

The UK Internal Market Bill and Northern Ireland:

A ‘back to basics’ explainer on where it comes from and what it might mean

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What is the internal market?

A single market is traditionally thought of as a set of self-governing territories between which barriers to movement (particularly trade in goods) are minimised. This is achieved through legal, political and economic processes.

To remove obstacles to movement requires integration. This can happen in ‘negative’ ways (e.g. prohibiting discrimination of goods from other parts of the market) and ‘positive’ ways (e.g. harmonising laws between them).

Such integration automatically impinges on the autonomy of those constituent territories, both in principle and in effect. This is why single markets tend also to be developed with clear measures to keep a check on that integration. This can be both through safeguards (e.g. a clear set of exemptions which can justify opt-outs from all-market rules) and through means of governance (e.g. consensus-building institutions).

The European Union is the most ambitious single (or ‘internal’) market in the world. It has removed barriers to movement of goods, services, capital and people; it has developed advanced mechanisms of governance of its own.

Why is the UK internal market considered to be in need of legislation?

The process of devolution within the United Kingdom has developed within and through the process of European integration. Some [160 policy areas](#) which fell within the remit of EU competence were the responsibility of the devolved legislatures to enact, such as environmental standards, transport, and procurement.

With Brexit, these powers are ‘repatriated’ back to the UK. In most cases, they can be ‘handed back’ straight to the devolved legislatures to deal with; this is why the UK government is able to claim that there will be a huge growth in the powers of devolved governments after Brexit.

In some cases (around 78 policy areas), there is a risk that divergent policies could lead to intra-UK friction. The agreed way to manage this was for devolved competence to be retained but within a non-legislative framework of agreement in an effort to forge a common approach to these areas.

In a minority of cases (around 21), the policy area is so vital that there is a need for UK-wide legislation to ensure that there will be not be significant divergence across the UK on these matters.

The powers to legislate in these areas were handed on to the devolved legislatures but the UK government (in the EU [Withdrawal] Act, 2018) retained the ability to ‘freeze’ devolved capacity in these areas until common legislative frameworks had been agreed. So far that ‘freezing’ power has not been exercised.

Progress reports on common frameworks are published every three months. It has been clear for some time that this process would not be completed in time for the end of 2020. Agreeing these common frameworks is a complicated process, covering highly regulated areas (e.g. agrifood).

The UK government's [White Paper](#) on the subject published in July 2020, led by the Department for Business, Enterprise and Industrial Strategy, preceded UK-wide legislation proposed at Westminster to address the wider question of emergent barriers to trade after Brexit. This describes the UK's internal market as the 'total set of trading relationships' within it – a broad remit to address.

Absent serious progress on the [Intergovernmental Relations review](#), this significant adjustment to the balance of competences and responsibilities within the UK is happening without a clear framework for establishing consensus and trust between the four administrations.

How will the UK internal market (purportedly) work?

At the core of the UK internal market (UKIM) legislation is a 'market access commitment'.

It works on two principles: (i) non-discrimination (local goods/services cannot be given direct or indirect privilege over those from the rest of the UK) and (ii) mutual recognition (goods/services sold in one part of the UK can be sold in another).

Another way of preventing distortions of trade within the UKIM as proposed here is to control state aid. The UKIM Bill proposes powers for the UK government to legislate for UK-wide subsidy control. In making these reserved matters, the UK government is showing recognition of the importance of state funding when it comes to trade and competition.

All this will be overseen by the Competition and Markets Authority (CMA), which will be given new powers to monitor 'the health of the internal market' and to advise and report on the potential or actual impact of proposals/regulations on the UKIM. The CMA is accountable to Westminster.

Clause 51 of the UKIM states that 'any power to make regulations under this Act is exercisable by statutory instrument', meaning that the government can amend the Act without having to pass another one through Parliament.

The Explanatory Note accompanying the Bill makes this clear: the Bill makes amendments to the Northern Ireland Act 1998, the Scotland Act 1998, and the Government of Wales Act 2006 'which restrict the legislative competence of the devolved legislatures'.

Yet there is no requirement for the consent of the devolved institutions or governments before these powers are used. In some cases, the UK government is obliged to consult the devolved institutions before exercising their powers (e.g. on the list of provisions covered by the non-discrimination principle), but not in all instances (e.g. changing the justifications for exemption).

What are the implications for the status of devolution?

The Bill does not provide for intergovernmental mechanisms to manage the internal market. Yet devolved institutions will be expected to operate within this UK-wide framework, constrained by being unable to pass legislation which conflicts with the provisions of the UKIM Bill.

More generally, the Bill will lead to constraints on the *effect* of the legislation of the devolved institutions; that is, it inhibits or undermines the intended consequence of their regulations or policy initiatives. Although Scotland and Wales may pass laws that uphold higher standards, the market access they must give to goods produced elsewhere in the UK, or imported into it, circulating within the UK renders those laws somewhat obsolete. This is particularly so given the asymmetry of the UKIM (given the relative size of England).

One 'missing' element is the ability to have agreed minimum standards across Great Britain. There was an indication in the White Paper on the UKIM that the monitoring authority could have the capacity to recommend such minimum standards.

Another means of mitigating against some of the most negative effects of the UKIM Bill would be to ensure that the list of justifications for setting aside the market access requirements are more comprehensive and that they are agreed with the devolved administrations.

There is a limited set of exceptions – primarily relating to public safety and security – in which a devolved institution can be justified for excluding the market access commitment can be set aside for a devolved institution.

This Bill gives a great deal more power to UK government ministers. This power is largely exercised through statutory instruments under the affirmative procedure, so it comes into effect within 40 days if the House of Commons votes to approve.

UK government ministers are obliged to 'consult' the devolved institutions before exercising certain powers (e.g. amending restrictions) but not in others (e.g. changing the exemptions list).

Annex A of the Explanatory Notes states that a legislative consent motion will be needed from Scotland, Wales and Northern Ireland for every part of the Bill. But all withheld their consent of the EU Withdrawal Agreement Act in January 2020 and it was ratified nonetheless.

Why is the NI/IRL Protocol relevant to the UKIM Bill?

The primary reason for the overlap of the UKIM Bill and the NI/IRL Protocol is that both of them have direct consequences for the movement of goods between GB and NI.

The purpose of the UKIM is purportedly to make the movement of goods and services within the UK as free as possible. This ambition, however, is stymied by the Protocol, which has already set in place certain rules for NI that will mean some frictions in the movement of goods.

This is a compromise that the UK and EU agreed upon in October 2019, on the understanding that the Protocol represented the baseline legal foundation for avoiding a hard Irish land border.

In essence, on 1 January 2021, the Irish Sea border becomes the edge of two 'single markets'.

Whilst NI's status in the EU's single market is quite clear (assuming that the Protocol is implemented), its status in the UK's has to be clarified. This falls most particularly on the conditions for market access between GB and NI.

Whereas the UK can largely decide what it wants to do when it comes to movement of goods from NI to GB, goods moving the other way are subject to procedures to be put in place to protect the EU's single market and customs union.

In order for NI to have free access to the EU's single market – for trade in goods across the Irish border to be as much the way it is now as possible – the EU wants to be confident that what is crossing that border will not pose a threat to that market.

As a consequence, the baseline of the EU's approach to GB to NI trade is not as internal UK trade but as potential GB to EU trade. The more the UK does to assure the EU that there is very little threat (e.g. by legally committing to maintaining high standards, by having good systems in place to know what goods entering NI stay in NI), then the lighter those procedures can be.

The future UK-EU deal will therefore have an impact on what happens at the Irish Sea. It was inevitable that any UKIM Bill explicitly addressed the Protocol, but the political framing of the Bill (e.g. as a 'safety net' in case of no deal) was focused on the UK-EU negotiations for this reason.

How does the Protocol affect the 'market access' of GB goods into NI?

Whilst the UKIM Bill means in effect a constraint on devolved competence, it does not have such an effect in NI (in goods; it does in services). This is because NI *does* have a baseline of minimum standards to be followed: the EU's.

As a de facto member of the EU's single market, NI will continue to adhere to a portion of the EU's body of law (some 290 EU legislative instruments). These obligations relate to many of the areas – such as genetically modified organisms – that are to be covered by legislative and non-legislative common frameworks.

The UKIM White Paper (July 2020) explicitly acknowledged that 'any goods being placed on the NI market will need to comply with' a 'specific subset of EU rules'.

In effect, this rules NI out from the *full* application of the UKIM principle of market access, because GB goods cannot be automatically sold in NI and there will be direct and indirect discrimination vis-à-vis GB goods in NI.

This is not to say that GB goods cannot enter NI, but they must meet certain standards. This is the type of 'regulatory border' that the UKIM Bill seeks to avoid, or erase, within GB. The closer the UK alignment with the EU, then the lighter this border will be.

The Protocol also means that a 'customs border' will be operable on goods entering NI via GB. This gives rise to the need for customs paperwork (e.g. import declarations, safety and security declarations) on goods entering NI from GB. The Trader Support Service will be the interface by which this can be managed come 1 January 2021.

Although NI is in the UK's customs territory, there may be a need to pay tariffs on goods entering NI from GB if those goods are designated as being 'at risk' of moving on into the EU. If there is at least a zero tariff, zero quota FTA between the UK and EU, then this would greatly reduce the number of goods potentially 'at risk' and diminish the thickness of that customs border.

How does the UKIM affect the access of NI goods into GB?

The NI/IRL Protocol explicitly addresses (Article 6) Northern Ireland's place in the UK internal market. It states that nothing in the Protocol shall prevent the UK from 'ensuring unfettered market access for goods moving from NI to other parts of the UK's internal market'.

'Unfettered access' from NI into GB after the end of transition will be about ensuring that NI goods are recognised as valid for sale and not discriminated against anywhere in the UK.

The UK government have often repeated this point, and promised in the [New Decade, New Approach](#) document to legislate for unfettered access. The UKIM Bill is this primary legislation.

The other elements that will ensure such unfettered access – like defining the measures by which products can qualify for to having status that allows unfettered access into GB from NI – will come through secondary legislation.

The market access commitment contained in the UKIM Bill are important for NI when it comes to assurance that NI goods can still be placed on the market in the various parts of the UK.

The White Paper indicated where NI traders have product approvals and certification for the NI market from EU authorities and bodies, the UK would recognise these 'for the purpose of placing goods on Great Britain's market'.

The degree to which standards and regulations would vary significantly within the UK potentially centres on how much Scotland, Wales and England diverge from the EU's standards (and thus NI). There is a concern that, if there are no minimum standards set for GB, that there is a risk of competitive disadvantage for NI vis-à-vis the rest of the EU.

The issue raised by the Protocol is not just 'access' but 'unfettered' access and it is presumed that those 'fetters' take the form of paperwork. This is where the more contentious parts of the UKIM Bill come to the fore.

Part 5 of the UK Internal Market Bill and the NI/IRL Protocol

Part 5 of the UKIM Bill deals with the Protocol, covering clauses 40-45.

The Explanatory Note describes these as 'measures which take steps to clarify specific elements of the Northern Ireland Protocol in domestic law'.

The specific elements of the Protocol that are addressed, however, are just two, and they are not ones that are the causes of the greatest concern for business in NI. They are: the customs paperwork required for NI entering GB, and the application of EU rules on state aid regarding trade covered by the Protocol.

Clause 40: NI place in the UK internal market and customs territory.

This is the clause dealing with GB to NI movement of goods.

It does not seek to challenge the implementation of the Protocol but says that it will ensure the 'free flow' of goods by placing a duty on all UK authorities, including devolved authorities, who are administering the Protocol to do so with 'special regard' to three things.

These are: (i) NI's integral place in the UK's internal market; (ii) NI's place in the UK customs territory; and (iii) the need to facilitate the free flow of goods between GB and NI.

None of this in principle conflicts with the Protocol, but the wording of this clause is very vague, with UK authorities exercising their functions relating to the Protocol with the aim of 'maintaining and strengthening the integrity and smooth operation of the internal market in the United Kingdom.'

This could conflict with the principle of 'rigorous impartiality' required of the government.

Clause 41: Unfettered Access to UK IM for NI goods.

This clause in effect prevents UK authorities from bringing in a new check, control or administrative process on goods moving from NI into GB.

Despite the strength of the statement, this clause explicitly *allows* for checks if they are 'necessary to secure compliance with an international obligation' (as per Protocol Art. 6).

Something which may not be evident in the text of the Bill itself is brought out in the Explanatory Note. This states that: 'A Minister of the Crown may by regulations amend the type of movement to which this clause applies.'

Clause 42: Power to disapply or modify export declarations and other exit procedures.

Unfettered access from NI to GB is constrained by the 'international obligations of the Union' (Article 6.1 Protocol). Namely, the requirement for Exit Summary Declarations – safety and security declarations – on goods exiting the EU's customs union territory.

The UK government has made it clear that it wishes to see these waived by the EU but it has to date noted that this required agreement at the Joint Committee level (see [7 August guidance](#) and the [UK Command Paper](#)).

This clause in effect cancels out one of the 'exceptions' allowed for in Clause 41 by allowing a Minister of the Crown 'make provision about the application of exit procedures to goods'.

The Explanatory Note says that this is about 'retaining the ability to act as necessary if a negotiated outcome in the Joint Committee should not be possible', but there are no such conditions attached to the wording of the Bill itself.

Clause 43: Regulations about Article 10 of the NI Protocol

Article 10 of the Northern Ireland Protocol provides that EU State aid rules will apply in relation to trade in goods and electricity between Northern Ireland and the EU.

As it stands, this is the element of the Protocol that has potential 'reach' into GB, in that if the UK Government gives aid to a business that maybe based in GB but is trading in NI, it could be said to come under the EU's state aid rules.

This does not ban such aid, but if it comes above the EU's state aid threshold, it falls within the scope of EU supervision. This means that the Commission will have to determine whether it is compatible with the EU's single market and thus permissible.

The reason it is part of the Protocol is because NI is de facto part of the EU's single market for goods. If the UK government decides, for example, to subsidise a particular sector or industry, then the EU would be concerned that this would (via NI) give the UK an advantage over EU competitors in that area.

The Bill gives powers to the BEIS Secretary of State to make regulations setting out how (s)he considers Article 10 of the Protocol is to be interpreted and allowing for disapplying or modifying its effect.

The regulations may include provisions where 'aid is granted to persons in respect of activities outside Northern Ireland', curtailing the 'reach' of Article 10 into GB.

Clause 44: Notification of state aid for the purposes of the NI Protocol

Only the Secretary of State for Business, Energy and Industrial Strategy may give the European Commission a notification or information relating to aid where Article 10 applies.

Clause 45: Further provision related to sections 42 and 43

Clauses 42 and 43 are to have 'effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent'.

This makes it absolutely explicit that 'all rights, powers, liabilities, obligations, restrictions, remedies and procedures' in the Withdrawal Agreement cease 'to be recognised and available in domestic law, or enforced, allowed and followed' if they are inconsistent with the new regulations made under sections 42 or 43.

These clauses (42, 43, 45) are highly contentious because they contravene Article 4 of the Withdrawal Agreement which is that of 'direct effect', i.e. allowing for the EU law to apply in domestic law.

It is important to recognise that: (a) these clauses only have relevance if the UK implements the Protocol and (b) they do not soften the Irish Sea border to the extent that a UK-EU deal could and (c) they do nothing to affect the controls of GB to NI movement of goods.

Amendments to the Bill

The original Bill had it that, in the first six months after enactment, ministerial powers under clauses 42 and 43 would come into effect through the 'made affirmative procedure'. This means that it comes into law straight away but it would not stay in place without a Commons vote approving it within 40 days.

The Neill amendment to clause 54 means that a minister has to move the motion specifying when clauses 42 and 43 would come into force, and that it would only do so if approved by a resolution of the House of Commons.

What might happen next in the UK-EU negotiations?

After the Extraordinary Joint Committee was held on 10 September (attended by all 27 member states), the EU made a statement seeking the withdrawal of those measures from the UKIM Bill. Its statement emphasised the need for the UK to act to rebuild trust.

On 17 September the UK government issued a statement in which it claimed that these measures would be used 'in parallel' with the official dispute settlement mechanisms of the Withdrawal Agreement.

It also took the opportunity to confirm that it would use a similar tactic in the Finance Bill, seeking to give Parliament powers to disapply elements of the Protocol (such as the designation of goods 'at risk' of moving from GB into NI and thus subject to tariffs).

The EU has made it clear that it is not renegotiating the Agreement. However, nor is it willing to be the one to walk away from the negotiations. What are its options?

The alternative is the mechanism that was always there to soothe differences between the UK and EU: the Joint Committee. The next UK-EU Joint Committee is on 28 September.

This will occur before the Bill moves on to the Lords. If there is some compromise agreed, then the Lords could potentially amend the Bill in a way that allows the UK government to put the powers in reserve or to make them conditional. It may not happen until around the time of the European Council in mid-October.

The date set in everyone's mind is 31 October. A deal has to be ready to be laid before the EU member states by that point if there is to be enough time for ratification.

In essence, everyone knows that this UK-EU relationship – and the negotiations – will not be over by the end of October. If it is a deal, it will be a thin one. There will be plenty of 'outstanding issues' to continue to negotiate after 1 January 2021.

Where does this leave Northern Ireland?

The relationship between the UK and the EU is one bound together through the Protocol. The UK-EU Joint Committee will continue to be very important for Northern Ireland's future. When it comes to north/south cooperation (Article 11) and NI's place in the UK internal market (Article 6), the Joint Committee is to keep these things 'under constant review'.

On 22 September, the [NI Assembly](#) voted in favour of a motion rejecting the UK Internal Market Bill. The DUP and UUP did not support the motion, partly on the grounds that the UKIM Bill clauses were at least some insurance against the threat of a harder Irish Sea border.

There are two questions about the Protocol: Is there an intention to implement it? Is there the capability? All signs are that the intention to implement it is still there. The UKIM clauses would be redundant were this not so. However, there is little to no possibility that the Protocol will be implemented effectively and smoothly from the start of next year.

Whatever happens, the conditions in which business, politics and civic society will have to operate after the end of the transition period will change forever. Beyond legal frameworks and paperwork and trader support services, what will make the biggest difference of all is whether each side can trust - and present - each other as a credible partner, especially when it comes to the ever-tricky case of Northern Ireland.

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