

# Spotlight on the UK Internal Market Bill

15/09/2020

**Public Law analysis: The government introduced the UK Internal Market Bill in Parliament on 9 September 2020, following a brief consultation on its policy proposals for preserving access and regulatory harmonisation across the UK internal market after the end of the transition period under the Withdrawal Agreement. Some aspects of the Bill have been criticised and the EU has warned that passage of the Bill as introduced would be considered a serious violation of the Withdrawal Agreement. Laura Rees-Evans of Fietta LLP looks in detail at the provisions of the Bill and the associated legal principles, issues and implications.**

On 9 September 2020, the UK government introduced to the House of Commons the '[United Kingdom Internal Market Bill](#)'. The purpose of the Bill is to promote the continued functioning of the internal market in the UK after the transition period established under the Withdrawal Agreement comes to an end on 31 December 2020, by making provision for customs and trade rules between England, Scotland, Wales and Northern Ireland. The intention is that the rules set out in the UK Internal Market Bill would come into effect in the event that no free trade deal with the EU were reached, or the Joint Committee failed to reach agreement on how to implement the rules applicable to trade in goods between Northern Ireland and Great Britain.

The most controversial aspects of the Bill are set out in clauses 41–43 and 45. Those draft provisions propose the following:

- 'unfettered access to [the] UK internal market for Northern Ireland goods' (including no new checks on goods moving directly from Northern Ireland to Great Britain) (clause 41)
- the power for Ministers to 'disapply or modify export declarations and other exit procedures' (clause 42). According to the Bill, Ministers would have the power by regulation to make provision for rights and obligations 'that would otherwise apply, as a result of relevant international or domestic law, not to be recognised, available, enforced, allowed or followed' (clause 42(5))
- powers for the Secretary of State to make provision 'disapplying, or modifying the effect of, Article 10' of the Withdrawal Agreement's Protocol on Ireland/Northern Ireland (NI Protocol), which relates to State aid for goods related to Northern Ireland. Those powers include the power to remove any right of action in respect of aid except in accordance with those regulations, and to make provision to ensure that Article 10 of the NI Protocol is not to be interpreted in accordance with case law of the Court of Justice (clause 43)

As the [explanatory notes](#) to the Bill explain, the UK and EU are 'currently discussing the disapplication of the requirement for export declarations for goods moving from NI to GB through the UK-EU Joint Committee' established by the Withdrawal Agreement. The measures on 'unfettered access' set out in clauses 41–42 of the UK Internal Market Bill 'would provide a power to disapply or modify the requirement for export declarations or other exit procedures, retaining the ability to act as necessary if a negotiated outcome in the Joint Committee should not be possible'.

Clause 45 of the Bill, as well as its explanatory notes, make clear that 'provisions in the UK Internal Market Bill relating to the application of exit procedures to goods, when moving from Northern Ireland to Great Britain (clause 42) and the ability to make regulations regarding Article 10 of the Northern Ireland Protocol (concerning State aid) (clause 43), are able to have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent' (ie, including the Withdrawal Agreement).

The day before publication of the Bill, the Secretary of State for Northern Ireland, Brandon Lewis, acknowledged that the proposed legislation would 'disapply the EU law concept of direct effect, required

by Article 4 [of the Withdrawal Agreement], in certain very tightly defined circumstances'. The Northern Ireland Secretary explained that there are 'clear precedents of this for the UK and, indeed, other countries needing to consider their international obligations as circumstances change' (citing the [Finance Act 2013](#), which, he said, contains provisions that expressly disapply tax treaties to the extent that they conflict with the 'general anti-abuse rule').

His reference to the reconsideration of 'international obligations as circumstances change' is likely to be a veiled reference to Article 62 of the Vienna Convention on the Law of Treaties (VCLT), which allows parties to a treaty to invoke a 'fundamental change of circumstances' as a ground for terminating or withdrawing from a treaty, or for suspending its operation in certain limited circumstances. (Those who have been following Brexit for some time may recall this provision of the VCLT attracting mainstream attention in late 2018 and early 2019, when some commentators speculated that the UK could one day rely on a 'fundamental change of circumstances' unilaterally to terminate the Withdrawal Agreement if the Irish backstop (as it was at the time) were to persist or become permanent.) The Northern Ireland Secretary also stressed that the UK remains committed to ensuring that the UK 'delivers' on the Withdrawal Agreement and its NI Protocol, and 'to do that through the negotiations and through the Joint Committee work'.

On 10 September 2020, the government released a one-page [document](#) setting out its official legal position on the Bill and the NI Protocol. It states that the Bill 'ensures that the government will be able to deliver its commitments to protect peace in Northern Ireland and the Belfast/Good Friday Agreement, and to strengthen and maintain the UK internal market'. Like the Northern Ireland Secretary's statement in Parliament, it acknowledges that the powers set out in clauses 42 and 43 'may be exercised in a way that is incompatible with provisions of the Withdrawal Agreement'. Specifically, it acknowledges that clause 45 (which provides that clauses 42 and 43 may have effect notwithstanding any incompatible or inconsistent international or domestic law) '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'. It also acknowledges that the Bill has that effect 'regardless of whether any regulations made under clause 42 or 43 of the Bill are in fact incompatible with the Withdrawal Agreement'.

The government's legal statement affirms that the obligation to discharge treaty obligations in good faith is 'an established principle of international law' and therefore 'the key principle in informing the UK's approach to international relations'. The statement proceeds to explain how the principle of Parliamentary sovereignty means that it is not unlawful for Parliament to pass legislation that contravenes the UK's international legal obligations (ie as a matter of domestic constitutional law). The statement does not explain on what basis it is lawful for the UK not to fulfil its obligations under the Withdrawal Agreement as a matter of international law.

The European Commission, for its part, issued a [statement](#) underlining that 'the timely and full implementation of the Withdrawal Agreement, including the Protocol on Ireland/Northern Ireland [...] is a legal obligation'. The statement added that since the entry into force of the Withdrawal Agreement on 1 February 2020, 'neither the EU nor the UK can unilaterally change, clarify, amend, interpret, disregard or disapply the agreement'. The European Commission Vice-President, Maroš Šefčovič, told the UK government that if the Bill were to be adopted, it would constitute an 'extremely serious violation of the Withdrawal Agreement and of international law'. The Vice President also warned the UK that the EU would 'not be shy' in resorting to the 'mechanisms and legal remedies' set out in the Withdrawal Agreement 'to address violations' of legal obligations under the Agreement.

The 'mechanisms' for the settlement of disputes between the UK and EU to which the European Commission Vice President referred are set out in Part Six, Title III of the Withdrawal Agreement. It provides that the parties 'shall endeavour to resolve any dispute regarding the interpretation and application' of the Agreement by entering into 'consultations in the Joint Committee in good faith' (Article 169). If no agreement can be reached within three months of either party providing written notice to the Joint Committee to commence consultations, either party may make a written request for the establishment of an arbitration panel. The request is to be made to the other party and to the Permanent Court of Arbitration (Article 170).

The Withdrawal Agreement provides that the Joint Committee shall, by the end of the transition period, 'establish a list of 25 persons who are willing and able to serve as members of an arbitration panel' (Article 171). Each party shall propose ten persons, and they shall jointly propose five persons to act

as chairperson. The Joint Committee is yet to establish the list (the EU's invitation for applications for inclusion in the list closed on 4 September). The Withdrawal Agreement provides that the parties have just 15 days from the date of a request for arbitration to nominate two members from the list of 25 arbitrators to serve on the arbitral panel. Where (as is currently the case) the list has not been established by the end of the 15 days from the date of a request for arbitration, Article 171(8) provides that the EU and the UK shall each nominate two persons. The four nominated members, in turn, shall select the chairperson by consensus (Article 171(4) and (5)). (The Withdrawal Agreement also sets out default provisions that apply in the event that either or both of the parties fail to nominate members of the panel or the chairperson cannot be agreed).

The arbitral panel is required to 'notify' (render) its ruling within a year of the date of establishment of the panel, or to 'make every effort' to notify its ruling within six months if the panel upholds a reasoned request of one of the parties that the case is urgent (Article 173). The panel ruling shall be binding on the EU and the UK, and each 'shall take any measures necessary to comply in good faith with the arbitration panel ruling' (Article 175). The Withdrawal Agreement also provides for 'temporary remedies' in the case of non-compliance with a panel ruling, starting with a 'lump sum or penalty payment', and moving on to the right to suspend performance of certain obligations in the Agreement (Article 178).

The European Commission Vice President's claim that the draft bill 'jeopardises the attainment of the objectives of the Agreement', and therefore would be in violation of Article 5 of the Withdrawal Agreement (the obligation to act in good faith), might suggest that it believes the UK to be in breach of the Withdrawal Agreement even if the Bill is not passed in its current form. However, it seems unlikely that the EU would initiate any formal dispute settlement mechanism before the fate of the Bill and the specific wording of the controversial provisions is settled as it passes through the UK Parliament. If, in the meantime, progress is made in trade talks or in Joint Committee discussions regarding the implementation of the NI Protocol, the government may revise or withdraw the controversial aspects of the Bill. All that is certain is that the NI Protocol continues to take centre stage in the differences between the UK and EU.

## Further reading

The UK Internal Market Bill is available [here](#) and its explanatory notes are available [here](#).

The Withdrawal Agreement (including the NI Protocol) is available [here](#).

The House of Commons debate on the UK's Legal Obligations under the NI Protocol is available on Hansard [here](#) (the quotes cited in this spotlight are at column 509). (A House of Commons briefing from March 2019, summarising the arguments that had been made relating to 'fundamental change of circumstances' and the Irish backstop, is available [here](#).)

HMG's legal position on the UK Internal Market Bill is [here](#).

The European Commission's press statement of 10 September 2020 is available [here](#).

*This analysis written by Laura Rees-Evans of Fietta LLP first appeared on the [Fietta website](#) on 11 September 2020.*

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