as 'new powers' to be 'transferred' to Scotland, Wales and Northern Ireland (para. 12).

^{viii} Something along the lines of the [Single Market Forum](#) might be of some use in this respect, as an annual meeting of businesses, citizens and policy-makers.

^{ix} For more on governance of NI in light of the Protocol, please see this [report](#) (with Komarova and Phinnemore).

^x 1. Do you agree that the government should seek to mitigate against both 'direct' and 'indirect' discrimination in areas which affect the provision of goods and services?

2. What areas do you think should be covered by non-discrimination but not mutual recognition?

3. What would be the most effective way of implementing the two functions outlined above? Should particular aspects be delivered through existing vehicles or through bespoke arrangements?

4. How should the Government best ensure that these functions are carried out independently, ensure the smooth functioning of the Internal Market and are fully representative of the interests of businesses and consumers across the whole of the UK?