

# UK Internal Market Bill and the Withdrawal Agreement

## SUMMARY

On 9 September 2020, the United Kingdom (UK) government tabled a bill in the House of Commons which would govern the country's internal market after the Brexit transition period ends. It aims to allow goods and services to flow freely between the four jurisdictions of the UK – England, Scotland, Wales and Northern Ireland – replacing the rules now in place through membership of the EU's single market.

Certain parts of this UK Internal Market Bill are particularly controversial, as they explicitly contravene the Protocol on Ireland/Northern Ireland attached to the Withdrawal Agreement (WA) that was ratified in January 2020. First, the bill provides that the UK government may authorise Northern Ireland businesses not to complete exit summary declarations when sending goods to Great Britain, thereby breaching the Union Customs Code applicable to NI. The bill would also allow the UK government to interpret, dis-apply or modify the application of the State aid rules of the European Union, which are applicable to UK measures that affect trade between Northern Ireland and the EU. Last but not least, the bill provides that UK regulations in these areas will have effect *notwithstanding* their incompatibility with relevant domestic or international law, including the Withdrawal Agreement.

The reaction of the European Commission to the bill was immediate, calling for an extraordinary meeting of the EU-UK Joint Committee, which was held the following day, 10 September. On 1 October, the Commission sent a letter of formal notice to the UK for breaching its obligations under the WA, marking the beginning of an infringement process against the UK. As the UK did not reply by the end of October, the Commission may now proceed with the process, sending a Reasoned Opinion to the UK. Meanwhile, the bill has passed third reading in the House of Commons, even if in the House of Lords the government has been heavily defeated, with amendments removing the controversial clauses. While the government has indicated its intention to re-table the clauses when the bill returns to the Commons in December, it would be open to it to no longer press for their inclusion, if and when agreement is reached in the ongoing negotiations on the future EU-UK relationship.



### In this Briefing

- Background
- Relevant parts of the Northern Ireland Protocol
- Controversial clauses in the UK internal market bill
- Impact of the bill
- Procedure in the UK Parliament

## Background

The United Kingdom (UK) withdrew from the European Union (EU) on 1 February 2020. The [Withdrawal Agreement](#) (WA), ratified by both parties in January 2020, sets out a series of rules applicable after the withdrawal and in particular following the end of the transition period which runs from 1 February to 31 December 2020.

Included in the WA is a [Protocol on Ireland/Northern Ireland](#) (henceforth, the Protocol) which deals with one of the most difficult subjects in the withdrawal negotiations. The aim then was to ensure that a hard border would not be established between Northern Ireland and Ireland, damaging the social and economic ties that have flourished across the island since the 1998 [Good Friday \(Belfast\) Agreement](#) brought an end to 30 years of armed conflict in Northern Ireland. The Protocol [affirms](#) that Northern Ireland (NI) is 'part' of the UK's customs territory ([Protocol, Article 4](#)) and 'protects' the UK internal market ([Protocol, Article 6](#)), but it also includes [provisions](#) on trade and competition so that NI businesses retain access to the EU customs union, especially the application of Article 30 of the Treaty on the Functioning of the European Union (TFEU) and the prohibition of quantitative quotas ([Protocol, Article 5\(5\)](#)). The Protocol applies irrespective of whether there is a future trade deal between the EU and the UK, unless the NI Assembly withdraws its consent to it (at specific intervals following the conclusion of the transition period), as per the [Protocol's Article 18](#).

On 9 September 2020, the UK government tabled the [Internal Market Bill](#) (IMB) in the House of Commons, to put in place principles for the country's internal market for goods and services, on the basis of mutual recognition and non-discrimination across the four jurisdictions - England, Scotland, Wales and Northern Ireland – after the transition period. It may be noted that the bill as a whole is opposed by the three devolved legislatures, the [Scottish Parliament](#), [Welsh Senedd](#) and [Northern Ireland Assembly](#). In addition, clauses in the bill seek to ensure unfettered access for Northern Irish goods to the British market. These have been the subject of particular controversy, both in the UK and abroad, as they explicitly or potentially contravene the Protocol.

## Relevant parts of the Northern Ireland Protocol

In order for NI firms to access the EU's customs union, EU law relating to trade and competition will remain applicable to NI. In particular, [Protocol Article 5\(4\)](#) and its related [Annex 2](#) declares that the [Union Customs Code](#) is applicable to NI businesses, requiring [exit summary declarations](#) for goods leaving the EU's single market. The declaration is meant to ensure the [correct application](#) of all export measures, for instance, export restrictions and surveillance measures; it is also aimed at value-added tax reimbursement and procedures on imports of parts, which require a [proof of departure](#). As reiterated in a technical note of the Commission ([UKTF \(2020\) 16](#), April 2020), NI businesses will have to comply with the requirements for exit summary declarations on shipments to Great Britain.

As regards State aid, EU Member States are subject to EU law, which ensures fair competition. [Protocol Article 10](#) affirms that EU State aid law is applicable to the UK 'in respect of measures which affect trade' between NI and the EU. The provisions of EU law applicable are listed in [Annex 5](#), and includes Articles [107](#) and [108](#) TFEU. Article 107 makes incompatible any sort of State aid 'so far as it affects trade between Member States', and defines compatible State aid. Therefore, the State aid provisions in the Protocol may apply to any [UK measures](#) that have an impact on EU-NI trade. Moreover, Article 108 gives the Commission powers to 'decide that the State concerned shall abolish or alter such aid' and may 'refer the matter to the Court of Justice of the European Union' (CJEU) (par. 2); the measures should not be put into effect 'until this procedure has resulted in a final decision' (par. 3).

## Controversial clauses in the UK Internal Market Bill

Of the clauses that clash with the Protocol, first, clause 42 in the bill as introduced to the Commons ([IMB c42](#)) would give powers to the UK government to 'dis-apply or modify' rules on export declarations to goods moving from NI to Great Britain, including for any 'exit procedure that is

applicable by virtue of the Protocol' (c42(2)). The decision is motivated in the bill (in particular) by the need for the goods to benefit from 'unfettered access' to the rest of the UK (c43(3)(a)) and the need to maintain the integrity of the internal market (c43(3)(b)). In a [command paper](#) published in May 2020, the UK government had previously raised the issue that the summary declaration requirement is an obstacle to unfettered access for NI businesses to the rest of the UK, although such unfettered access is guaranteed by the Protocol. The paper considers that the absence of summary declarations cannot create a backdoor to the EU since it applies to goods entering the UK. According to the Minister for the Cabinet Office, Michael Gove, the bill is designed to form a '[safety net](#)' that ensures that the UK government can always deliver on its obligations to the citizens of NI.

The second issue is found in [IMB c43](#), which provides that the UK government may make legislation in connection with the interpretation and modification of Article 10 (State aid) of the Protocol. Such legislation may not only touch on the 'interpretation of Article 10' (c43(2)(a)) but also 'disapply or modify' the effect of Article 10 (c43(2)(b)). The explanatory note accompanying the IMB specifies that the provisions are aimed at giving a '[uniform approach](#)' across the UK to the application of EU State aid law under the Protocol.

Finally, [IMB c45](#) declares that any regulation made under clauses 42 and 43 would have effect '*notwithstanding* any relevant international or domestic law with which they may be incompatible or inconsistent' (c45(1)), and therefore should not be viewed as unlawful on related grounds (c45(2)). The 'relevant international or domestic laws' are defined in [c45\(4\)](#) and include not only the Protocol and the WA, any EU or international law, but also any 'convention or rule of international or domestic law whatsoever'.

## Impact of the bill

On 8 September, the Secretary of State for Northern Ireland, Brandon Lewis, admitted in the House of Commons that the IMB would break international law '[in a very specific and limited way](#)' – an admission which caused a political storm, with many voices raised among MPs, including Conservatives, [against the bill](#). In a [joint declaration](#), former Prime Ministers John Major and Tony Blair, [questioned](#) the UK's 'credibility as "global Britain" if we so blatantly disregard our commitments the moment we sign them'. On 16 September, Lord Keen, the Advocate-General – the senior Scottish law officer – [resigned](#) from the UK government, citing concerns over those clauses in the bill.

Moreover, over-riding the WA could put into question the Protocol, and a hard border may be put in place in consequence. Joe Biden, now US President-elect, stated on [16 September](#) that 'any trade deal between the U.S. and U.K. must be contingent upon respect for the [Good Friday] Agreement and preventing the return of a hard border'. Nancy Pelosi, Speaker of the US House of Representatives, gave a [similar warning](#). Biden reportedly raised the issue of the Agreement in his [post-election phone call](#) with the UK Prime Minister, Boris Johnson, on 10 November. Conversely, both Johnson and Gove [argue](#) that the bill will protect the Agreement as well as the integrity of the UK.

As talks on the future relationship between the EU and the UK [intensified](#) in late October, Michael Gove signalled that the contested clauses of the [bill might be rewritten](#) in the event of an EU-UK deal being agreed. Even so, the bill may have shed doubt on the [reliability](#) of the UK government at a time the country needs the confidence of negotiating partners not only in the EU but more generally.

## Reactions in the EU

The President of the European Commission, Ursula von der Leyen, reacted immediately by [stating](#) that the implementation of the WA is an 'obligation under international law and a prerequisite for any future partnership'. On 10 September, an extraordinary meeting of the EU-UK Joint Committee was held at the request of Commission Vice-President, [Maroš Šefčovič](#), where he [reiterated](#) that the WA had legal effects under international law and that neither the EU nor the UK can unilaterally 'change, clarify, amend, interpret, disregard or dis-apply' the agreement. On 1 October, the Commission sent a [letter of formal notice](#) to the UK for breaching its obligations under the WA, marking the beginning of

a formal infringement process against the UK, on the grounds of the 'good faith' provisions (WA [Article 5](#)). The latter states that the EU and the UK must take all appropriate measures for the fulfilment of the WA; if adopted, the IMB would 'flagrantly violate' the Protocol. The UK did not respond by the end-of-October deadline, and the Commission may now decide to issue a [reasoned opinion](#).

In a [statement](#) on 11 September, the European Parliament's UK Coordination Group expressed deep concern, stating that the UK IMB clearly represented a serious and unacceptable breach of international law and the WA, and said that Parliament would not ratify any agreement between the EU and the UK should the UK authorities breach the WA. As regards the negotiations between the EU and the UK, at its 15 October [meeting](#), the European Council noted that progress on the key issues was insufficient, reaffirming the EU's determination to have as close as possible a partnership with the UK; but it reiterated that the WA and its Protocols must be fully implemented and in a timely manner.

## Views of experts and think tanks

The bill has been criticised by think tanks such as the [Institute for Government](#) and the [International Bar Association](#). In fact, many [lawyers](#) in the UK view the IMB as an infringement to the rule of law with a potential direct impact on the UK's international reputation and credibility. Professor [Catherine Barnard](#) (Cambridge University) says that the IMB does indeed break international law, and likely more than just 'in a very specific and limited way'. She adds that the proposed breaches are 'a remarkable step for the UK government', leading many to the conclusion that the UK cannot be trusted in the negotiations and that it could lose the moral authority to criticise other states. (Lord) David Neuberger, former President of the UK Supreme Court, expressed his strong [concerns](#) about the IMB, qualifying it as 'extraordinary' and 'worrying' for the British government to breach an international agreement.

## Procedure in the UK Parliament

On 9 September, the [bill](#) was presented to the UK Parliament, and passed the House of Commons at third-reading by [340 to 257](#) votes on 29 September. The rule of law issue dominated the [debate](#) in the House of Lords, and on 20 October, an amendment by Lord Judge passed by [395 to 169](#), stating at second reading that 'this House regrets that Part 5 [Northern Ireland Protocol] of the bill contains provisions which, if enacted, would undermine the rule of law and damage the reputation of the United Kingdom'. In votes on [9 November](#), by large majorities, including Conservative members, the House of Lords removed the clauses at issue during committee stage. Following its third reading in the Lords later in November, the bill will return to the Commons, and the two Houses vote in turn until they agree on a common text, in a process known as 'ping pong'. The UK government reacted to the 9 November votes by stating that it would [re-table the controversial clauses](#) at that stage.

## DISCLAIMER AND COPYRIGHT

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2020.

Photo credits: © niroworld / Adobe Stock.

[eprs@ep.europa.eu](mailto:eprs@ep.europa.eu) (contact)

[www.eprs.ep.parl.union.eu](http://www.eprs.ep.parl.union.eu) (intranet)

[www.europarl.europa.eu/thinktank](http://www.europarl.europa.eu/thinktank) (internet)

<http://epthinktank.eu> (blog)

